

# LexisNexis® Rule of Law Conference 2013 A Transnational Dialogue

2nd to 3rd September 2013  
Excelsior Hotel, Hong Kong





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## Why This Conference?

A major part of our work involves talking to our customers, partners and friends across the globe. As we connect with you, we learn about the challenges you face. Some are unique, yet we see many commonalities across the global legal landscape. We also discover opportunities for improvement and we see ways in which we can address these challenges together.

Are laws universal and can we find a common thread between what is legal and what isn't across jurisdictions? As the world connects and people cross borders, are we increasingly forced to reference laws across borders? If so, what are our limitations and how can we put this into practice? As technology propels us all to the future, how has the law evolved to meet this new reality? How do the judiciary and law enforcement deal with modern-day challenges? How prepared are we as a global community to connect pieces of this puzzle?

The LexisNexis Rule of Law Conference 2013 is an invitation-only event which brings together judges, prosecutors, lawyers and academicians in one setting. This two-day conference features a keynote address, actual case studies and panel sessions which will discuss law reform, provide a closer look at Myanmar and its law reform efforts, discuss cyber crime, financial crime, intellectual property, technology and more. All these issues are transnational and we will address issues which take us beyond our national laws.

We take great pride in the fact that our expert panel of speakers are passionate about these issues and we expect robust interaction among our speakers and guests during this event. We hope that this event will expand your horizons and inspire you to take these issues forward in your own way. We wish you an enjoyable time connecting and making new friends at this forum and look forward to hearing from you.

If you would like to work with us to advance the rule of law, we would love to hear from you.

Please email Gaythri Raman at [gaythri.raman@lexisnexis.com](mailto:gaythri.raman@lexisnexis.com)

## About LexisNexis®

LexisNexis® is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis originally pioneered online information with its Lexis® and Nexis® services. Part of Reed Elsevier, LexisNexis® Legal & Professional serves customers in more than 100 countries with 10,000 employees worldwide.

## Advancing the Rule of Law Is Our Purpose as a Business:

The rule of law is a concept that unifies our company across the globe and is passionately supported by the people of LexisNexis. We are committed to actively working to advance the rule of law, through our day-to-day business, products and services, and actions as a corporate citizen by:

Providing products and services that enable customers to excel in the practice and business of law, and that help justice systems, governments, and business to function more effectively, efficiently, and transparently.

Documenting local, national, and international laws and making them accessible in print and online to individuals and professionals in the public and private sector.

Partnering with governments and non-profit organizations to help make justice systems more efficient and transparent.

Supporting corporate citizenship initiatives that strengthen civil society and the rule of law across the globe.

# Programme

## DAY 1

Monday, 2nd September 2013  
Law Reform – The Practical Aspect

- 9.30am Welcoming remarks  
9.40am Welcome speech by Shawn Clark, Chief Executive Officer of LexisNexis Asia  
9.50am Keynote Address Topic: Good Governance, Human Rights & the Rule of Law – From Aspiration to Reality, by Andrew Cayley, QC from ECCC  
10.50am Panel Forum:  
Topic: Achieving International Standards in the Reform of Financial Crimes  
Moderator:  
Simon Young, Professor & Director, Center for Comparative Law, HKU.  
Panellists:  
– Kevin Zervos SC, Director of Public Prosecutions DOJ HK,  
– Judge Rowan Downing, QC from ECCC  
12.20pm Lunch  
2.10pm Case Study  
Topic: Law Reform in Myanmar by Robert S. Pé of Orrick, Herrington & Sutcliffe LLP  
2.40pm Panel Forum:  
Topic: Reforming the Criminal Justice System – A Practical Perspective  
Moderator:  
Prof. Christopher Gane, Dean, Faculty of Law, CUHK  
Panellists:  
– Andrew Cayley QC, ECCC  
– Judge Klonowiecka-Milart, Supreme Court, ECCC  
4.00pm Summary and wrap up  
7.30pm Gala Dinner

## DAY 2

Tuesday, 3rd September 2013  
Modern Day Judicial Challenges

- 9.30am Panel Forum  
Topic: When Technology Outpaces The Law  
Moderator:  
Gaythri Raman, Head, Customer Discovery & Innovation LexisNexis Asia  
Panellists:  
– Judge Nico Tuijn, Deputy Chief Justice, COA Netherlands,  
– Naoki Hayata, Of Counsel and former Tokyo High Court Judge, Japan  
10.30am Break  
11.00am Case Study: The Dutch Knowledge Center for Cyber Crime, Court of Appeal, The Hague by Judge Nico Tuijn, Deputy CJ, COA, Netherlands  
11.30am Panel Forum:  
Topic: A Comparative Approach in Judicial Decision Making  
Moderator:  
Gaythri Raman, Head, Customer Discovery & Innovation LexisNexis Asia  
Panellists:  
– Justice Ramasubramaniam, Madras HC  
– Judge Klonowiecka-Milart, SC ECCC  
– Ms Susila Sithamparam, President, Industrial Court Malaysia  
12.50pm Lunch  
2.30pm LexisNexis Rule of Law Debate Finals  
The Motion: “In rebuilding the Rule of Law in Myanmar, it is better for the country to stay true to its English common law traditions rather than seeking to move to a more independent and “Asian” system.”  
Debate Teams: The University of Hong Kong vs The Chinese University of Hong Kong  
4.30pm Summary & End of Conference  
4.35pm Cocktail Reception

7 CPD points will be awarded for this conference.

# Programme

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## The LexisNexis® Rule of Law Conference Gala Dinner Agenda

**Registration** : 6.30pm

**Dinner commences at** : 7pm

**Venue** : Gloucester Room I – II,  
3rd Floor, Excelsior Hotel

**Dress Code** : Cocktail

**Program** : As this is an intimate affair with customers, colleagues, partners and friends, we wanted to ensure that you have the time and luxury to connect and bond with your fellow participants. We would like to share our Rule of Law efforts in Myanmar with you.

Gaythri Raman, who recently visited the country will share her personal insights and LexisNexis' hopes for #LN4ROL Burma. Robert Pe, who has been intimately involved in Myanmar's law reform process will share his personal account of this nation's journey. Together, we will ponder this nation's history, challenges and her future and think of ways in which we can all help her succeed.

# Speakers

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## 1. Mr. Andrew Cayley, QC [UK]

Chief International Co-Prosecutor  
The Extraordinary Chambers of the Courts of  
Cambodia (ECCC)  
United Nations Assistance to the Khmer Rouge Trial  
(UNAKRT)

Appointed in 2009 by Ban Ki-moon (Secretary General of the UN) and His Majesty Norodom Sihamoni (king of Cambodia), Mr Cayley has served as Chief International Co-Prosecutor of the Khmer Rouge Tribunal, part of the Extraordinary Chambers in the Courts of Cambodia. He currently leads the prosecution of several persons responsible for genocide and crimes against humanity. Formerly the Senior Prosecuting Counsel at the International Criminal Tribunal for the former Yugoslavia, he provided legal input for the investigation against General Ratko Mladic (commander of the Bosnian Serb army) for war crimes and oversaw investigations against the Kosovo Liberation Army on account of grave human rights violations for which they were later prosecuted; as well as the International Criminal Court in The Hague, where he offered guidance on UN investigations into human rights violations in Darfur. Arrest warrants were later issued for countless atrocious war crimes.

Mr Cayley has acted as defence counsel in the Special Court for Sierra Leone in *The Prosecutor v Charles Ghankay Taylor*. He is a Barrister of the Inner Temple and graduated from University College London with an LL.B and LL.M. Also a professional officer graduate of the Royal Military Academy Sandhurst, he has delivered papers and talks via prominent platforms such as Harvard, Yale and Washington University School of Law on international criminal and humanitarian law since 1996.

## 2. Judge Rowan Downing, QC [Australia]

International Judge  
The Extraordinary Chambers of the Courts of  
Cambodia (ECCC)  
United Nations Assistance to the Khmer Rouge Trial  
(UNAKRT)

Having acted in leading judicial positions in the Pacific region, Judge Downing has held positions as Judge of the Court of Appeal and Supreme Court of Vanuatu, where he dealt with severe criminal matters and major civil claims. He has had two decades of international experience in law reform in areas of criminal and commercial law, human rights law and treaties, refugee law, administrative law, anti-corruption law and the investigation and prosecution of transnational crime.

Judge Downing has also engaged with several multiparty organisations to enhance judicial independence and systemic integrity within legal systems in numerous countries. He has shown advocacy in many human rights cases and offered guidance to governments on human rights, primarily on the rights of women and children. He has extensive experience training advocates and members of the judiciary in South East Asia and the Pacific. Judge Downing has also trained members of the Australian Defence Force in the areas of war crimes law, human rights and the laws of warfare. He tutored law at Whitley College and the College of Legal Training, and holds a Master of Laws degree from Melbourne Law School.

## 3. Professor Christopher Gane [Hong Kong]

Dean, Faculty of Law,  
Chinese University of Hong Kong

Professor Christopher Gane was appointed Dean of the Faculty of Law at CUHK in September 2011. Prior to that he held the Chair of Scots Law at the University of Aberdeen. His research and teaching interests include domestic Criminal Law and Procedure, International Criminal Law and Human Rights. He is the author, co-author or editor of twelve books and more than fifty scholarly articles and papers.

He has acted as consultant to the Scottish Executive in respect of their Human Rights obligations under the Scotland Act 1998 and the Human Rights Act 1998, as advisor to the Scottish Parliament on a number of criminal law, criminal justice and criminal procedure Bills and as advisor to the Scottish Government on European Union criminal law and procedure. He was a member of the Committee appointed by the Secretary of State for Scotland to review the Law on disposals of serious violent and serious sex offenders (the McLean Committee) and a member of the Sentencing Commission for Scotland throughout its term of appointment. He was the co-founder of the group which produced the Draft Criminal Code for Scotland, published by the Scottish Law Commission.

## 4. Mr. Naoki Hayata [Japan]

Currently Of Counsel at Bingham McCutchen Murase,  
Tokyo

Specializing in financial services and advice on general corporate matters, Mr Hayata has also had experience with intellectual property, IP litigation, employment and labor, and general civil litigation. He also acts in insolvency matters, including civil rehabilitation and bankruptcy.

Mr Hayata is a member of Daini Tokyo Bar Association, and has served as a judge in the Tokyo District Court, Tokyo High Court, Intellectual Property High Court and General Secretariat of the Supreme Court. He also spent a year studying at the Superior Court of New Jersey in the US as part of his training. Mr Hayata has co-authored several books on property, labour, intellectual property and civil procedure. He graduated from the University of Tokyo law school and attended The Legal Training and Research Institute of the Supreme Court of Japan.

# Speakers

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## 5. Judge Agnieszka Klonowiecka-Milart [Poland]

International Judge, Supreme Court  
The Extraordinary Chambers of the Courts of  
Cambodia (ECCC)  
United Nations Assistance to the Khmer Rouge Trial  
(UNAKRT)

Appointed to the Supreme Court of Kosovo, Judge Klonowiecka-Milart has adjudicated on humanitarian and war crimes, genocide and terrorism. Also the leading international judge in the United Nations Interim Administration Mission in Kosovo, she is an expert in the drafting and reform of legislation.

Judge Klonowiecka-Milart was frequently invited to the Department of International Cooperation and European Law in the Polish Ministry of Justice, where she engaged in reviewing and altering law for compliance with international standards, especially those of the European Convention on Human Rights (ECHR) and the European Union. Previously, she headed the Judicial Review Team in the United Nations Mission in Bosnia and Herzegovina where she analysed and reported on its respective courts. She holds an LLM from the Faculty of Law in the Marie Curie Skłodowska University in Lublin.

## 6. Mr. Robert S. Pé [Hong Kong/Myanmar]

Partner, Commercial Litigation at Orrick, Hong Kong  
Advisor to Myanmar's Daw Aung San Suu Kyi

A partner in Orrick's Hong Kong office, Mr Pe focuses his practice on international commercial litigation and dispute resolution. He is an adviser to Burmese leader and Nobel laureate, Aung San Suu Kyi. Mr Pe has handled a broad range of contentious matters, including high-value international arbitrations in Hong Kong, London and Singapore under various rules including the HKIAC's Administered Arbitration Rules, the ICC Rules, SIAC's Arbitration Rules and the UNCITRAL Rules. He is also a CEDR accredited mediator and occasionally acts in arbitrator appointments.

Mr Pe has made numerous representations recently, among which were for private equity investors where he obtained a large sum award, an internal investigation following whistleblower allegations of Sarbanes-Oxley Act and Foreign Corrupt Practices Act violations by subsidiaries in Greater China, and a high-profile trade secrets litigation in a mainland Chinese-based group of companies. Mr Pe has received many honours and awards, including being "Arbitration Lawyer of the Year in Hong Kong" for the 2013 Corporate International Legal Award. He has been described in Chambers Asia as "much in demand" and "well prepared, creative and highly effective", in The Asia Pacific Legal 500 as "highly respected" and "a major figure in Asia-based arbitrations;" and in the PLC Dispute Resolution Handbook as "one of the region's top litigators."

## 7. Judge Nico Tuijn [The Netherlands]

Deputy Chief Justice, Court of Appeal, Netherlands

Having held various positions as a trainee judge in the Court of First Instance in Roermond, Netherlands where he dealt with commercial, family and criminal law cases, Judge Tuijn specialises in criminal law and served as Justice in Netherlands Court of Appeal. He has taken part in international legal projects to enhance the judiciary in Europe and Asia since 1985. Aiming for greater charities for children, Judge Tuijn was president of Foundation Anak Terlantar in Indonesia since 2008, which aims to alleviate child poverty and abuse. He has also served a stint at Indonesia's International Monetary Fund, and as Deputy Chief Justice in s'Hertogenbosch Court of Appeal. In 2010, he co-founded a group for judges to facilitate international networking in the profession as he seeks for deeper judicial interaction transcending geographical boundaries. He was also a scientist in the University of Leiden, served as a law clerk in the Court Martial and was a researcher in effectivity at The Netherlands Court of Audit. Judge Tuijn has acted as consultant in both the European Union and Council of Europe branches in Turkey. He has also been invited as a guest lecturer in Europe, Indonesia and Malaysia. His special interests include criminal law, human rights, rule of law and media communications.

## 8. Justice Ramasubramaniam [India]

Judge, Madras High Court, India

Justice V.Ramasubramaniam graduated in Chemistry from the Ramakrishna Mission Vivekananda College, Madras and acquired a Degree in Law from the Madras Law College. He got enrolled as an Advocate on 16.2.1983. After practising in various Courts, including the Administrative Tribunals, the High Court and the Supreme Court, he was elevated as an Additional Judge of the Madras High Court on 31st July 2006. He was later made a permanent Judge on 9.11.2009. He is often invited as a resource person by the National Judicial Academy, India, for the workshops organised for Subordinate Judicial Officers from all over the country. He has rendered several path-breaking decisions, some of which are the firsts of their kind:

- (i) The decision in Consim Info Pvt. Ltd v. Google India Pvt. Ltd was perhaps the first decision by an Indian court on Trade Mark Infringement on the Internet by a Search Engine.
- (ii) The decision in Dorothy Thomas v. Rex Arul which again related to the battle for the custody of a minor child, dealt extensively with the recent trend in the field of private international law and the need for harmonising the approach of courts in various jurisdictions.

# Speakers

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## 9. Ms. Susila Sithamparam [Malaysia]

President, Industrial Court

Ms Susila Sithamparam was appointed as the President of the Industrial Court on 16 November 2009. In the past few years, she has been involved in numerous high profiled industrial cases, where she has been continuously upholding social justice. In her capacity as the President of the Industrial Court of Malaysia, she has also been invited as a member of panels in various forums and conferences around the region, speaking primarily on industrial and employment issues.

## 10. Professor Simon NM Young [Hong Kong]

Professor and Barrister, Faculty of Law, University of Hong Kong

Professor Young was the Director of the Centre for Comparative and Public Law and Deputy Director/Director of Research in the Department of Law from 2007 to 2013. He is a practising Hong Kong barrister and lectures criminal law, evidence and human rights. Professor Young has undertaken several research projects centred on public policy, covering anti-corruption law, money laundering, proceeds of crime, security and anti-terrorism laws, public sector disciplinary processes, screening processes for asylum seekers, laws for electing Hong Kong's legislators and Chief Executive, and Hong Kong's Court of Final Appeal.

Professor Young has acted as counsel in providing advice on key constitutional and public law cases, offering guidance to the Hong Kong Government on its Convention Against Torture screening mechanism and has led the 'Continuing Legal Education' programme in the Prosecutions Division of the Hong Kong Department of Justice since 2011.

A member of the Review Body on Bid Challenges under the WTO Agreement on Government Procurement, Post-Release Supervision Board and Disciplinary Panel A of the Hong Kong Institute of Certified Public Accountants, Professor Young has also served on the Hong Kong Law Reform Commission subcommittees on double jeopardy and hearsay in criminal proceedings and was a member of the Independent Police Complaints Commission's Observers Scheme.

## 11. Mr. Kevin Zervos, SC [Hong Kong]

Director of Public Prosecutions, Department of Justice, HK

Director of Public Prosecutions in the Hong Kong Department of Justice, Mr Zervos has for the past twenty years specialized in credit card and currency frauds, banking and corporate frauds, infringement of intellectual property, money laundering and corruption. He was first attached to the Commercial Crime Unit where he acted in prosecutions for white-collar crimes, then was Head of Appeals focusing on human rights and later as Chief of Staff. Mr Zervos was thereafter appointed Senior Counsel in Hong Kong, and completed a Master of Laws (Human Rights) at the University of Hong Kong. He has wide experience in the trial and appeal process in all areas of law.

Before coming to Hong Kong, Mr Zervos worked with the Special Prosecutor's Office in Australia and was responsible for investigating and prosecuting large-scale revenue frauds. He was later Senior Assistant Director in the office of the Commonwealth Director of Public Prosecutions at the Melbourne and Sydney Offices and headed the Major Fraud Section. Mr Zervos was also General Counsel to the Independent Commission Against Corruption in New South Wales from 1989 to 1992.

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CRITICAL THINKING AT THE CRITICAL TIME™

# Keynote Address

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by Andrew Cayley

Day 1: 9.50am

## Economic development, human rights and the Asian perspective

*Synopsis: Adherence to good governance and rule of law as well as the promotion and protection of human rights are inextricably tied to the sound and sustainable economic development of any country. These are not aspirational ideals but mutually reinforcing norms which have and should continue to take root around the globe and certainly in the Asia Pacific region.*

Judges, Ladies and Gentlemen,

It is my very great honour and privilege to make this keynote speech in particular because I am coming to the end of my time in this part of the world. I have much enjoyed nearly four years in this region now. I believe I have learnt a fair amount about unique cultures, new peoples, fascinating histories and the indeed the past role of my own country, both for good and ill, in this part of the world. I have certainly come to respect immensely the industry, growth and ingenuity of the Asia Pacific region.

Today I would like to address you on some very pressing issues of our time. I want to speak to you of industrialisation, economic development and profit in the Asia Pacific region -- and the interrelationship of those endeavours with human rights, rule of law and good governance. The discussion of that particular interrelationship will necessitate me making some observations on the Asian view of individual rights and also the misplaced claims, in some quarters, about the social dangers of increased rights for the individual.

Rule of Law, human rights and good governance are terms most often found in the narrative of development literature although, of course, as laudable aims they are not limited to developing countries. The principles which these terms encapsulate apply with equal force to developed nations too. In this time of economic crisis in Europe the term good governance finds itself being called into question in relation to corporations and businesses -- in particular we see now to the banking industry. In the United Kingdom, we are learning very hard lessons about sound national financial supervision and how this too is a major component of the good governance of any state.

Meanwhile, at an extreme level, where the intertwined political and business elites of certain countries around the world extract wealth only for self-enrichment, independent honest economic activity is subverted and the result, in the end, is stagnation often leading to a complete break-down of the social order and state institutions. Look at the Democratic Republic of Congo, Haiti, Liberia, Sierra Leone and Zimbabwe, although we see small glimmers of hope now in Zimbabwe. All these countries demonstrate that economic and political mismanagement, beginning as personal enrichment by the governing elite, ultimately results in the collapse of the state, human

rights abuses, and in some cases, civil war as in the Democratic Republic of Congo, a seemingly never ending war bringing ruin to the people.

It is true that in times of relative peace human rights are seen as ideals and aspirations contained in un-enforced or un-respected declarations and international treaties. An expression of how we might wish the world to be if our better angels were at the fore. But when shocking images appear on our television screens of mass unlawful killing somewhere in the world demands become increasingly vocal for the respect of our most basic human rights. And the cry often goes up when it is too late.

The Khmer Rouge Tribunal was established to address the murder or untimely death of nearly two million Cambodian people in the space of less than four years. A level of human extermination and suffering on a par with the Holocaust.

Let us fervently hope that the Asia Pacific region will never again have to confront these kinds of horrors. That the fate of human dignity, and thus the success and peaceful advancement of society, at least in this part of the world, is preserved and respected.

The example of Cambodia and the Khmer Rouge -- of catastrophic state failure and massive human rights abuses falls of course at the very extreme end of the human rights discourse. My message to you today is a more moderated one. It is that those values and principles which were so comprehensively abused by the Khmer Rouge have an equally important place in all the states across this region which are largely enjoying peace and economic expansion, whatever their stage of development.

The dominant discourse on human rights in the past half century has placed great value on individualism. That individual men and women everywhere are the touchstone of value in society and that the role of the state, as far as possible, is to create an environment in which the potential of the individual can be cultivated and expressed. To the extent that Asian voices have been heard in this debate they tended to express concern at the misconception that the good of the whole is best secured by serving the good of the part. That the promotion of the individual risked marginalising hard-won social order and cherished community values. And also, importantly, that with rights come responsibilities. This is a valuable perspective. Indeed in Europe and the United States politicians may lip service to the principle of individual responsibility, but a culture of stewardship is not engrained into state or corporate governance. We see every day the consequences of governance, banking, business or commerce unfounded and unguided by those ultimate moral aims and values that in reality we all share regardless of race, history or religion. Long before the financial crisis in the

West Mahatma Gandhi stated that commerce without morality is one of the seven deadly sins. And whatever excuses economists find for the mess we are in, we know that banks in Europe and United States have gambled with debt and played fast and loose with basic principles of decency and integrity.

But I also need be clear that a regional perspective of human rights cannot be used to justify repression or authoritarianism, nor should the promotion and extension of human rights be seen as a threat to the integrity of the state or governmental or business interests. A cultural relativist argument that custom is king hides the fact that it is victims' voices which are often unheard, and that, of course, certain basic sentiments and rights are as applicable in ancient Greece as in modern Asia. Naturally states and those who lead them have an obligation to have regard to the particular interests of their society. Security, the rule of law, and social order must be balanced against human rights. But that balancing act must be done in good faith and with integrity and rigour, and not for personal or party interest or increase. Change makes people fearful. Enhanced enforceable rights for individuals makes many political systems very nervous indeed. For it can loosen the grip of social control. But it is worth reminding ourselves that history is full of wonderful examples of ideas or agendas which at one point in time were seen as revolutionary or disruptive to the social order. And yet within a few decades later those same ideas or agendas were part of the mainstream. Let me give you an example of what I mean:

In 1909 in the United Kingdom a working class self taught Welsh lawyer had risen to the very highest levels of government. Imbued with the radical liberalism of the time David Lloyd George, as chancellor of the exchequer – minister of finance – presented to the British parliament a budget to wage war on poverty. He had grown up amongst the poor working class of his nation, he knew about their trials better than any minister in government. His mission was a simple one – to bring some level of succour to the sick, the infirm, the unemployed, the widows and orphans. He questioned how the then richest country on earth – hard to believe now we once were so – could lay claim to civilisation when many of its own people were living in abject poverty or even starving to death. The conservative establishment of the time – the landowners, the aristocracy - of Edwardian England loathed Lloyd George for his desired reforms. Many saw him in 1909 as a revolutionary intent on bringing down the social order of the day. But by the time of his death in 1945 what were revolutionary social reforms of 1909 were seen as the mainstream policy of all the major political parties in the United Kingdom.

Lloyd George said at the time that what was taking place was a “quiet but certain revolution, as revolutions come in a constitutional country, without an overthrowing of order, without doing an injustice to anybody, but redressing those injustices from which people suffer.” Lloyd George had vision. He knew that his ideas and principles, unpopular and viewed with great scepticism by the ruling British elite of 1909, would eventually become part of the mainstream and indestructible pillars of the British welfare state. This history teaches us patience and also that in the long run a few people with guts and vision can change things for the better and for ever.

Lastly on this we point need be vigilant too to the risk that concepts such as good governance and human rights can be misused by elements of civil society to promote self-serving agendas that undermine the principles on which the fragile system rests. I have seen this myself in my work. Such misstatement does much damage to the credibility of the human rights debate and thus

adversely affects the willingness of governments to shift position and pursue enforcement because they feel confronted by lobbyists who are not living in the real world.

It is a self evident truth that sustainable commercial success can only flourish in countries committed to upholding human rights and the rule of law: where people are safe and secure and where individuals know that their contracts will be enforced and their rights recognised in the courts. A study<sup>1</sup> was done in 2002 proving the relationship between judicial independence in Hong Kong and the strength of her financial markets. Events expressing the judiciary's assertive approach to protect the rule of law -- like the Court of Final Appeal's decision in the landmark case of *Ng Ka Ling*<sup>2</sup> and its subsequent Clarification<sup>3</sup> upholding the ruling -- yielded positive<sup>4</sup> average returns on the Hang Seng Index. In contrast, the Reinterpretation Request<sup>5</sup> by the Hong Kong government relating to the same case and widely taken to indicate the executive's deference to higher powers was correspondingly associated with a negative<sup>6</sup> return.

Apart from having a skilled professional and managerial population, a keystone of Hong Kong's economic success is its commitment to the rule of law. Born out of a period of great political uncertainty, the Basic Law is a very impressive “mini-constitution” preserving all the institutions which comprise the rule of law, and it has laudably enjoyed robust stewardship by an independent judiciary. Hong Kong now places 15 out of 142 countries on Transparency International's ranking on judicial independence and is at the 91<sup>st</sup> percentile for the rule of law. The country has signed over 170 bilateral agreements and the Hong Kong dollar is now the eighth most traded currency in the world.

The same story of success unfortunately cannot be told of all rapidly developing economies in Asia, where in some cases a mix of corrupt politics and a weak legal system and judiciary has allowed inefficient businesses to operate outside the law and left the population to needless poverty, disease and suffering. The negative results of this combination are many but the most visible is that increased economic expansion does not find its way to those who need it most.

Lord Desai remarked that “across Asian society there is a very intimate relationship between business and government”<sup>7</sup>. Sometimes it is that relationship that has led to many problems in this region but Hong Kong today is in a strong position to show how this intimate relationship can be harnessed to spur economic development matched and supported by progress made in judicial independence and human rights. The Hong Kong government has always recognised the reciprocal interaction between good governance and economics, preserving the liberty of her citizens as eagerly as it does expanding trade with other countries. Hong Kong today has a liberalising influence in the region, acting as a window to education and skilled managerial professionalism and a gateway to China's export market. It can extend its influence too to encouraging good governance and protecting human rights, especially to a generation of Asian youth who are well-informed and eager for change.

Indeed when speaking of the youth of this region and the thirst for change one can see strong aspirations beyond these shores for the same success Hong Kong has enjoyed in upholding the rule of law and protecting human rights. The younger generations of the Asia Pacific region are demanding accountability and transparency in government, and everywhere in Southeast Asia we see the calls for more robust protection of minorities' rights. The young want to

speaking freely, they want to express and communicate ideas, they want to be heard and they want to affirm their membership of the body politic and to recall government to its duties and obligations. Just over a month ago in Cambodia during the general election it was the young who were speaking and rallying and it seemed to me driving the political process. They want change, they want honest and clean business and government and they want their rights respected.

Of course, the reality of the law is in the details and the practical application in the courts. In a number of Southeast Asian countries the economies are developing more quickly than the legal institutions. In some instances their domestic legal systems need support – offered in the concrete, not the abstract – support not just on human rights but in respect of very basic rights. Judicial independence, separation of powers, proper procedure and sound and consistent application of the law. Only then will clean and sustained investment flow into countries with all the benefits that this kind of investment brings to the entire population.

As Hong Kong moves into the future, its commitment to the rule of law will become more important than ever as Shanghai and other cities vie for prominence as the region's most prominent financial centre. The independence of Hong Kong's judiciary and the confidence individuals and businesses have in the courts may well turn out to be Hong Kong's trump card and its living promise of the success of a clean government tied to a thriving economy. There are other areas of law and government in which Hong Kong can lead by example, and can learn from the example of others. For instance, demands for legislative reform and the need to continue developing a jurisprudence open to ideas from different traditions are challenges both Hong Kong and other Asian economies face as people become more aware of their legal rights and what can be achieved through the courts. Meanwhile, international law declaring universal human rights is influencing the development of the common law, and there is correspondingly a growing body of constitutional law in Hong Kong internalising these international human rights norms. Two cases arising in the Hong Kong Court of Final Appeal in the last 7 years<sup>9</sup> illustrate this well, and recent legal scholarship has developed to reflect this area of growing interest.

I think the lessons from all of that I have said about human rights and commerce, about the Asian perspective of human rights and rule of law, about this immediate fear of change or upheaval is quite simply to focus very calmly on a middle way. To allow the strident voices pulling to the extremes of these debates on good governance and human rights to be stilled for a moment. To concentrate on the needs and aspirations that bind individuals, communities and institutions in reciprocal and mutually beneficial relationships. Good governance was not something that was dreamt up in the ancient city state of Athens. It has distinctive Asian roots which can contribute to a robust human rights discourse proceeding on the basis of equality and respectful of the learning that diverse communities may possess at any given time.

More than 2300 years ago, the Confucian scholar, MèngZi[a contemporary of Plato], was approached for advice by a prince who had sentenced a multitude of villagers to death for their failure to intervene in the defence of 33 of his officers, who were killed in a skirmish. A particularly draconian case of criminal liability for omissions without possibility of appeal.

"It is impossible to put such a multitude to death," the prince mused (I'm glad he was at least a pragmatist), but then there is a "crime unpunished" of their "looking angrily on at the death of their officers, and not saving them." MèngZi admonished him in the following terms:

*In calamitous years and years of famine, the old and weak of your people, who have been found lying in the ditches and water-channels, and the able-bodied who have been scattered about to the four quarters, have amounted to several thousands. All the while, your granaries, O prince, have been stored with grain, and your treasuries and arsenals have been full, and not one of your officers has told you of the distress. Thus negligent have the superiors in your State been, and cruel to their inferiors. The philosopher Zeng said, "Beware, beware. What proceeds from you, will return to you again." Now at length the people have paid back the conduct of their officers to them. Do not you, O prince, blame them. If you will put in practice a benevolent government, this people will love you and all above them...*

Let us be clear. This is no call to revolution, which would have been contrary to Confucian thought. MèngZi expresses the view that good governance is necessary for a well ordered and harmonious society, because the government is a trustee of the people. The government should guard its trust.

I would emphasise to you my belief that the advancement and enforcement of human rights must be pragmatic. We have to live in the real world. There must be concrete measurements of the benefit of the increase in individual rights. But such pragmatism does not need to limit our aspirations. Let me give you another example of what I mean: Abraham Lincoln was the emancipator of millions of African American slaves. He laid the groundwork for the civil rights movement of the 1960's in the United States. And yet while he acknowledged years before his presidency that human slavery was morally repugnant he stated to a colleague four months before issuing the Declaration of Emancipation in January 1863 that:

*"If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union."*

From the perspective of 2012 we might question Lincoln's sincerity about squarely confronting slavery - the greatest moral challenge of the 19<sup>th</sup> century. And yet what this demonstrates is that Lincoln had to live and act in the real world. Whatever his personal views were, and from all I know about the man he abhorred slavery, he had to choose the right moment exercise his political will and abolish it. He had to find the right circumstances. And so must we be pragmatic too in 2013. There is a right time for issues to be settled. And all states must recognize they do not possess a monopoly on best practice in human rights, rule of law and good governance. Indeed any claim that the west could historically make to moral superiority in the human rights discourse has gone with the events of the last ten years. And this does not mean advocating for drift - of course we have to be robust and press ahead. But above the hue and cry that always surrounds human rights, good governance and the rule of law we have to look at what can seriously be

achieved and by when. And we have to provide clear examples of how human rights can have such a beneficial impact on economic expansion and progress. Indeed that it is in the interests of states to adopt policies which in the end encourage honest business and government and provide a buttress against corruption and state mismanagement.

Good governance, human rights and rule of law all express the harmonious relationship between the individual and the government, adherence to these norms over the long-term actually protects individuals, communities and government institutions from destabilising social processes that can thwart the objectives of economic development and trigger the kind of mass violence the ECCC now works to redress. It is a simple fact that in rapidly developing economies, without accountable politicians and businessmen, without functioning courts and independent judges, governance and commerce become so fraudulently intertwined so quickly that a great many parts of state institutions become completely corrupted. And the web of deception, bribes and illicit profit which grows becomes so powerful that it is almost impossible to conduct any kind of honest business activity or change the political system for the better. It should come as no surprise that the United Nations and the international community focus transitional justice mechanisms on those who bear the greatest responsibility for atrocities, on senior leaders and those most responsible. Or a lesson from transitional justice processes: that the individuals found to bear the greatest responsibility for mass violence will have tended to hold positions of authority in government or armed groups – the leaders, commanders, planners and organisers who misuse the means and mechanisms of government to unleash terror on the population: *“Beware, beware. What proceeds from you, will return to you again.”*

I hope that that in making these observations it is quite clear that I make no claim to perfection of regulation, morality or rights in my own country or region. We are all human. We are all susceptible to the same temptations and fall prey to the same human failings. But at least in countries with legally enshrined obligations and rights, with independent courts and judges we can make claim to basic rights and we can bring to firm and fair account those who are tempted and fail to meet their proper legal obligations.

In the end of course we must get things done. We must dream but we must dream what can be realised. We must encourage aspiration and listen to the voices of dissent. We must believe in a real paradise and a real earth in which men and women can live in the here and now and fulfil their destiny. We can make life better and kinder and safer everywhere. We really can at this moment. I have seen in the course of my professional life a great deal of unneeded suffering. We all have. We see it today. Misery in many parts of the world is too near and insistent. Injustice is too obvious and glaring. And danger too is present.

In acknowledging the imperfections of rights and obligations in the west while trying to promote human rights in this part of the world

one becomes starkly aware of our reliance on each other. On the very real interdependence of rights and obligations in a globalised world. Banking fraud in Europe can create financial chaos here in Asia. Indeed the financial crunch in Europe has significantly slowed the mammoth Chinese economy. So too the failure to protect and enforce human rights, in conformity with international standards, produces dire consequences spilling beyond national borders. Look at the never ending Palestinian issue, look at Syria.

But in conclusion we must remain full of hope about progress and rights. Look at Myanmar today.

In talking about hope let me leave with you some words of Professor Howard Zin:

“TO BE HOPEFUL in bad times is not just foolishly romantic. It is based on the fact that human history is a history not only of cruelty, but also of compassion, sacrifice, courage, kindness.

What we choose to emphasize in this complex history will determine our lives. If we see only the worst, it destroys our capacity to do something. If we remember those times and places—and there are so many—where people have behaved magnificently, this gives us the energy to act, and at least the possibility of sending this spinning top of a world in a different direction.

And if we do act, in however small a way, we don't have to wait for some grand utopian future. The future is an infinite succession of presents, and to live now as we think human beings should live, in defiance of all that is bad around us, is itself a marvelous victory.”

#### Notes

- 1 Emily Johnson Barton, Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong [2002] 43 HVILJ 361
- 2 Ng Ka Ling v Director of Immigration [1999] 2 HKCFAR 4, 36 (CFA), where the Court of Final Appeal (CFA) held that persons having the right of abode in HK under the Basic Law do not require exit approval to leave the Mainland to exercise that right.
- 3 The CFA issued a Clarification maintaining its own position in Ng Ka Ling.
- 4 With a value of 0.012668952 and 0.018590585 respectively.
- 5 Five months after the ruling in Ng the Hong Kong government requested a reinterpretation by the Standing Committee, who responded that persons having the right of abode in HK do need exit approval to leave the Mainland.
- 6 With a value of negative 0.007339108.
- 7 Lord Meghnad Desai, The Resurgence of Asia, 43 Asian Aff. 1, 9 (2012)
- 8 Koon Wing Yee v Insider Dealing Tribunal [2008] resulted in the striking down of a constitutional statutory provision when doing so best conformed with legislative intent. Koo v Chief Executive [2006] recognised the Court's power to temporarily suspend a declaration of unconstitutionality to allow for corrective legislation.

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# Judgment

by Judge Nico Tuijn

Panel Forum: “When Technology Outpaces The Law”

Day 2: 9.30am

## The stealth SMS

The defence has taken the position that use was made during the investigation of the accused of a means of coercion that is not regulated by law, the so-called silent SMS or stealth SMS. This allegedly amounted to an intensive and systematic breach of his privacy. According to the defence, this should lead to exclusion of the evidence obtained from this, either directly or indirectly.

The Court’s findings on this are as follows, leaving it as a moot point whether in this case the so-called Schutz standard (in summary, insofar as relevant here, meaning that the accused cannot in principle rely on irregularities that have occurred in the case of a co-accused) amounts to an obstacle to the sanction argued by the defence for the procedural defect concerned.

### A. Stealth SMS and its application in Begonia

When a person receives an SMS message, the mobile phone in question makes contact with a transmission mast. In the course of an investigation, the police can use this facility to localise a mobile phone, in the sense that it can determine the transmission mast within whose range the mobile phone is located. Normally, this only works if the mobile phone is being used. By sending a stealth SMS message (a “silent SMS”), the police need not wait until the user of that mobile phone makes a call or sends a message, or is called or messaged by a third party. A stealth or silent SMS is an SMS message with no content, so that the recipient cannot see that he has received a message with no content, but which activates his mobile phone and makes a connection with a transmission mast.

By sending a stealth SMS message, the police can therefore establish at any particular moment which transmission mast is being contacted by a particular phone while the SMS message is being received. Since it is known where the relevant transmission mast is located, the police can establish that the phone in question must be situated within the range of the transmission mast in question. The user of the phone has no notice of the stealth SMS. This is therefore a means for the police to find out about traffic data secretly, with a view to determining the location of an individual, assuming that the person is carrying the relevant mobile phone.

On the basis of the file, the Court can confirm that stealth SMS messages were used in the Begonia case. For this, the Court is proceeding on the basis of the official report of 5 April 2013 from reporting officer [reporting officer 1], senior police officer/detective, and the PDF file attached to that official record:

- a total of 28 stealth SMS messages were sent to the number 2171, at intervals of about 5 minutes, on 25 and 26 October 2010;
- a total of 9 stealth SMS messages were sent to the number 7242, at intervals of 5 minutes, on 17 November 2010;
- stealth SMS messages were sent to the numbers 7242, 7195 and 7096 every 10 minutes between 09.40 hours and 12.20 hours on 18 November 2010;
- stealth SMS messages were sent to the numbers 0848 and 7684 every 10 minutes between 10.10 hours and 13.00 hours on 19 November 2010;
- a total of 18 stealth SMS messages were sent to the number 4248, at intervals of 5 minutes, on 27 November 2010;
- stealth SMS messages were sent to number 5218 between 11.03 hours and 12.59 hours, at intervals between 3 and 5 minutes, on 9 December 2010;
- stealth SMS messages were sent to numbers 7242 and 0031 between 18.27 hours and 19.57 hours, at intervals of about 4 minutes, on 30 December 2010;
- a total of 29 stealth SMS messages were sent to the number 6933, at intervals of about 15 minutes, on 17 and 18 January 2011.

In the official record dated 19 April 2012, the public prosecutor confirmed that the objective of using the stealth SMS messages (*Court: on the above-mentioned dates*) was to provide support for the observation, monitoring and seizure of a suspected delivery of drugs.

Finally, the use of the stealth SMS messages on 7 and 8 February 2011 in relation to numbers 5200, 7242, 6933, 6773, 0391 and 2247 was, according to what was said by the public prosecutor during the hearing at first instance, connected with a number of (planned) arrests of suspects in this criminal case. The object of using these messages was to establish where the telephones of certain suspects, who were due to be arrested, were transmitting from during the indicated period. The Court has not seen evidence of any other objective on these two dates in February 2011.

In line with the District Court, the Court of Appeal confirms that in all cases, when the stealth SMS messages were sent, there was a telephone tap in place on the number to which these stealth SMS messages were sent.

### B. Regulation of stealth SMS

The Court of Appeal confirms that the use of the stealth SMS is not regulated separately by law.

The Court is also satisfied that the stealth SMS is not just as an exceptional application. This method of working is now used regularly by the police, including in the context of detection. One of the sources from which this can be inferred is the report entitled "The use of telephone and internet tapping in detection", WODC 2012, pages 130-131.

It is also confirmed that the stealth SMS has been in use in investigations for a considerable period. During the examination at the appeal hearing, witness [witness name] (a specialist at the Specialist Investigation Applications Service of the KLPD) stated in relation to this that "the stealth SMS was introduced, i.e. made tactical, in 2005".

The only regulation for the application and use of the stealth SMS that became apparent during the examination at the hearing is the "GSM concept Aug 2008" (hereinafter the "GSM concept"), which includes the formulation of conditions and procedures for (as the Court of Appeal understands it) the use of stealth SMS. The witness [witness name] stated, as regards the preparation and status of the document: "It is correct that 'concept' does not mean that the document has not yet been adopted, but that the word 'concept' in this context is used in its meaning as 'guideline'." According to the statement from the witness [witness name], the document was put together by three members of the National Public Prosecutor's Office and agreed at the meeting of investigative officers. According to the text of the GSM concept, this approval was given at a meeting on 24 April 2007.

So far as the Court of Appeal has been able to establish, there has been no further regulation or confirmation of how to deal with the stealth SMS. The Court shall revert to this regulation in what follows.

### C. Not a technical resource

The question that must then be dealt with is whether, as argued by the defence, the stealth SMS has to be classified as a technical resource, as defined in Article 126g or 126m, Code of Criminal Procedure (CCP), so that its use would for that reason fall within the scope of one of those statutory provisions and consequently also under the Decree on Technical Resources in Criminal Proceedings, pursuant to Article 126ee, CCP.

In the view of the Court of Appeal, the Parliamentary history of debate shows that technical resources, as defined in Article 126ee, CCP, should be understood to include resources by which signals may be recorded and secured. What this is about, according to the Explanatory Memorandum relating to this Article, is to ensure that there can be as little doubt as possible about the degree of truth of whatever is recorded by the technical resources, and that there should be sufficient certainty that any images or signals that are recorded cannot be manipulated. With this in mind, the legislature deemed it necessary to impose rules, by means of general administrative order, concerning the requirements to be satisfied by technical resources, as regards the quality and inviolability of the observations that are secured.

A feature of sending a stealth SMS is that no signals are recorded and secured in the equipment or software used for this, but that the equipment in question only activates a mobile phone, leading to that mobile phone transmitting a signal. That signal is subsequently recorded and secured by the provider of a public communication service and this recording can be observed in the police tapping room. Information on the use of the mobile handset can only be obtained with that recorded and secured signal.

For this reason, the equipment and software used for sending a stealth SMS cannot, in the opinion of the Court of Appeal, itself be classified as a technical resource within the meaning of Article 126ee, CCP.

Furthermore, the reliability of the recording of such a message – activated by a stealth SMS – by the public communication service and its observation in the tapping room do not impose any specific requirements in relation to the recording of other telephone traffic.

For this reason, the Court of Appeal does not subscribe to the position adopted by the defence, to the effect that the stealth SMS is a system consisting of three elements, which should collectively be regarded as a technical resource.

The Court of Appeal accordingly finds that the equipment used for the stealth SMS cannot be taken to be a "technical resource" within the meaning of the Decree on Technical Resources in Criminal Procedure. The use of silent SMS should rather be regarded as a *method* of detection (not regulated by law).

### D. Permissibility of the use of stealth SMS without a statutory basis

The question that must then be answered is whether the use of stealth SMS was permissible without a statutory basis.

#### D.1

The introduction of the Special Investigative Powers Act was based on the notion that methods of detection which infringed fundamental rights and freedoms of citizens, or posed a risk to the integrity and governability of the detection, required an adequate specific statutory basis in the law. However, the legislature also perceived that the regulation of methods of detection need not be exhaustive.

This means that methods and techniques which

- involve a meaningful infringement of fundamental rights or the right to freedom,
- and/or pose a risk to the integrity and governability of the detection process  
may only be used if there is a specific statutory regulation underpinning them. "Posing a risk" is also intended to include methods and techniques whose risks cannot be sufficiently managed.

The Court of Appeal accordingly raises the question of whether the stealth SMS amounts to a meaningful infringement of fundamental rights or rights of freedom and/or whether it poses a risk to the integrity and governability of the detection process.

#### D.2

As the Court of Appeal will find in what follows, there was a relatively limited infringement of the accused's private life in the present case. In the view of the Court, however, it is not just important whether the actual use of stealth SMS messages amounts to a meaningful infringement of fundamental rights or rights of freedom in a specific case, looked at in hindsight. It is also important that the use of this method of detection has the potential to amount to such a meaningful infringement. The Court considers that, when assessing the gravity of such an infringement, it may be important whether the citizen has to be aware of the relevant method of detection, in ordinary social circumstances. A citizen to whom the police send a stealth SMS will not be aware of this, and it is also relevant here that there is no apparent rule concerning the use of such SMS messages. This is a particular dimension of the secrecy of detection by means of a stealth SMS. In addition, the use that is made of data collected in this way may be a factor in determining the gravity of the said infringement. This should involve consideration of the storage of that data (for instance in government databases) and the use of such data as evidence in a criminal case.

As regards stealth SMS messages, the Court also takes particular account of the fact that if this detection method is applied in such an intensive, systematic and/or widespread manner that in some way or other it provides a more or less complete picture of suspects' private lives, the privacy of those persons will be impacted to a meaningful extent. Such use of the stealth SMS may even result in a situation where the method used is effectively equivalent to, for instance, the deployment of directional microphones. The legislature could not have predicted such an actual intensive impact when the Special Investigative Powers Act was being passed in 1999.

#### D.3

This raises the question of whether the use of the method of stealth SMS messages poses a risk to the integrity and governability of the detection process. The Court considers that there are such risks attached to the way in which the detection method of stealth SMS messages is currently embodied that there are not sufficient safeguards for the integrity and governability of the detection process.

The Court's findings in support of this are as follows.

##### a. Inadequate regulation

a.1 As previously mentioned, the stealth SMS has been in use by the police since 2005, and it was only in 2008 that this process was set out in black and white by means of the previously mentioned GSM concept, which is not, as it happens, a public document. The GSM concept is designated "confidential". The advocate general made no comments on the document, which was submitted in trial by the defence during the further appeal. Therefore, while the stealth SMS has already been used by the

police for some considerable time as a mechanism for detection, there are still no public or publicly known rules.

a.2 The GSM concept cannot be classified as a regulation containing proper safeguards in relation to the governability of the use of stealth SMS messages. For instance, the document states that the police should prepare an official report which will be used to seek permission from the public prosecutor to localise a mobile phone handset. The Court confirms that the GSM concept imposes no substantive requirements on this official report, so the question arises as to what information the public prosecutor needs in order to make a balanced decision on whether or not to give permission.

a.3 According to the GSM concept, the public prosecutor should admittedly issue written and reasoned permission, but the document does not state what such permission should include (for instance the nature of any conditions to be set in advance, the maximum number of SMS messages to be sent, the maximum period and frequency of transmission, any increase in the frequency, or the procedure that should then be followed, such as providing feedback to the public prosecutor).

a.4 It became clear to the Court during the hearing that it is actually the investigators who make decisions on the frequency of use, based on developments in the investigation, which gives rise to the risk that the public prosecutor may only find out about the scope/frequency of actual use after the event.

a.5 This raises the question of who in practice is making sure that the use of the stealth SMS does not amount to systematic observation, for which an order as specified in Article 126g, CCP is required, as is in fact also mentioned in the GSM concept. In this context, the Court would point out that the term "systematic", where it appears in Article 126g, CCP, is not a clearly defined expression, and that short but intensive observations may also be characterised as systematic.

a.6 According to the GSM concept, the official report in relation to the use of the stealth SMS is only added to the file if the data obtained from it is used as evidence. The Court assumes that those who prepared the GSM concept meant at this point the official report of the use of the SMS, prepared in retrospect, and the information in that official report that might be harmful to the accused. Bearing in mind the transparency that should be aspired to in relation to the detective investigation, and also the possibility that the use of the stealth SMS may produce data that might be considered to be harmful to the accused, the Court fails to understand why the official record in question should then only be submitted to the judge and the defence if the data obtained may – apparently in the opinion of the public prosecutor – be used as evidence. Providing full information to the judge and the defence on the results of the detective process, so that an assessment can also be made, for instance, as to whether the collated data is harmful, is a condition for the integrity of the detection process.

a.7 Bearing the foregoing points in mind, the Court considers that the GSM concept cannot be classified as a substantive regulation offering safeguards for the governability and integrity

of the detection process. There was neither assertion nor evidence to the effect that such safeguards exist in some other way. In this context, the Court would point out that requirements are imposed on a range of other detection powers that are regulated in the law, such as the expertise of the officers in question and the requirement for "notification" of the exercise of those powers.

#### **b. Defects in the current investigation**

The Court of Appeal makes the following findings in relation to the manner in which the stealth SMS was used in the current investigation.

b.1 There is no evidence that the police prepared an official report prior to receiving permission from the public prosecutor to use the stealth SMS. The Court is proceeding on the assumption that the public prosecutor's department does not realise that this is prescribed in the GSM concept.

b.2 Nor was there any compliance with the provision that the public prosecutor should issue his permission in writing and with reasons. The official report by the reporting officer [reporting officer 2] dated 29 February 2012 shows that this permission was consistently given verbally.

b.3 As the public prosecutor's office has said nothing further about permission given in advance, we must assume that the public prosecutor did not impose any conditions, such as the maximum frequency of use or any necessary interim feedback by the police to the public prosecutor.

The Court also finds that the use of the stealth SMS was confirmed and accounted for by the public prosecutor too late, bearing in mind the following factors.

b.4 Agreeing with the District Court, the Court of Appeal finds that the public prosecutor's office did not, on its own initiative, mention at first instance that the stealth SMS had been used in the Begonia investigation. Information was only conceded in relation to this matter after active interrogation by counsel. The question arises as to whether this information would have become known if counsel had not asked any questions on the matter.

b.5 The use of the stealth SMS was ultimately confirmed and accounted for in writing, and the extent and frequency of that use are now clear. This was an incorrect sequence of events, as control should be able to be exercised over the application of powers of investigation at the court hearing. Only full information concerning such application will guarantee the possibility of a full value discussion at the court hearing on all aspects of how the power was exercised. The judge and the defence should be able to rely on the fact that the public prosecutor's office will provide this information on its own initiative and in good time.

b.6 This is not just about supervision over the special detective powers described in Articles 126g et seq., CCP. It is also quite specifically about supervision over investigative actions that are not regulated in a specific Act. The fact that the public prosecutor only provided information on the fact that the stealth SMS had been used in 2010 at a late stage, and in response to interrogation

by the defence, is yet a further indication of the risk that supervision and control over these investigative activities are not guaranteed in practice.

#### **D.4.**

All of the foregoing factors lead the Court of Appeal to the conclusion that the necessary safeguards in relation to proper management, as well as supervision and control, over the use of the stealth SMS were absent. Bearing in mind the aforesaid risks to the integrity and governability of the investigative process, and partly in the light of the potential of the stealth SMS to amount to a significant infringement of the privacy of the accused in question or the person carrying the mobile phone, the Court of Appeal considers that there should be a special statutory basis for the use of this investigative method.

#### **E. Section 2, Police Act and Articles 141-142, CCP, are not a statutory basis**

Provisions that give general descriptions of tasks, such as Section 2 of the Police Act (which is not in fact relevant in this case, since the case at hand deals with the investigation phase, bearing in mind Article 132a, CCP) and Articles 141-142, CCP, cannot be regarded as being sufficiently specific supplements to the rules on powers contained in the Code of Criminal Procedure in such matters. Articles 141-142, CCP, provide no indication of the nature and substance of the investigative power, so that there is no adequate limitation of that power. If the use of the stealth SMS were to be based solely on Articles 141-2, CCP, this would actually mean that this method could be applied during the investigation without the intervention of the public prosecutor. In the context of the governability of the investigation process, the Court of Appeal regards this as undesirable. The necessary statutory rules must provide a reliable indication of the circumstances in which and the conditions under which the government has authority to use the stealth SMS to make a secret infringement of a person's right to respect of his privacy.

#### **F. Irremediable procedural defect**

Bearing this in mind, the Court of Appeal considers that the last-mentioned general provisions do not provide any basis for the investigative method of the stealth SMS. The Court of Appeal considers that the stealth SMS, which had been a facet of investigative practice for some years in 2010, could only have been used at the time if it was based upon a specific statutory rule. As that was not the case, and as the investigative method was nevertheless used, the Court of Appeal regards this as an irremediable procedural defect.

This is not altered by the fact that the examining judge had authorised taps in the Begonia case. After all, this authority extended only to telephone taps, which would involve recording and listening to telephone conversations. The stealth SMS is an entirely different dimension, namely the primary and active interception of data traffic with a view to determining the location of an individual. The Court of Appeal also takes note of the fact that there was no evidence to the effect that the examining judge was aware of the use of the stealth SMS when these authorisations for tapping were being requested or issued, so that they could not have had any bearing on such use.

## G. Consequences of the procedural defect

As the Court of Appeal has established that there has been an irreparable procedural defect in the Begonia case, through the use of stealth SMS messages, we must now examine the consequences that must be attached to this finding, in the light of Article 359a, CCP.

Bearing in mind the interest served by the norm that has been breached, the gravity of the breach and the harm that it caused, the Court of Appeal considers it sufficient to make a finding that an irreparable procedural defect has occurred, with no need to attach any further legal consequence to this.

In so finding, the Court of Appeal has taken the following factors into consideration.

As regards the suspects in the Begonia case, a range of investigative activities were deployed, which were regulated by law and which were frequently much more intrusive in nature than the stealth SMS.

At the end of the day, the use of the stealth SMS in the Begonia case was restricted to a number of specific dates and times (as indicated above), which the Court of Appeal regards as having probably intruded on the private life of the accused, albeit this was no more than a relatively limited intrusion.

The criminal offences with which the accused and his co-accused are charged are serious in their nature and extent.

The disadvantage suffered by the accused as a result of the use of the stealth SMS is regarded by the Court of Appeal as relatively minor, certainly viewed in light of the use of the other investigative resources.

The defence argued that it was a disadvantage to the accused that so much time and energy had been spent on clarifying the resources that had been used, and making them available for appraisal, that this seriously hindered an effective defence. If indeed one accepts that this complication was in existence when the defence was being argued, then in the view of the Court of Appeal that does not amount to a disadvantage which should in this case result in the evidence being ruled out, which is the sanction argued for.

The defence has also pointed out that the interest served by the infringement in this case is the accused's interest in having a transparent investigation, so the judge can assess the extent to which the activities were lawful. This is not, however, a factor that would lead to the exclusion of evidence in this case. The Court of Appeal would point out here that this judicial appraisal has indeed taken place, with the conclusion there was an irreparable procedural defect.

In the view of the Court, the situation does not arise in this case where the accused's right to fair proceedings, as defined in Article 6.1, ECHR, is not safeguarded. The Court points out that both official reports and CD-Rs were made available, which allowed the frequency of the stealth SMS usage to be confirmed. There is no hint of a suggestion that the stealth SMS was used on a larger scale than stated in the relevant official reports by the police and the public prosecutor.

The mere fact that the delivery reports were not handed to the defence does not, in the view of the Court of Appeal, mean that the accused's right to a fair trial was breached.

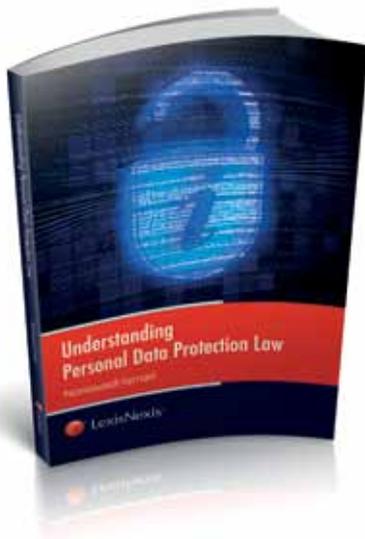
Far less has there been any significant degree of infringement of any other important provision or legal principle, which would render the sanction of exclusion of evidence necessary as a means of preventing future comparable procedural defects resulting in unlawful gathering of evidence, or as a means of providing a forceful encouragement to act in accordance with the prescribed standards. Nor does the more exceptional situation arise here, where the breach of form in question, as apparent from objective information, was repeated to such an extent as to establish its structural nature, so that the responsible authorities made insufficient efforts, from the time when they ought to have known about this structural infringement, to prevent any breaches of the relevant provision. The Court of Appeal would point out in this context that there is no evidence to the effect that the responsible authorities had any such awareness.

## H. Conclusion

In the opinion of the Court of Appeal, the use of the stealth SMS in this case without having a basis in any specific statutory rule amounts to a procedural defect. In this case, however, that procedural defect is not of such a nature as to require any legal consequences to be attached to it. There is accordingly no place for the exclusion of evidence sought by the defence.

# Understanding Data Protection we've got it all covered!

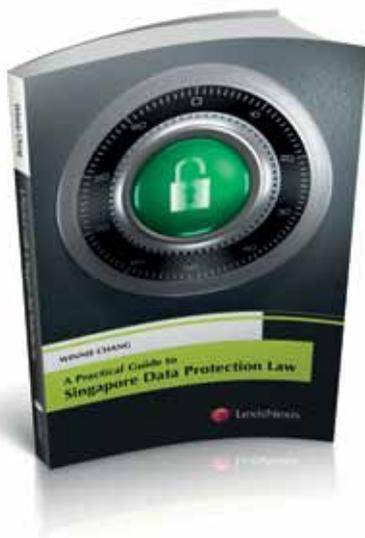
## Understanding Personal Data Protection Law



**Author:** Noriswadi Ismail  
**ISBN:** 9789674001445  
**Format:** Soft Cover

This book provides general guidance to individuals and organisations on the processes of how to manage, collect and use personal data. It offers practical tips on topical data protection scenarios from the context of the Malaysian Personal Data Protection Act 2010 (Act 709). The tone, manner, look and feel of this book are straightforward, succinct yet presented in simple language for the ease of understanding. It highlights Privacy by Design (PbD), a best practice module by which the seven foundational principles of personal data protection are advanced towards organisational data protection compliance and assurance. This book guides the reader, through case studies and tips on how these principles and the law of personal data protection should be contextually applied in day to day life; flowing from the consumer's role in relation to personal data right through to steps to be taken in case of a breach. An interesting chapter on PDPA post enforcement, Top Ten Hitlist and the reflection of Malaysian data protection and privacy law evolution is carefully covered.

## A Practical Guide to Singapore Data Protection Law



**Author:** Winnie Chang  
**ISBN:** 9789814406031  
**Format:** Paperback

This book ushers in the new data protection regime in Singapore. You will be introduced to the Personal Data Protection Act and provided with a general guidance on complying with the Act. Written in plain English, the book summarises the new legislation and offers practical tips to make compliance with the legal requirements easier. It provides key insights and guidance, by looking at the typical life cycle of personal data processed in any private organisation, from collection, storage, use to disposal of the personal data. This concise and practical guide will be essential reading for anyone who needs to know about data protection issues in Singapore. Adopting a practical approach to explaining the new data protection law and its implications for local and international businesses, this book will provide in-house lawyers, businesses and their staff a head start in better understanding the new data protection legal framework and devising an effective compliance strategy.

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# Judgment

by Justice Ramasubramaniam

Panel Forum: “A Comparative Approach in Judicial Decision Making”

Day 2: 11.30am

## Consim Info Pvt. Ltd. and Ors v. Google India Pvt. Ltd. and Ors [2010] 7 MLJ 497

Madras Law Journal - Civil (Case Law)/2010/Volume 7/Consim Info Pvt. Ltd., No. 94, Bellicia Towers, Tower II, 10th Floor, MRC Nagar, Mandaveli, Chennai-600 028 represented by its Director and Chief Executive Officer Mr. Janakiraman Murugavel and Others Versus Google India Pvt. Ltd., No. 3, RMZ Infinity-Tower E, 3rd, 4th and 5th Floors, Old Madras Road, Bangalore-560 016 and Others - [2010] 7 MLJ 497

IN THE HIGH COURT OF JUDICATURE AT MADRAS

V. Ramasubramanian, J.

O.A. Nos. 977 and 978 of 2009, Application Nos. 6001, 6380, 6381 and 6382 of 2009 and Application No. 247 of 2010 in C.S. No. 832 of 2009

30th September, 2010

*(A) Trade Marks Act (47 of 1999), Sections 2(2)(b), 2(2)(c) and 29 - Infringement of registered trade mark - Injunction - Concept of honest practices - Use by defendants, of individual words constituting registered trademarks of plaintiff, in advertisements in internet, may not amount to taking unfair advantage of and contrary to honest practices in industrial or commercial matters - Ingredients of Section 29(8)(b) and (c) are also not satisfied - Though use by defendants would be an use in course of trade and an use in advertising, such use does not amount to an infringing use.*

### FACTS IN BRIEF:

By virtue of the Deed of Assignment and by virtue of the registrations made in its own name, the Plaintiff Company has become the Proprietor of the registered trade marks, BHARATMATRIMONY, TAMIL MATRIMONY, TELUGUMATRIMONY etc. The grievance of the plaintiff is that the defendants 2 to 4, who also have matrimonial web portals, rendering online matrimonial services in the internet, advertise their services in the search engine “Google”, by adopting adwords and texts, which are exactly identical or deceptively similar to the registered trademarks of the plaintiff. With this grievance, the plaintiff has come up with the suit for permanent injunction and also has filed applications for interim injunction. The plaintiffs charge the defendants 2 to 4 with direct infringement and passing off. They charge the first defendant, a search engine with indirect or contributory infringement.

### QUERIES:

1. What constitutes “the use of the trade mark”, within the meaning of Section 28 (1) of the Trade Marks Act, 1999?
2. Whether the defendants are using the registered trade mark in the course of trade or using it in advertisements within the meaning of Section 2(2)(b) and (c) and 29(6) and whether such use or application constitutes infringement within the meaning of Section 29(8) of the Trade Marks Act, 1999?
3. What constitutes ‘honest practices’?

4. Whether the online service provider was jointly liable for the infringement committed by the others?
5. Does the use by a search engine, in its adwords advertising system, of keywords corresponding to trademarks, constitute an infringement of those trademarks?

Held: In the light of the provisions of Sections 2(2)(b), 2(2)(c), 29(6)(d), 29(7) and 29(8), if the case on hand is examined, it is clear that the defendants 2 to 4, use in the course of their trade, the two words, which form the component parts of the registered trade marks of the plaintiff, on their advertisements. Whenever a websurfer searches for the sites of the plaintiff, the links to the sites of the defendants 2 to 4 appear in the ‘sponsored links’ column. If the defendants 2 to 4 actually use in the adtitle and adtext of their advertisements in the ‘sponsored link’ column, the words which form part of the registered trade marks of the plaintiff, then it would certainly be an use in advertising and an use in the course of trade.[Para 166]

In the case on hand, it is the contention of the defendants that even if they use the individual words or parts of the plaintiff’s registered trade marks in their advertisements, such use will not be an use in the trade mark sense, but only in a descriptive sense. This contention has to be viewed in the light of the fact that a web portal rendering online matrimonial services for different Sections of the public, will have no alternative, except to describe the nature of the services rendered by them, in their advertisements, with reference to-

- (i) the caste/community/race/ethnic group and
- (ii) the type of services rendered.[Para 176]

Therefore, the defendants 2 to 4, in Court's view, cannot be said to be taking unfair advantage of and acting contrary to honest practices in industrial or commercial matters, within the meaning of Section 29(8)(a) of the Act.[Para 177]

Keeping in mind the concept of what constitutes "honest practices", if the third defence set up by the defendants 2 to 4 is looked at, it cannot be said that the defendants are guilty of infringement in terms of Section 29(8), especially in view of the descriptive nature of the individual words, whose combinations have been registered as trade marks by the plaintiff. However, it is clarified that if the registered trade marks of the plaintiff were not descriptive of (i) the consumers of the services rendered, such as Tamils, Telugus, etc., and (ii) the nature of the services rendered, namely matrimonial services, Court would not have accepted the third defence set up by the defendants, since even an application of the registered trade mark in advertisements, would be an use in the course of trade and may at times constitute infringement in terms of Section 29(6) and (8) respectively.[Para 180]

The use by the defendants, of the individual words constituting the registered trademarks of the plaintiff, in the advertisements in internet, may not amount to taking unfair advantage of and contrary to honest practices in industrial or commercial matters. The ingredients of Section 29(8)(b) and (c) are also not satisfied, since it is not shown that the use is detrimental to the distinctive character of the mark or against the reputation of the mark. Therefore, it is held that though the use by the defendants would be an use in the course of trade and an use in advertising, such use does not amount to an infringing use.[Para 181]

While the search engine may have a control over the selection of keywords by the advertiser, the search engine may not have any control over the surfer, on the choice of a search term. It is also not possible for a search engine to be aware of all the trademarks registered in all the jurisdictions, in respect of all the goods and services. Therefore, the offer of words by a search engine, in their keyword suggestion tool, may not per se amount to an infringing use of a registered trademark, though it may amount to a use in the course of their own trade. It is true that the number of visitors that a site has on a daily basis, may induce the search engine to include the whole or part of the name or title of the site, in the keyword suggestion tool, to enable the competitors of the site to choose those words as adwords. But it may or may not happen with the knowledge that such names constitute registered trademarks. There cannot be a presumption that the inclusion of those names in the keyword suggestion tool, happened with the knowledge of the search engine, about the registration of those words as trademarks. It is only in cases where a completely arbitrary or fanciful name, which has no nexus or connection with the nature of the goods or services, is adopted as a trademark, that the offer by a search engine of that trademark in their keyword suggestion tool, to the competitors of the proprietor of the mark, could be considered as amounting to vicarious or contributory infringement. In cases of the nature on hand, the benefit of doubt would go to the search engine, since the choice of the words 'Tamil', 'Matrimony' etc., in the keyword suggestion tool, need not necessarily have happened deliberately.[Para 200]

Held: The question as to whether the registered trade marks of the plaintiff have acquired secondary meaning or not, has to be tested only on the strength of the evidence let in. But, irrespective

of whether they have acquired secondary meaning or not, the use by the defendants 2 to 4, of the very same combination of words, namely 'Tamil Matrimony', 'Bharath Matrimony', 'Assamese Matrimony' etc., even if they leave a space in-between the two words, certainly provides a likelihood of confusion. Therefore, under normal circumstances, the plaintiff will be entitled to an injunction, for the simple reason that the others are not entitled to use the very same combination of words with just a space in-between and claim that both these words are just generic or descriptive. As a matter of fact, if the defendants 2 to 4 use one of the words constituting the registered trade marks of the plaintiff, in conjunction with a different word (which is not part of the registered trade mark), the plaintiff would have had no case at all. It must be borne in mind that the same mark test is different from a similar mark test. But, the objection of the plaintiff is to the use of the very same combination of words by the defendants, as contained in the registered trademarks of the plaintiff.[Para 148]

Though the objection of the plaintiff to the use by the defendants, of the very same combination of words, is well founded prima facie, the same cannot take them to the desired destination. It is on account of a subsidiary question that would then automatically arise for consideration. That question is as to whether the defendants 2 to 4 would be left with any other choice, to advertise their services, if the use of the combination of the above words is prohibited.[Para 149]

Even if the plaintiff's case is accepted in total, an injunction could be issued only to the extent of preventing the defendants from using the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc, in combination with the word 'Matrimony'. This would leave the defendants 2 to 4 with a very limited choice, to choose the expression 'Tamil Wedding' or 'Tamil Marriage' or 'Tamil Alliance' etc., instead of the expression 'Tamil Matrimony'. But, the grant of an order which would lead to the consequence of reducing the choice of words available to the competitors, to a very few and resulting in the plaintiff monopolising the English word 'Matrimony', will be very disastrous.[Para 150]

Moreover, Section 35 of the Act saves the use by any person, of any bona fide description of the character or quality of his goods or services. Therefore, in the light of the fact that there are no synonyms for the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., and also in the light of the fact that any curtailment of the use of the word 'Matrimony' would leave the defendants 2 to 4 with a very limited choice of two or three equivalent words only, the use by the defendants 2 to 4 of the combination of words could only be taken to be an inevitable and unavoidable, even if presumed to be not a bona fide description of the character or quality of their services, saved by Section 35.[Para 151]

Held: The second defence taken by the defendants, on the basis of Sections 15 and 17, cannot be sustained for one simple reason. The plaintiff does not seek an injunction restraining the defendants from making use of the individual words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', 'Matrimony' etc., independently. The plaintiff does not even seek an injunction to restrain the defendants 2 to 4 from using any of the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc in combination with any word other than 'Matrimony'. The injunction that they seek is to prevent the defendants 2 to 4 from using any of these

words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., in combination with the particular word 'Matrimony'. Therefore, the second defence taken by the defendants 2 to 4 cannot be accepted.[Para 157]

Held: A careful reading of Section 29, which contains an exhaustive list of various acts constituting infringement, shows that those various acts of infringement revolve either around the use of the mark in the course of trade or the use of the mark as a trade/business name or the use of the mark on packages, labels and advertisements. While sub-sections (1) to (4) lay emphasis on 'use in the course of trade', sub-sections (5) and (6) merely speak about use of the registered mark on trade name, business name or labels or packages or on business papers or in advertising. In contrast, sub-section (7) speaks of the application of the registered mark on labels, packages, business papers, etc., or on advertisements. Sub-section (8) does not speak either of the 'use of the mark' or 'application of the mark'. It speaks merely of the advertisement of the mark.[Para 164]

(E) Trade Marks - Infringement and passing off action - Decisions of various International Courts - Decisions to be understood in context of respective laws - principles enunciated in those decisions can be of persuasive value to the extent, laws in India are similar.

Held: The decisions of various international Courts, have obviously arisen out of (i) the laws relating to Trade Marks in their own jurisdictions or (ii) the European Union Directives or Council Regulations. They have also evolved only over a period of time, with infringements arising out of commercial greed, always scoring a march over the laws, just as crimes always march ahead of law enforcement. Therefore, the road so far travelled appears to have been bumpy and as Austrotrabant's blog put it, the law on the issue has become as confusing as the statement of the Oracle of Delphi could be. In any case, the decisions of various Courts have to be read only in the context of the laws with reference to which they were rendered and hence the relevant laws in the backdrop of which, those decisions were rendered are to be seen.[Para 128]

The decisions referred to from paragraphs 50 to 127 have to be understood in the context of the respective laws. The principles enunciated in those decisions can be of persuasive value to the extent, the laws in India are similar. [Para 134]

Held: The contention based on the validity of registration, cannot be accepted in view of Sections 31 and 32. Under Section 31(1), the registration of a trade mark is considered prima facie evidence of its validity. Under sub-section (2) of Section 31, a registered trade mark cannot be held to be invalid in a legal proceeding on the ground that it was not registrable under Section 9. By virtue of Section 32, it is open to the plaintiff to establish in the course of trial that after the registration of the mark, but before the commencement of the legal proceedings, the mark has acquired a distinctive character, in consequence of its use. Therefore, the contention that the trade marks in question ought not to have been registered, cannot be accepted. [Para 188]

Held: The Court, does not think that there is any necessity to stay the suit. The second defendant has entered appearance through counsel and has also filed counter affidavits to the applications

for injunction. The second defendant has also come up with substantial applications for stay of suit and rejection of plaint. Therefore, the stage at which the provisions of Order 6, Rule 14A(5) are to be invoked, has already passed. As a matter of fact, a careful perusal of the provisions of sub rules (5), (6), (7) and (8) of Rule 14A of Order 6 would show (i) that at any time, the plaintiff can seek the setting aside of the order of stay, after furnishing the true address of the defendant; and (ii) that as per sub rule (8), nothing in Rule 14-A shall prevent the Court from directing the service of process at any other address.[Para 212]

Held: A reading of the averments in the affidavits in support of the applications for rejection of plaint would show that the defendants 2 and 4 are attempting to bring the applications within clauses (a) and (d) of Order 7, Rule 11. But, the plaint does actually disclose a cause of action. It is well settled that for deciding an application under Order 7, Rule 11, the Court has to look only into the averments contained in the plaint and the documents filed by the plaintiff. The averments contained in the plaint, certainly disclose a cause of action. Whether such cause of action is true or false, is a matter of evidence and hence, the plaint cannot be thrown out without trial.[Para 219]

The defendants 2 and 4 are unable to point out as to how the suit is barred by any law (so as to bring it within clause (d) of Order 7, Rule 11). But, it has already been pointed elsewhere that the jurisdiction conferred upon this Court, is not ousted by the said Policy. Therefore, the case will not even fall under clause (d) of Order 7, Rule 11.[Para 220]

#### RATIO DECIDENDI

1. In view of Sections 2(2)(b) and 2(2)(c) and 29 of the Trade Marks Act, 1999 the use of the mark as or as part of any statement about the availability, provision or performance of certain services, would tantamount to 'the use of the mark in relation to such services'.
2. If a person use the individual words constituting the registered trade marks of the plaintiff, in their advertisements in the sponsored links column, then such use would certainly fall within Section 2(2)(c)(ii) and 29(6)(d) of the Trade Marks Act, 1999.
3. Honesty is actually an animus of mind and it can never be discovered either by the words spoken by a person or by the acts of omission and commission committed by him and as such, one can only make inferences from the circumstances.
4. When the use by the defendants, of the individual words constituting the registered trademarks of the plaintiff, in the advertisements in internet, may not amount to taking unfair advantage of and contrary to honest practices in industrial or commercial matters and when it is not shown that the use is detrimental to the distinctive character of the mark or against the reputation of the mark, though the use by the defendants would be an use in the course of trade and an use in advertising, such use does not amount to an infringing use.
5. A registered trade mark cannot be held to be invalid in a legal proceeding on the ground that it was not registrable under Section 9 of the Trade Marks Act, 1999.

6. The offer of words by a search engine, in their keyword suggestion tool, may not per se amount to an infringing use of a registered trademark, though it may amount to a use in the course of their own trade.
7. A plaint cannot be rejected unless the ingredients of Order 7 Rule 11 stand fully satisfied.

**CASES CITED/REFERRED TO :**

414 F.3d 400 (2005)[Para 75]  
 2003 ETMR 19[Para 88]  
 119 F.Supp.2d 309[Paras 66,]  
 174 F.3d 1036-9th Cir. 1999[Para 58]  
 292 F.3d 1139, 1153-55[Para 169]  
 (1899 AC 326)[Para 145]  
 315 F.3d 932-2003[Para 54]  
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 Filipino Yellow Pages, Inc. c. Asian Journal Publications, Inc. 198 F.3d 1143[Para 85]  
 5:03-cv-05340-JF[Para 69]  
 (2007(35) PTC 474),[Para 154]  
 326 F.3d 687-2003[Para 55]  
 Intershop comms. v. Tietz, LG Hamburg, No. 315 O 646 of 2003 (25.2.2004)[Para 53]  
 2010 US Dist. Lexis 18208[Para 104]  
 2009 EWHC 1094 (Ch.)[Paras 92,]  
 (1912) 29 RPC 225[Para 67]  
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 No. 312 O 887 of 2002 dt 14.11.2003[Para 52]  
 545 US 2005-1[Para 70]  
 (2002) F.S.R. 23[Para 178]  
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 (1946 (63) RPC 39[Para 144]  
 354 F.3d 1020[Para 59]  
 279 F.3d 796 9th Cir. 2002[Para 167]  
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 216 US 375 (1910)[Para 153]  
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 Societe Des Hotels Meridien v. Sarl Google France No. R.G.:04/03772[Para 68]  
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 (2008) EWHC 361 (Ch.)[Para 97]  
 1:09-CV-00636-REB-KLM[Para 105]  
 Welles 279 F.3d at 802[Para 168]

**Advocates Appeared:**

T.V. Ramanujun, senior counsel for A.A. Mohan for Applicant  
  
 P.S. Raman senior counsel for Sajjan Poovaiah for Respondent No. 1, Vineet Subramani, for Respondent No. 2, Satish Parasaran for Respondent No. 3 Arvind P. Datar, senior counsel for S. Mothilal Respondent No. 4

**COMMON ORDER**

“What’s in a name? That which we call a rose,  
 By any other name would smell as sweet”

would have been acceptable to Shakespeare, but certainly not to WIPO. Today everything is in a name, if the name had acquired significance as a trademark. William Murray, First Earl of Mansfield observed in Morgan vs. Jones, that “most of the disputes in the world arise from words”.

**Background of the Litigation on Hand**

2. The case of the plaintiff, as reflected in the plaint, is that it is a company rendering online matrimonial services, using internet as a vehicle/platform. The plaintiff has several matrimonial web portals including 15 regional portals, catering to the needs of millions of Indians living in India and outside. Mr. Janakiraman Murugavel, promotor/ founder Director of the plaintiff adopted a host of trademarks and obtained registration thereof. The plaintiff-company also adopted a few trademarks and obtained registration thereof in its own name. By virtue of a Deed of Assignment dated 16.6.2006, the trademarks registered in the name of Mr. J. Murugavel were assigned in favour of the company by name Bharat Matrimony.Com Pvt. Ltd. In the year 2008, the name of the company was changed to Consim Info Pvt. Ltd., which is the plaintiff herein.
3. Therefore, by virtue of the Deed of Assignment and by virtue of the registrations made in its own name, the plaintiff-company has become the Proprietor of the registered trademarks, listed in column No. 3 of the following table, with the registration numbers given against them each in column No. 2 thereof, in respect of the goods and services falling under the Classes indicated in column No. 4 thereof:-
4. The grievance of the plaintiff, in a nutshell, is that the defendants 2 to 4, who also have matrimonial web portals, rendering online matrimonial services in the internet, advertise their services in the search engine “Google”, by adopting adwords and texts, which are exactly identical or deceptively similar to the registered trademarks of the plaintiff. With this grievance, the plaintiff has come up with the above suit, praying for the following reliefs:-

A permanent injunction restraining the defendants, by themselves, their directors, partners, men, servants, agents, broadcasters, representatives, advertisers, franchisees, licensees and/or all other persons acting on their behalf from in any manner infringing and/or enabling others to infringe the plaintiff’s registered trademarks BHARATMATRIMONY, TAMIL MATRIMONY, TELUGUMATRIMONY, etc., a list whereof is annexed hereto and marked as Annexure-A and/or its variants by including them jointly or severally as “Adwords”, “Keyword Suggestion Tool” or as a keyword for internet search or as meta tag in any other manner whatsoever;

A permanent injunction restraining the defendants, by themselves, their directors, partners, men, servants, agents, broadcasters, representatives, advertisers, franchisees, licensees

and/or all other persons acting on their behalf from in any manner diverting the plaintiff's business to its competitor's by using first defendant's search engine in which the plaintiff's trademarks and domain names BHARATMATRIMONY.COM, TAMILMATRIMONY.COM, etc., a list whereof is annexed hereto and marked as Annexure-A and/or its variants, by using as Adwords, Keyword Suggestion Tool, as a keyword for the internet search and/or as meta tags and thereby passing off and enabling others to pass off the business and services of the plaintiff's competitors including defendants 2 to 4 as that of the plaintiff or in any other manner whatsoever;

A direction to the defendants to surrender to the plaintiff for destruction, of all compact discs, master copy, advertising materials, pamphlets, brochures, etc., which bears the plaintiff's registered trademarks and/or any other variants which are phonetically and/or deceptively identical and/or similar to the plaintiff's registered trademarks or in any other form whatsoever; Award damages of Rs. 10,05,000/- for infringing and/or for passing off and/or for enabling others to infringe and/or pass off the plaintiff's trademarks and domain names; An order for rendition of accounts of profits in favour of the plaintiff and against the first defendant to ascertain the profits made by the first defendant on account of allowing such infringements.

5. Along with the suit, the plaintiff also filed 2 applications in O.A. Nos. 977 and 978 of 2009, seeking -

an interim injunction restraining the respondents, by themselves, their directors, partners, men, franchisees, licensees and/or all other persons acting on their behalf from in any manner infringing and/or enabling others to infringe applicant's registered trademarks BHARATMATRIMONY, TAMIL MATRIMONY, TELUGUMATRIMONY etc., a list whereof is annexed hereto and marked as Annexure-A and/or its variants by including them jointly or severally as "Adwords", "Keyword Suggestion Tool" or as a keyword for internet search or as meta tag in any other manner whatsoever, pending disposal of the suit; and

an interim order of injunction restraining the respondents, by themselves, their directors, partners, men, servants, agents, broadcasters, representatives, advertisers, franchisees, licensees and/or all other persons acting on their behalf from in any manner diverting the applicant's business to its competitors by using the first respondent's search engine in which the applicant's trademarks and domain names BHARATMATRIMONY.COM, TAMILMATRIMONY.COM, etc., a list whereof is annexed hereto and marked as Annexure-A and/or its variants, by using as Adwords, Keyword Suggestion Tool, as a keyword for the internet search and/or as meta tags and thereby passing off and enabling others to pass off the business and services of the applicant's competitors including respondents 2 to 4 as that of the applicant or in any other manner whatsoever, pending disposal of the suit.

6. On 17.9.2009, a learned Judge granted ex parte ad interim orders of injunction in both the applications. But on 7.10.2009, the blanket interim orders of injunction were vacated by the learned Judge and a direction was issued to the search engine (viz., the first defendant) to adhere to their business policy of protecting the registered trademarks, by ensuring that others do not use such registered trademarks in their "Adwords".

7. Complaining of violation of the said interim orders, the plaintiff moved an application in A. No. 6001 of 2009 under Order 39, Rule 2-A CPC, for punishing the first defendant by attaching its properties.

8. While opposing the applications for injunction, the defendants 2 to 4 raised preliminary objections that the plaint contained incorrect and misleading statements. The plaint as it was originally filed, proceeded on the basis that the plaintiff is the registered Proprietor of all the trademarks mentioned in the above table. But actually, it was Mr. Janakiraman Murugavel who was the registered Proprietor of a majority of those trademarks. The plaintiff was the registered Proprietor of only a few marks. Therefore, the second defendant People Interactive (I) Pvt. Ltd., came up with two applications in A. Nos. 6382 and 6383 of 2009, seeking a stay of further proceedings in the suit and also seeking a rejection of the plaint under Order 7, Rule 11, CPC. Similarly, the fourth defendant Times Business Solutions Ltd., also came up with an application in A. No. 6380 of 2009, seeking rejection of the plaint under Order 7, Rule 11, CPC.

9. In the meantime, realising the mistake committed in the pleadings, the plaintiff, of their own accord, came up with an application in A. No. 6379 of 2009, seeking an amendment of the plaint and the original applications. The scope of the amendment sought for, was (i) to insert paragraph 8-A in the plaint so as to make it clear that Mr. Janakiraman Murugavel was the registered Proprietor of most of the trademarks and that he had assigned them in favour of the plaintiff, of which he is the promotor/director (ii) to delete the words "www." and ".com" and (iii) to substitute the correct address of the second defendant in the long and short cause title.

10. By an order dated 21.1.2010, the application for amendment A. No. 6379 of 2009 was allowed by me and the amendments were also carried out. Even while allowing the amendment, I reserved liberty to the defendants to raise all their objections in the applications for injunction and in the suit. The reasons that persuaded me to allow the amendment were -

that Mr. Janakiraman Murugavel is undoubtedly the registered Proprietor of most of the trademarks listed in the above table;

that the plaintiff company is also the registered Proprietor of a few of them ;

that there is no dispute that Mr. Janakiraman Murugavel is the promotor/director of the plaintiff; and

that even in the first instance it was Mr. Janakiraman Murugavel who had signed and verified the pleadings, including the plaint and the affidavit in support of the applications for injunction.

11. Therefore, it was obvious that there was a mix up, between Mr. J. Murugavel's identity as an individual and his identity as the promotor/director of the plaintiff-company. This had led to improper and shabby pleadings on the part of the plaintiff in the plaint filed in the first instance. After being pointed out, the plaintiff sought amendment and hence the amendment was allowed, as it did not alter the character and nature of the dispute raised in the suit. Moreover, the dispute on hand raises larger issues of global concern and hence I did not wish to short circuit

the same, by rejecting the prayer for amendment and by throwing out the plaint on hyper technical grounds, though it could have suited me very much and saved much of the botheration that I had to undergo later.

12. The plaintiff has also come up with another application in A. No. 247 of 2010, seeking to implead Google Inc, as the 5th defendant in the suit, on the ground that the first defendant claimed in their counter affidavit to be just a wholly owned subsidiary of Google Inc., USA and that therefore, it is a necessary and proper party, for the purpose of a binding adjudication.

13. Thus, there are actually 7 applications on hand viz.,

O.A. Nos. 977 and 978 of 2009 filed by the plaintiff for interim orders of injunction,

A. No. 6001 of 2009 filed by the plaintiff for punishing the first defendant for violating the interim orders.

A. No. 6380 of 2009 filed by the fourth defendant seeking rejection of the plaint.

A. Nos. 6382 and 6383 of 2009 filed by the second defendant seeking rejection of the plaint and stay of further proceedings and

A. No. 247 of 2010 filed by the plaintiff for impleading Google Inc., USA as the 5th defendant in the suit.

14. All the above applications were taken up together and I have heard Mr. T.V.Ramanujun, learned senior counsel appearing on behalf of Mr. A.A.Mohan, counsel for the plaintiff, Mr. P.S.Raman, learned senior counsel appearing for the first defendant, Mr. Vineet Subramani, learned counsel appearing for the second defendant, Mr. Satish Parasaran, learned counsel for the third defendant and Mr. Arvind P.Datar, learned senior counsel for the fourth defendant.

Grievance of the Plaintiff:

15. The plaintiff as well as its promoter Mr. Janakiraman Murugavel are the registered proprietors of about 22 trademarks such as Bharatmatrimony, Tamilmatrimony, Telugumatrimony etc. Out of them, 4 marks are registered under Class 42, covering "marriage bureau, horoscope matching and other matrimonial services, services to facilitate online marriages, profile references, match making services" etc. The others are registered under Class 16, covering printed matter.

16. While the first defendant is a search engine, the second defendant is the proprietor of a web portal, offering matrimonial services with the domain name www.shaadi.com (the word "shaadi" in Hindi means marriage). Similarly, the third defendant is a business division of a company by name Info Edge India Ltd., also having a web portal offering matrimonial services with the domain name www.jeevansathi.com. (Jeevansathi in Hindi means friend for life). The fourth defendant is also a company having a web portal offering matrimonial services, under the trademark "simplymarry" and a domain name www.simplymarry.com.

17. The grievance of the plaintiff is that whenever a websurfer browses the search engine 'google' using as keywords, any of

their 22 trademarks or the constituent parts thereof (such as Bharat, Assam, Tamil, Matrimony etc.,) the links to the websites of the defendants 2 to 4 also appear on the right hand side of the page, as "sponsored links". Each sponsored link has (i) an ad title (ii) an ad text and (iii) the URL (Uniform Resource Locator) of the advertiser's website. When the trademark of the plaintiff or a mark which is deceptively similar to it, is used in the ad title or ad text, by a competitor, whose advertisement appears on the sponsored links, an infringement happens, according to the plaintiff. Since the choice of the keyword is made by the advertiser through the keyword suggestion tool provided by the search engine, the contention of the plaintiff is that the search engine is guilty of aiding and abetting such infringement. In other words, the plaintiffs charge the defendants 2 to 4 with direct infringement and passing off. They charge the first defendant with indirect or contributory infringement.

18. There is no dispute about the fact that whenever any of the registered trademarks of the plaintiff such as BHARATMATRIMONY, TAMIL MATRIMONY etc., or the words constituting these trademarks such as BHARAT, TAMIL, MATRIMONY etc., are typed by a surfer searching for results, the search engine google displays information about the plaintiff's websites, on the left hand side, as natural/organic results. But simultaneously, the search engine also displays the advertisements of the respondents 2 to 4 on the right hand side, as "sponsored links". The objection of the plaintiff is not per se to the very display of advertisements of its competitors as sponsored links. Their objection is that the words used by the respondents 2 to 4 in the ad title and ad text of the advertisements in the sponsored links, happen to be either the registered trademarks of the plaintiff or deceptively similar versions thereof.

19. For instance, when a websurfer types the word BHARAT MATRIMONY in the box appearing on the home page of the search engine, the links to the sites of the defendants 2 to 4 also appear on the right hand side under the column "Sponsored Links". When the ad titles and/or ad texts appearing in those links, of the respondents 2 to 4, contain either the combined word "BHARATMATRIMONY" or the individual words "BHARAT" and "MATRIMONY", it results in confusion, deception and diversion of business traffic. This is what the plaintiff is objecting to.

20. Admittedly, the adwords used by advertisers in the sponsored links, as ad title or ad text, are selected by the advertisers themselves. But they also receive assistance from the keyword suggestion tool provided by the search engine itself. The keyword tool is search based and it generates ideas matched to the websites of the advertisers. A person who wishes to choose appropriate keywords will have to enter into the keyword suggestion tool of the search engine and type one or more descriptive words or phrases and solicit keyword ideas. Immediately, the engine displays all keywords related to the word entered by the advertiser, along with the volume of monthly searches made on the same keyword and the additional keywords that could possibly be considered for use by the advertiser. Suppose an advertiser uses the keyword tool to find the appropriate adwords, which would easily lead to his website, the search engine suggests innumerable keywords that could be adopted by the advertiser so that the link to his website would appear at as many locations as possible.

21. According to the plaintiff, the first defendant has provided in the keyword suggestion tool, the registered trademarks of the plaintiff or deceptively similar variations thereof, thereby inducing the trade rivals to choose them as their adwords, either by way of ad title or ad text or both. According to the plaintiff, the words BHARATMATRIMONY, ASSAMESEMATRIMONY, Bharat, Tamil, etc., are made available by the first defendant in their keyword suggestion tool enabling the other defendants to choose them as their adwords. Consequently, when a websurfer searches the engine, for the various websites of the plaintiff, by typing the words BHARATMATRIMONY or BHARAT or MATRIMONY, the search engine not only displays the details of the websites of the plaintiff as organic results, but also displays in the column reserved for sponsored links, the details of the websites of the defendants 2 to 4 with the title and/or text of the advertisement, carrying the registered trademarks of the plaintiff or deceptively similar variations thereof. This, according to the plaintiff, amounted to infringement and hence the suit.

#### Stand taken by first defendant

22. The response of the first defendant to the grievance of the plaintiff is that it has an “adwords program” which allows advertisers to create and run advertisements through a simple process. The advertisements comprise of short commercial messages with an indication of the link to the advertiser’s site. These links are presented under the heading “sponsored links” either at the top of the page against a yellow background or on the right hand side separated by a line from the organic results. Apart from these links, banner advertisements or pop-up advertisements also appear. However, the adwords program of the first defendant fixes responsibility upon the advertiser, under Clause 4 of an Agreement normally entered into with the search engine, not to advertise anything illegal nor violate or encourage violation of any applicable laws or third party rights including intellectual property rights.

23. According to the first defendant, the advertisements on their website are governed by a defined set of policies. The advertisement policy of the first defendant, a copy of which is filed as a document, shows the policy line adopted by them with respect to trademarks vis-a-vis adwords. The relevant portion of the policy reads as follows:-

24. It is the contention of the first defendant that in view of the aforesaid policy, the first defendant is not actually allowing the registered trademarks of the plaintiff to be used in advertising the products and services of its competitors. In other words, the stand taken by the first defendant is that they do not allow the defendants 2 to 4 or anyone else, to use per se, the registered trademarks of the plaintiff such as BHARATMATRIMONY, ASSAMESEMATRIMONY etc.

25. However, it is contended by the first defendant that since all the registered trademarks of the plaintiff comprise of a combination of two generic or descriptive terms used in common parlance, the plaintiff cannot claim exclusivity and complete control over such words as “matrimony”, “bharat”, “tamil”, “urdu”, “punjabi” etc. A person looking for a web portal offering matrimonial services relating to his community, would necessarily type the name of his community, his linguistic identity and the description of the services that he is looking for. Therefore, it is

but natural for an advertiser to choose as his adwords, the name of the community, caste or creed and the description of the services. This cannot, according to the first defendant, amount to an infringement.

#### Defence of the second defendant

26. The second defendant, whose website is shaadi.com, has contended in its counter affidavit that even when a search is made for the websites of the defendants 2, 3 or 4, the link to the plaintiff’s website appears as a sponsored link, showing thereby that what the plaintiff seeks to injunct, is something which the plaintiff himself is guilty of. Therefore, the plaintiff cannot be allowed to injunct others from doing what they themselves are doing in the same search engine. The second defendant has also given details of the prior litigations between them and the plaintiff, to highlight the trade rivalry and to show that similar issues form the subject matter of an earlier suit, about which no whisper is made in the plaint. It is the further contention of the second defendant that since 18 out of the 22 trademarks claimed to have been registered are in relation to goods in Class 16 and also since Class 16 relates to paper, cardboard, printed matter etc., with which the second defendant is not concerned, there was no question of infringement or passing off. Moreover, the plaintiff has not obtained registration of the words “tamil”, “telugu”, “matrimony” etc., individually and hence, the use of these generic or descriptive words would not amount to infringement. The fact that these separate words form the constituent parts of the registered trademarks of the plaintiff, would not per se make the use of these words, an infringement. The second defendant also contends that all disputes relating to registration and use of domain names are to be referred to and resolved by an international system known as Internet Centre for Assigned Names and Numbers (ICANN), in accordance with the Uniform Domain Names Dispute Resolution Policy (UDRP) and hence, the jurisdiction of this Court is excluded in such matters. The second defendant has also given the names of several websites such as www.matrimony.org, www.matrimony.com, www.matrimony.net.in, www.matrimonys.com, www.matrimony.co.za, in support of its contention that the plaintiff cannot claim monopoly over the word “matrimony”. The second defendant also claims to be the prior user, with its website in existence from 1996.

#### Response of the third defendant

27. In their counter affidavit, the third defendant has contended that even as per the admitted averments, the defendants were not using the registered trademarks of the plaintiff, as “marks”, while marketing or offering their products and services. Therefore, it is not a case of infringement or passing off, since the words “matrimony”, “tamil”, “telugu” etc., are not used in the trademark sense, but only in descriptive sense. Moreover, the separate words such as telugu, tamil etc., which together with the word “matrimony” constitute the trademarks of the plaintiff, are words that are indispensable and unavoidable in the context of the websearch for matrimonial services. Therefore, no exclusivity can be claimed nor can any infringement be alleged. It is more so, since no part of the registered trademarks of the plaintiff contain an invented word. It is the further contention of the third defendant that when a search is made on the search engine, using the word “jeevansathi”, the website of the plaintiff appears

under the sponsored links, indicating thereby that the plaintiff has knowingly and willingly submitted to the business model of the first defendant. Therefore, the plaintiff is, according to the third defendant, estopped from questioning the said model. Moreover, there cannot be an injunction, according to the third defendant, restraining the fundamental right of expression in the form of advertising, which is nothing but a right of free commercial speech.

#### Contentions of the fourth defendant

28. In their counter affidavit, the fourth defendant has resisted the plea for injunction, on similar grounds as the other defendants have done. In addition, they have also contended that a search engine is like a directory which displays the links to different websites that contain words which are typed in by the websurfer and hence the use of the words contained in such directory cannot be prohibited. The very registration of the trademarks in question in favour of the plaintiff by the Trademark Registry is contrary to law under Section 9(1)(b) of the Trade Marks Act, 1999. There is also no concept, according to the fourth defendant, of "secondary meaning" in the case of domain name protection. Moreover, the level of consumer sophistication is different in so far as internet is concerned and hence, the likelihood of confusion cannot be treated as the same. According to the fourth defendant, the expression "use of a mark" is defined in Section 2(2)(b) and 2(2)(c) of the Trade Marks Act, 1999 and coupled with the provisions of Section 29(6), the Act does not confer protection against the use of a trademark as an adword. The protection applies only to another mark used in the course of trade. Since the fourth defendant uses the mark "simplymarry", which has no resemblance to any of the marks of the plaintiff, there is no cause of action for the suit. Moreover, the litigation seeks to gain monopoly over keywords, which is anti competitive and hence would become a restrictive trade practice, disallowed by the Competition Act, 2002.

29. From the rival contentions briefly presented above, it is seen that fortunately, there are not many serious factual disputes in the case on hand, except two factual disputes that were originally raised.

The first was on account of the defective pleadings in the plaint as it originally stood, where the plaintiffs failed to plead registration in the name of Mr. Janakiram Murugavel and the assignment made by him in favour of the plaintiff. But, after the amendment was allowed, this first objection on erroneous pleadings receded to the background. Though Mr. Arvind P. Datar, learned senior counsel appearing for the fourth defendant insisted that the objections to the original pleadings still hold good and that the original pleadings disentitled the plaintiffs to any injunctive relief, I do not think that the real controversy, which is of larger public interest, should get over-shadowed on such technicalities. I am conscious of the fact that even while permitting the amendment, I have reserved liberty to the defendants to raise all these technical objections. But, considering the time and efforts taken by the counsel appearing for all the parties, I have chosen to take the bull by its horns.

The second factual dispute is with regard to the actual contents of the adwords, adtext or adtitle. According to the plaintiffs, the trade marks registered in their favour appear as such, on the

adtitle and the adtext of the advertisements of the respondents 2 to 4. But according to the first defendant (the search engine), the registered trade marks BHARATMATRIMONY etc., do not appear as such, though the words BHARAT, MATRIMONY etc. appear independently. Disputing the claims of the defendants, the plaintiffs have produced print outs of the web pages showing that at times, the trade marks have been used. But in my considered view, a detailed enquiry into the same may not be necessary in view of the stand taken by the first defendant that they follow a policy for protection of trade marks. The defendants 2 to 4 have also made it clear that they do not and would not use in their advertisements, the registered trade marks of the plaintiffs such as BHARATMATRIMONY etc., though the defendants claim a right to use the independent words BHARAT, MATRIMONY etc., separately.

Therefore, two things are very clear viz., (i) that the defendants do not claim a right to use the registered trade marks of the plaintiffs as such in their advertisements and (ii) that in so far as the usage of the independent words (which constitute the registered trade marks of the plaintiffs) are concerned, the defendants assert that the plaintiffs have no right to injunct them.

30. In view of the above, there is fortunately less dispute on facts and more dispute on questions of law, pure and simple and is perhaps raised in an Indian Court for the first time in the history of the internet age. Hence, it may be useful to have a prelude about the manner in which the internet operates and the search engines function. The prelude has become necessary more for the purpose of distinguishing routine trade mark disputes operating in the real physical world, from the disputes of this nature, operating in the virtual world. So let us now undertake a brief journey into the evolution of the virtual world. While persons who are not so familiar with the virtual world, are welcome to join me, the others are free to stay back, relax and come on board at the stage where the discussion from paragraph 42 onwards begin.

#### Prelude:

31. It appears that the age of internet, began in 1969 as a network of just 4 computers located at the University of California at Los Angeles, the University of California at Santa Barbara, the University of Utah and the Stanford Research Institute. At around the same time, the U.S. Department of Defence established the Advanced Research Projects Agency (ARPA) and established ARPAnet, the world's first decentralised computer network. Though Doug Engelbart invented the mouse for prototyping an online system for hypertext browsing and editing and the hypertext editing system was developed by Andy Van Dam in the 1960s, the next decade saw the development of electronic mail, telnet and FTP. The early 1980s brought the Transmission Control Protocol (TCP) and Internet Protocol (IP) which led to the development of web technology using Hyper Text Markup Language (HTML) and Hyper Text Transfer Protocol (http). The web technology, known as "World Wide Web" (www), that was developed by Tim Berners Lee while working for CERN in 1991, became available freely from 1993. It led to the development of three basic types of search tools known as (i) search engines (ii) search agents and (iii) hand-built directories.

32. A search engine is an information retrieval system designed to help find information stored on a system. It is a data base

of 'web page extracts' that can be queried to find reference to something on the net. Search engines provide a way to search the contents of millions of web pages simultaneously. To make a search of what one wants, one has to go to the web page of the search engine and submit key words or search terms, in a simple form. It runs these terms past its database and almost instantly, returns a list of results or hits. The results displayed are so voluminous that if one surfs through them in entirety, one may retire from service or perhaps even from this world.

33. There are several search engines such as HotBot, Alta Vista, Northern Light, Yahoo etc. Google, the first defendant herein, is one such search engine which has a large database and which uses a system of ranking hits by relevancy (popularity). The search engines find out the popularity of a site through the "cookies" planted in the computers. These cookies actually indicate the sites visited by a person and they map the areas of interest of a person browsing the net. As a matter of fact, whether one leaves footprints on the sands of time or not, a websurfer, without even realising what is happening behind him, leaves a trail behind, whenever he visits a site. This enables the operators even to profile the surfing habits of browsers. So far, this profiling has been used predominantly for the purpose of advertising. It is also possible to block the installation of cookies or clean up the surfing history, in order to protect privacy. Each search engine has its own quirks, which, if not properly learnt, would lead to a lot of time being wasted, by weeding through poor results. The search through these search engines prove to be fruitful, only when one learns how to create a phrase, how to search on multiple phrases and how to exclude certain words.

#### How Search Engines Operate

34. Normally, when one enters into the net and goes to a search engine, the first page that opens up on the screen of the computer is the "Home page". The home page contains a bar/box in which, the person making the search is to type the key words or the search terms. Just below the box, two options will be indicated. One is an open search option, which is actually a wild search. Another is a limited search option, indicated by the phraseology "I'm feeling lucky".

35. The moment one clicks the keyword in the open search option, two types of results are thrown open. The results that appear on the left hand side are known as "organic results" and those that appear on the right hand side are known as "sponsored links" (may be inorganic). Suppose one clicks the phrase "Bharatmatrimony" in the open search option, the page that opens with a set of about 10, out of millions of results, would contain natural results on the left hand side and sponsored links on the right side. The information provided on the left hand side as natural or organic results, is excavated by the search engine, from out of a mine field of data stored in its web pages. The information supplied to the search engine and stored in its store house and the information displayed by the search engine to the internet user, are available free of cost. The results displayed by the search engine are like catalogues, which provide "information gate-ways" to several sites, Therefore, they are available free of cost to the user. But, if the user intends to get into the sites, whose links are provided as organic results, he may have to pay a fee to such sites (if so prescribed), though not to the search engine. Some of the sites are also available free of cost.

36. In contrast, the information displayed on the right hand side as "sponsored links", is so displayed, upon payment of charges by the person (advertiser) sponsoring the link, to the company owning the search engine. In other words, the space on the right hand side is virtually like a hoarding site, where one is free to advertise his products or services, by paying necessary charges to the person who owns the search engine. The advertisements could be said to be "hung" in these designated ads-zones and the main source of revenue for the search engines, is only through advertisements hosted on the sponsored links. The plaintiff as well as the respondents 2 to 4 advertise their services on the sponsored links by paying necessary charges to google.

Method of advertising in the sponsored links:

37. The Internet Search Engine "Google" was estimated to index about 8 billion web pages and process over 200 million searches per day (statistics as of 2007). Due to the enormity of the number of visitors to their site, what was originally developed as a huge store house of information, slowly turned into a huge warehouse/supermarket of products and services that could be bought and sold or hired. The moment it was found that the Search Engine provided a huge meeting place, like a supermarket or mall or a Trade Fair Centre, of unimaginable size and proportion, in a virtual world, connecting the world of trade and commerce with the world of consumers, its potential as an online advertising agency was realised. This led to all Search Engines, selling space for those who wished to market their products and services, so that they could host advertisements in the space so sold or let on hire by the Search Engine. Recent newspaper reports suggested that the revenue from advertising crossed several billions of US Dollars for Google. This is why, "The Economist" remarked in its edition dated 6.7.2006 that "Google is the world's most valuable online advertising agency disguised as a web search engine".

38. Information is retrieved on the internet by typing a query containing what is known as a keyword, into the search engine. Soon as the keyword is typed, the programme searches its data base and returns a list of results. The results are in the form of hyper links related to relevant web pages. Since the search engines do not possess natural intelligence to identify what a person is actually looking for, they use what are known as meta tags to produce the results. Meta tags can be compared to sign posts or indices, which lead one to what he is looking for, along with what he is also not looking for. It is a combination of two ordinary words meta and tag, meaning respectively "denoting position" and "label". Meta tags are embedded in the HTML code and remain invisible to the internet user. When a webpage creator creates the site, he lists meta key words in the computer code that makes up the web page. When someone searching for the information on the internet, types in one or more key words that relate to the information sought in the search field of the search engine, those websites having metatags that match the keywords, come up as hits. The importance of meta tags has slowly been reduced by modern search algorithms.

39. One of the meta tags successfully employed for locating an information, product or service on a search engine, is "keywords". Since all topics, things, products and services are associated with and identified by specific words or a combination of words, the conduct of a search, with the use of such words (keywords), has become the most popular and common mode of search.

The moment a keyword is typed, the search engine locates all web pages and hyper links where the same word appears, either separately or as part of another word and displays the links to all pages. Therefore, keywords constitute the lifeline of a search engine and consequently, the advertising policies of search engines, revolve around meta tags.

**40.** Any online advertising, involves two complimentary programmes designated as “adwords” and “adsense”. Since an internet user targets the site on which he wishes to land, only through the use of specific words or expressions, called “keywords”, the advertisers use a host of keywords, as their adwords, so that the link to their own site would appear as a sponsored link, whenever a search is made by the user, using the very same word or a variation thereof.

**41.** In order to enable the advertisers to select appropriate adwords, so that the links to their sites are advertised in appropriate locations, search engines themselves guide the advertisers, in the selection of adwords. While doing so, search engines provide an unlimited choice to the advertisers, to choose from millions and millions of words. If the keyword selected by the advertiser is not selected by anybody else, the search engine makes it available to the advertiser at a fixed rate. However, if the keyword selected by the advertiser is already in use by others, the advertisers who vie with one another are asked to bid upon a basic price fixed by the search engine. Though all the advertisers are allowed to use the same keyword as their adword, the highest bidder is given the top slot in the list of sponsored links. Therefore, in essence, an advertiser is entitled to choose any number of keywords for advertising his website on the sponsored links, but the slot allotted to him in the list of sponsored links, depends upon the price offered by him for the keyword, in comparison to the price offered by others for the very same keyword. Since a search engine is insensitive to what the user actually wants, it would display on the sponsored links, the links to the web pages of a host of products and services, which may even be unrelated to each other or to what the user was actually looking for. For an advertiser, his product and/or service gets advertised in many locations, including those where his competitor’s products and services are also displayed by way of advertisement or otherwise. But, when the products and services of two or more competitors are displayed in the same location, directly as a result of the choice of keywords which are deceptively similar to the registered trademark of one of them, disputes relating to infringement arise. However, the question to be addressed in such cases, is spelt out by McCarthy on Trademark and Unfair Competition, in the following words:

Therefore, the issue obviously has many dimensions.

Origin of such disputes worldwide:

**42.** To have a better understanding of (i) how trade mark disputes arose in the internet context and (ii) how the war on words or war for words (rather than war of words) in the virtual world is different from that in the real world, it is necessary to see how the internet servers operate. Without doubt, the internet, by far, has been the largest information resource, to have ever existed. The information resources on the internet, are available via networks. These networks have IP addresses (Internet Protocol), expressed as four binary numbers, each of eight bits,

normally written as decimal numbers. Necessarily, each server has to be located in a different IP address, as no two servers can either have a living-in relationship or live together under one roof at the same IP address. But, since IP addresses are expressed in terms of decimal numbers, impossible of memorising, a system of labelling the IP addresses with names known as domain names was developed. This is how the Domain Name System (DNS) got developed. In simple terms, the Domain Name System serves to translate an address expressed in numerals into an address expressed in words. The Interim Report of WIPO Internet Domain Name Process on “The Management of Internet Names and Addresses: Intellectual Property Issues” issued in 1998, points out that DNS serves the central function of facilitating users’ ability to navigate the internet. A domain name is the human-friendly address of a computer that is usually in a form which is easy to remember or identify. When an internet user types a domain name into a software application such as a browser program, the software sends the name to one of a number of Domain Name Server Computers. It searches its data base for the IP address that matches the domain name and then returns the IP address to the requesting software application. Upon receipt of the IP address, a communication is established with the server.

**43.** Therefore, domain names are selected by the servers in such a manner as to serve several purposes such as (i) making it easily memorable for the user (ii) ensuring a semantic association with the operator or the activities carried on by the operator and (iii) making them relatable to the trademarks or trade names of the servers. It is while doing so, that disputes relating to domain name infringement and passing off, arise.

**44.** The legal rights in names arise out of either (i) their registration as trademarks, or (ii) their actual use for trading, or (iii) their actual use as personal names by natural or legal persons. Insofar as trademarks are concerned, they are generally classified in the order of their increasing distinctiveness: generic, descriptive, suggestive, arbitrary and fanciful. The more distinctive the mark, the greater the protection afforded by law. When a trademark is not inherently distinctive, it may nevertheless be protected if it has acquired distinctiveness, also known as “secondary meaning”. But it depends upon the length and manner of use, nature and extent of advertising and promotion, efforts made to promote conscious connection in the public’s mind between the trademark and the business and extent to which the public actually identifies the mark and the product or service as measured by Consumer Surveys.

**45.** In the physical world, the problems posed by identical names being used by different persons, can be resolved more easily than the same can be resolved in the virtual world of internet. This is primarily because of the fact that the virtual world has no geographical limitations or borders, but the laws relating to protection of trademarks are normally country specific or region specific and confined to specific boundaries. The system of allocating rights in names, works reasonably well in the physical world, since the physical world is partitioned both by geographical boundaries and by the categorisation of goods and services. But, internet knows no partitioning. Consequently, the holders of similar trademarks in different jurisdictions were rarely exposed to conflict, at least till the advent of globalisation and glasnost. But, the domain name system allows every server connected to the internet, to be accessed from anywhere else, resulting in the trademarks registered in the domain owner’s jurisdiction

being displayed in other jurisdictions, where different persons may hold the mark. Due to this unique problem, persons with the same name in several jurisdictions may stake competing claims over the same name chosen as a trademark or as a domain name by a server. The resolution of such conflicts has thrown serious challenges to the legal systems all over the globe, in view of the fact that even if there is no actual infringement, there is always the danger of trademark dilution. However, serious attempts have been made in the form of legislations such as US Federal Trademark Dilution Act, 1995 and Anti-Cybersquatting Consumer Protection Act, 1999, to protect famous marks from getting diluted.

**46.** Interestingly, the cases which appeared in the early stages of the internet age, related to the ordinary household names, getting registered as domain names and the individuals bearing such names and registering them, staking claims of infringement against leading multinationals. One of the earliest cases that came up before the German Supreme Court of Justice was in *Deutsche Shell GmbH v. Andreas Shell*. Though the individual by name Andreas Shell had obtained registration of his name, the Court decided in favour of the company on the ground that Deutsche Shell was far better known and hence had a better claim to the domain name "shell.de".

**47.** While one type of disputes relating to infringement of trademarks, arise out of the use of the registered trademarks of a person by another as part of their domain name, another type of disputes, relates to the infringement of trademarks by advertisements posted in the search engines. These advertisements could either be banner advertisements/pop-up advertisements or advertisements which appear as sponsored links. The dispute on hand belongs to the later category.

**48.** The question as to whether keyword banner advertising should be interpreted as an unauthorised exploitation of a competitor's goodwill, has been the subject matter of business ethics assessment, with reference to Article 10 of the International Chamber of Commerce International Code of Advertising Practice, which states as follows:-

But, we are not concerned here with business ethics as the expression "business ethics", has become an oxymoron. Therefore, let me now see how the issue has thrown a conundrum in different jurisdictions and how the World Intellectual Property Organization (WIPO) has taken serious note of the disputes arising in several jurisdictions.

**49.** At its 23rd session held in Geneva from June 30 to 2.7.2010, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) of the WIPO requested the Secretariat to prepare a background document summarising the past and current developments in the area of trade marks and the internet. In accordance with the request by the SCT, the Secretariat prepared a document and presented the same on 31.8.2010. In the said paper, the SCT took note of the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks and other Industrial Property Rights in Science on the Internet, which was adopted during the series of meetings of the Assemblies of the Member States of WIPO (October 2001). In Chapter IV of the said paper, the SCT took note of the fact that practices such as unauthorised use of trade

marks as key words by search engine operators constituted clear challenges to the traditional application of trade mark law. Annexure I to the document contains a summary of challenges regarding the use of trade marks on the internet as shown in a selective sample of cases across different jurisdictions, such as USA, UK, Argentina, China, India, Israel etc., Interestingly, the report refers to the contradictory views prevailing in China with regard to the legality of key word advertisement in the following words:

**50.** The question whether key word banner advertising results in trademark dilution or creates a likelihood of confusion that leads to infringement, has come up in several jurisdictions. Two of the earliest cases were settled without adjudication. In *Estee Lauder Inc. v. Fragrance Counter, Inc.* 189 FRD 269-SDNY 1999, Estee Lauder sued Excite and The Fragrance Counter in a case involving both metatags and keyword banner advertising. Estee Lauder objected the highlighting of advertisements for Fragrance Counter, whenever internet users searched for its trademarks. However, the defendant agreed to refrain from using Estee Lauder trademarks and the case was settled out of Court.

**51.** In *Reed Elsevier, Inc. v. Innovator Corp.*, Reed Elsevier, which owns the LEXIS, NEXIS, and LEXIS-NEXIS trademarks, brought a trademark infringement suit against (i) Innovator, a competing information retrieval system (ii) Altavista, a search engine and portal site and (iii) DoubleClick, a service that assists firms with the placement of advertising on websites and search engines. Reed Elsevier sought damages and injunctive relief due to Altavista's sale of LEXIS, NEXIS, and LEXIS-NEXIS as keywords to its competitors. Reed Elsevier ended the case by entering into settlement agreements with Altavista and DoubleClick.

**52.** In *Metaspinner Media GmbH v. Google Deutschland, LG Hamburg*, No. 312 O 887 of 2002 (14.11.2003), the German District Court in Hamburg found that the search engine engaged in trademark use when it sold advertising space based on keywords identical to the plaintiff's trademark and issued a preliminary injunction against Google. Google refused to accept the injunction as a final ruling; therefore, Metaspinner refiled its case in May 2004 to "prevent further infringements of rights and to sustain the preliminary injunction". But, it appears that on 21.9.2004, the Court dismissed the suit.

**53.** However, other European Courts have reached different conclusions. In *Nemetschek AG v. Google, LG Munich*, No. 33 O 21461 of 2003 (12.2.2003), the Court held that an Internet search engine was not liable for direct or indirect trademark infringement when an advertiser placed ads based on trademarked keywords. And in *Intershop comms. v. Tietz, LG Hamburg*, No. 315 O 646 of 2003 (25.2.2004), the same Court that decided Metaspinner found that the advertiser had not engaged in trademark use by selecting a trademarked keyword.

**54.** In *DaimlerChrysler AG v. Bloon* 315 F.3d 932-2003, the 8th Circuit held that a Tele Communications Company did not use the term "Mercedes" in a trademark sense merely by licensing a vanity phone number that spelled "1-800-Mercedes" to Mercedes dealers. The Court reasoned that the dealers themselves might engage in trademark use by advertising the phone number or otherwise presenting it as a brand to the public, but the company selling the phone number did not.

55. In *Interactive Prods. Corp. v. A2Z Mobile Office Solutions Inc.* 326 F.3d 687-2003, the 6th Circuit also took the same view, holding that if the defendants were using the plaintiff's trademark in a non-trademark way—that is in a way that does not identify the source of a product—then trademark infringement and false designation of origin laws do not apply.

56. In *Planned Parenthood Federation of America, Inc. v. Bucci and Jews For Jesus v. Brodsky*, for example, consumers reaching the defendants' sites were falsely led to believe that the site they reached was authorised by the trademark owner and only gradually came to realise their mistake as they kept reading. There was thus a diversion of customers through a combination of initial confusion and switching costs.

57. Thus, in the early stages, Courts perceived the unauthorised use in metatags, by a person, of someone else's trademark, as creating a confusion in the minds of the consumers. This doctrine, identified as a doctrine of initial interest confusion posits that trademark infringement results when a consumer has been confused prior to purchase. But in normal circumstances, the likelihood of confusion would occur at the time of purchase. All over the world, the Courts have struggled hard, as pointed out above, to grapple with this problem of "initial interest confusion" in the internet context, where internet users seeking a trademark owner's website are diverted (i) either by identical or confusingly similar domain names to websites in competition with the trademark owner or (ii) by a competitor's unauthorised use of another's mark as the keyword to generate banner or pop-up advertisements for its products and services.

58. In US, the use of another's trademark in meta-tags to capture initial consumer attention was also regarded as a potential infringement of a trademark. In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* 174 F.3d 1036-9th Cir. 1999, the defendant West Coast Entertainment used the plaintiff's "moviebuff" mark in the metatags of its website. The Court analogised it to the use of a Bill Board bearing the plaintiff's mark to attract consumers interested in the plaintiff's products or services. Although the consumers would ultimately realise that the defendant was not the provider they initially sought, they might decide instead to patronise the defendant's website. The Court held that using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Elaborating this illustration, the 9th Circuit Court said, "Using another's trademark in one's meta-tags is much like posting a sign with another's trademark in front of one's store. Suppose West Coast's competitor (say 'Blockbuster') puts up a billboard on a highway reading 'West Coast Video: 2 miles ahead at Exit 7' where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by West Coast. Nevertheless, the fact that there is only initial consumer

confusion does not alter the fact that Blockbuster would be misappropriating West Coast's acquired goodwill".

59. The Bill Board analogy used in *Brookfield* was again considered in *Playboy Enterprises, Inc. v. Netscape Communications Corporation* 354 F.3d 1020. In that case, the plaintiff sued the defendants, alleging infringement as well as dilution, of their trademarks "Playboy" and "Playmate". Their claim was that companies which market adult oriented material, advertised in the internet search engine, by using as keywords, the registered trademarks of the plaintiff. Consequently, whenever a websurfer typed the words "playboy" or "playmate", the advertisements of those companies appeared as banner advertisements on top of the search results page. The District Court rejected the plaintiff's request for a preliminary injunction and the Court of Appeals, Ninth Circuit confirmed the same. Subsequently, the District Court granted summary judgment (akin to rejection of plaintiff) in favour of the defendants.

60. While reversing the order granting summary judgment in favour of the defendants and remanding the matter for further proceedings, the Court of Appeals, Ninth Circuit applied an eight-factor test, originally set forth in *AMF Inc. v. Sleekcraft Boats* viz., (1) strength of the mark (2) proximity of the goods (3) similarity of the marks (4) evidence of actual confusion (5) marketing channels used (6) type of goods and the degree of care likely to be exercised by the purchaser (7) defendant's intent in selecting the mark and (8) likelihood of expansion of the product lines.

61. Thereafter, the Court accepted the argument of "initial interest confusion" advanced by the plaintiff, on the ground that the choice of keywords, presented to the advertisers by the search engine and the use of click-through rates as a way to gauge the success of advertisements, showed an intent to confuse. Since an intent to confuse constituted probative evidence of likelihood of confusion, the Court held that the summary judgment issued in favour of the defendants by the District Court was wrong. Note: But the decision *Playboy* came in for criticism from academics on two grounds viz., (i) that they were not prohibiting initial interest confusion, but prohibiting initial interest itself; and (ii) that trademark infringement requires likelihood of confusion and not a mere likelihood of diversion.

62. Extending the road sign metaphor used in *Brookfield*, the Court held in *Playboy Enterprises, Inc. v. Netscape Communications Corporation* (supra) that in that case, the scenario was more akin to a driver pulling off the freeway in response to a sign that reads "fast food burgers" to find a well known fast food burger restaurant, next to which stands a billboard reading "better burgers: 1 block further". The Court also expressed concern that a finding of infringement might result in the loss of otherwise generic words from the English language at the expense of competitor need. The Court further pointed out that by seeking a prohibition on all advertisements that appear in response to the search words "playboy" and "playmate", the plaintiff would effectively monopolise the use of these words on the internet and that the same violated the First Amendment Rights of (a) Excite and Netscape (b) other trademark holders of *Playboy* and *Playmate*, and also (c) the members of the public who conduct internet searches. The Court pointed out that "internet is a unique and wholly new medium of worldwide human

communication and Courts should be mindful of the difficulty of applying well established doctrines to electronic commerce”.

**63.** Three defences were asserted in *Playboy Enterprises Inc.*, case. One of them was that the defendants merely made a nominative use of the marks of the plaintiff and hence it did not constitute infringement. But, the Court rejected this defence by pointing out that to be considered a nominative use, the use of a mark must meet three tests viz., (i) the product or service in question must be one not readily identifiable without the use of the trademark (ii) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service and (iii) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the proprietor of the trademark. The Court held that the defendants could actually use other words, to achieve the same result, viz., to trigger adult oriented banner advertisements and that since they were actually using about 400 words, besides the trademarks of the plaintiff, there was nothing indispensable about the plaintiff's marks.

**64.** The second defence viz., that the defendant was only making functional use was also rejected by the Court on the ground that the marks in question were not parts of a design that have a functional use and that the fact that these marks made the defendant's computer program more functional was irrelevant. Thus, the Court of Appeals found that there were triable issues and that the case deserved a trial, though the plaintiff was held not entitled to interim prohibitory reliefs.

**65.** After the 'Bill Board' analogy in *Brookfield* and 'highway sign post' analogy in *Playboy*, the Courts extended the "initial interest confusion doctrine" to correspond to a broader reading of *Brookfield*, under which real confusion is not required, but a probability of confusion was enough. In *Promatek Industries, Ltd v. Equitrac Cor.*, for example, the Seventh Circuit upheld an injunction against a service company's use in metatags of the name of a product for which it offered maintenance and repair services. The Court found a probability of initial interest confusion. Similarly, in *People for the Ethical Treatment of Animals v. Doughney*, the Court found initial interest confusion based on the use of the domain name *peta.org* to link to a site entitled "People Eating Tasty Animals", a parody of the "People for the Ethical Treatment of Animals" website that visitors were presumably trying to reach. Once visitors reached the page, there is no way they could have been confused given the very different title and the obviously parodic message of the page. Nonetheless, the Court found the instant of confusion created before visitors saw the content of the website to be actionable.

**66.** But, in *Bihari v. Gross* 119 F.Supp.2d 309, the Court said that the use of the highway bill board metaphor is not the best analogy to a metatag on the internet and that the harm caused by a misleading bill board on the highway is difficult to correct, while on the information super highway, resuming one's search for the correct website is relatively simple involving only one click of the mouse and a few seconds delay. In *Bihari v. Gross*, the Court noted that the operator of internet website using the plaintiff's mark is merely providing a means of cataloging the plaintiff's site.

**67.** In *(2004) EWCA (Civ) 159*, a dispute arose between a large publishing house and an employment agency. The employment

agency had its mark "Reed" registered as a trademark in 1986 and it also started advertising job vacancies on its website, *www.reed.co.uk* in 1995. The publishing house also began online versions of its magazines which included job advertisements. In 1999, the publishing house created a special dedicated job related website, *totaljobs.com*. There were several versions of this total jobs website which contained the word "Reed". The logos containing the word "Reed" also appeared at the bottom of the pages, as banner advertisements. Therefore, they were accused of constituting passing off and infringement of the registered trademark. The Court of first instance found both infringement and passing off to have been established. When the matter was taken on appeal on limited issues, the Court of Appeals (Civil Division), London, pointed out that search engines have elaborate indexing systems, which can take note of visible matter in a website as well as invisible matter, called as metatags. Therefore, whenever a search is conducted using a word in a metatag, the search results would include that site along with all other sites which use that matter, irrespective of whether the results have anything to do with what one was actually searching for. After pointing this out, the Court of Appeal held that the appearance of the name "Reed" or "Reed jobs" in a banner advertisement by itself may not amount to infringement within the meaning of Article 5.1(b) of Trademarks Directive (89/104). For holding so, the Court gave the following reasons:-

**68.** In *Societe Des Hotels Meridien v. Sarl Google France* No. R.G.:04/03772 Minute 2004/3190, the plaintiff sought a direction to Google France to delete from its generator of keywords accessible on its internet site, any word or expression reproducing in servile or quasi servile manner, the brand names "Meridien" and "Le Meridien". The plaintiff also sought to prohibit Google France from displaying the advertisements of companies offering products and services protected under Class 42 by the brand names "Meridien" and "Le Meridien". On the application for interim relief, the Crown Court of Nanterre (France) found that when search queries were made with the combination of the words "Meridien" and "Le Meridien", on the site of the search engine, advertising links for the competing hotel services were also displayed along with the search results. The Court also found that the list of keywords suggested by the adwords system of the search engine, comprised of the words that were the well known brands of the plaintiff within the meaning of Article L.715-3 of the Intellectual Property Code. Despite a denial by the search engine, the Court found that the search engine had an active role in the choices made by the advertiser, since there was a suggestion of additional keywords, in the "suggestion tools" provided by the search engine. The suggestion tool encouraged advertisers to consider replacing the generic keywords by more specific keywords presented by them, so as to increase their rate of clicks. In view of the inducement so made by the search engine, the Court rejected the protection claimed by the search engine under the guarantee limitation clause, fixing total responsibility upon the advertiser for the choice of the keywords, as against third party claims.

**69.** In *Google Inc. v. American Blind & Wallpaper Factory, Inc.* 5:03-cv-05340-JF, Google filed an action for a declaratory relief seeking a judicial determination that its adwords advertising program did not infringe American Blind's Trademarks. Initially, American Blind brought a motion to dismiss the complaint of Google, unsuccessfully. Later, American Blind not only

answered Google's complaint but also made counter claims against Google as well as third party claims against several other search engines such as Ask Jeeves, Earthlink, AOL, Netscape and Compuserve, for trademark infringement and dilution, false representation, injury to business reputation, unfair competition and tortious interference with prospective business advantage. The defendants to the counter claim (Google and Others) brought motions to dismiss American Blind's counter claims and third party claims. By an order dated 30.3.2005, the United States District Court for the Northern District of California, San Jose Division, allowed the motion only in so far as American Blind's claim of tortious interference with prospective business advantage, but disallowed the motion as to the other claims made by American Blind. It was found by the Court in that case that through adwords, Google had sold to American Blind's competitors, certain keywords, comprised in whole or in part, of the American Blind's marks. Moreover, through its adwords keyword suggestion feature, Google was found to have actively and deliberately encouraged American Blind's competitors to purchase as keywords, American Blind's marks as well as every conceivable iteration of those marks. Two things were brought to the notice of the Court in that case viz., (i) that Google has the technological capacity to block the purchase of keywords and (ii) that as a matter of fact, Google operated a policy until 27.1.2004 which enabled it to exercise its discretion to block the purchase of certain keywords, once it was advised that the keyword purchased by a company was actually the trademark of another company. The District Court followed the decision of the Ninth Circuit in *Playboy Enterprises Inc.* However, the Court cautioned that its order should be understood only as allowing American Blind's counter claims and third party claims to proceed beyond the motion-to-dismiss stage. The Court also held that the purchase of trademarks as keywords for a website and the insertion of the trademarks as metatags in the code of a website are sufficiently analogous, as they are employed as means of having links to that website appearing on a search-results page. Therefore, the Court held that American Blind's allegation of contributory infringement, whereby a person intentionally induces a third party to infringe the plaintiff's mark, cannot be rejected without trial.

70. In *545 US 2005-1*, MGM Studios sued the companies which distributed free software that allowed computer users to share electronic files through peer-to-peer (P2P) networks, on the ground that it enabled the recipients of such software to share copyrighted music and video files unauthorisedly, which amounted to infringement. Though the said case involved issues relating to copyrights, I am tempted to make a reference to it in view of certain principles of law evolved by the U.S. Supreme Court.

71. In that case, though the District Court acknowledged that there was infringement of MGM's copyright, the Court allowed the motion of the respondents for summary judgment and the Ninth Circuit affirmed it. The decisions of the trial Court and the lower Appellate Court were based upon the earlier decision of the Supreme Court of the United States in *Sony Corporation of America v. Universal City Studios Inc.* 464 US 517.

72. Reversing the summary judgment in favour of the respondents and remanding the matter for trial, the Supreme Court of the United States held that "one who distributes a

device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, and is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses".

73. The Court distinguished the decision in *Sony*, on the basis of patent law's traditional staple article of commerce doctrine, which absolved the equivocal conduct of selling an item with lawful and unlawful uses and limited liability to instances of more acute fault. The Court held that when a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. The Court also pointed out that contributory infringement arises when a direct infringement is induced or encouraged intentionally. A vicarious infringement arises by profiting from direct infringement while declining to exercise a right to stop or limit it.

74. Pointing out that the rule on inducement of infringement in early cases is no different today, the Court held that evidence of active steps taken to encourage direct infringement such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe and a showing that infringement was encouraged, overcomes the law's reluctance to find liability when a defendant nearly sells a commercial product suitable for some commercial use.

75. In *1-800 Contacts, Inc. v. WhenU.Com, Inc.* 414 F.3d 400 (2005), the dispute related to pop-up ads of competitors that were made by the defendant to appear on the desk top of the computer users, whenever the computer user accessed the plaintiff's website. The plaintiff in that case was 1-800 Contacts Inc., which was engaged in the business of distributing and selling contact lenses and related products by mail, telephone and internet. They had obtained registration of a trademark in the service mark "We Deliver.You Save". They had also applied for registration of the service mark "1-800 CONTACTS". The defendant WhenU.com, Inc., was an internet marketing company that uses a software called "SaveNow" to monitor a computer user's internet activity in order to provide the computer user with advertising in the form of pop-up ads that is relevant to that activity. The grievance of the plaintiff was that the defendant WhenU was infringing their trademarks in violation of the Lanham Act by causing pop-up ads of the plaintiff's competitors, to appear on the screen of the computer user, whenever the website of the plaintiff was accessed. The District Court granted a preliminary injunction in favour of the plaintiff and the defendant filed an appeal to the Second Circuit. Reversing the decision of the District Court, the Court of Appeals, Second Circuit held that the defendant WhenU cannot be said to "use" the plaintiff's trademarks within the meaning of the Lanham Act, under two situations viz., (i) when it includes 1-800's website address, which is almost identical to 1-800's trademark, in an unpublished directory of terms that trigger delivery of WhenU's contextually relevant advertisements to computer users; or (ii) when it causes separate, branded pop-up ads to appear on a computer screen either above, below or along the bottom edge of the 1-800 website window.

76. For holding so, the Second Circuit reasoned that “a company’s internal utilization of a trademark, in a way that does not communicate it to the public, is analogous to a individual’s private thoughts about a trademark. Such conduct simply does not violate the Lanham Act, which is concerned with the use of trademarks in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services. A fortiori, a defendant who does not sell, but merely uses internally within his own company, the trademarked product of another, is not a trademark infringer or unfair competitor by virtue of such use.

77. In *Edina Realty, Inc. v. The Mlsonline.Com* 04-cv-04371-JRT-FLN, the plaintiff was the largest real estate brokerage firm. The defendant was also a full service real estate brokerage firm, directly competing with the plaintiff. The plaintiff had obtained registration of the trademark “EDINA REALTY” and also established their presence in the internet with the website address as “www.edinarealty.com”. The grievance of the plaintiff was that the defendant purchased the keywords Edina Realty, Edina Realty, EdinaRealty.com, EdinaRealty, etc., from the search engines google and yahoo. By purchasing these search terms, the defendant made their advertisements appear on the search engine results page, under the heading “sponsored links”. Thus, the defendant started riding the coat-tails of the plaintiff’s advertising efforts by using such marks, thereby committing infringement.

78. When the defendant sought a summary judgment, the United States District Court, Minnesota refused it, holding among others that the purchase of search items is a use in commerce and that though it may not be a conventional type of use in commerce, it was nevertheless a use of the mark commercially.

79. In *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.* 425 F. Supp. 2D 402, the defendants were operating online pharmacies. Through interactive websites, they offered for sale to U.S. consumers generic versions of plaintiffs’ popular cholesterol medication, Zocor. In listing their products, certain defendants used plaintiffs’ trademark ZOCOR, identifying their products as “generic ZOCOR” or some variation thereof. Certain defendants also used plaintiffs’ stylized ZOCOR logo, and several defendants also purchased sponsored links from the internet search companies Google and Yahoo, so that consumers who search the word “ZOCOR” will be offered links to these defendants’ websites. Therefore, Merck & Co., brought lawsuits alleging infringement, dilution and unfair competition. The defendants moved for dismissal of the suits on the ground that their use of the plaintiff’s marks was “fair use”.

80. While dismissing some of the trademark claims against three defendants, on their use of the mark in connection with search engines, the United States District Court, SD New York held that a trademark is “used in commerce” in connection with the goods, “when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale and the goods are sold or transported in commerce”.

81. Following the decision of the Court of Appeals Second Circuit in 1-800 Contacts, the District Court further held as follows:-

82. In *Rescuecom Corp. v. Google Inc.* Docket No. 6-4881-cv, Rescuecom, sued Google for trademark infringement, false designation of origin and dilution under the Lanham Act. The District Court for the Northern District of New York dismissed the action invoking Rule 12(b)(6) of the Federal Rules of Civil Procedure (equivalent to the provision for rejection of plaint under Order 7, Rule 11, CPC 1908) on the ground that Google did not use Rescuecom’s trademark in commerce within the meaning of the Lanham Act. On appeal, the Second Circuit vacated the order of the District Judge and remanded the matter for further proceedings.

83. In that case, the plaintiff was a national computer service franchising company that offered on-site computer services and sales. The name “Rescuecom” was a registered federal trademark ever since 1998 and the plaintiff conducted a substantial amount of business over the internet. The grievance of Rescuecom was that through its keyword suggestion tool, Google recommended the plaintiff’s trademark, as a search term, to the plaintiff’s competitors, so that whenever the Rescuecom’s website was visited, the competitor’s advertisement and link would also appear on the searcher’s screen. But, this contention was repelled by the District Court on the ground that Google’s activity did not involve Rescuecom’s mark being “used in commerce”, following the decision in 1-800 Contacts.

84. While reversing the decision of the District Court, the Second Circuit held that “regardless of whether Google’s use of Rescuecom’s mark in its internal search algorithm could constitute an actionable trademark use, Google’s recommendation and sale of Rescuecom’s mark to its advertising customers, are not internal uses”. Explaining its decision in 1-800 Contacts, the Second Circuit pointed out as follows:-

85. In *Filipino Yellow Pages, Inc. c. Asian Journal Publications, Inc.* 198 F.3d 1143, the publisher of Telephone Directory for Filipino-American Community of Southern California brought an action for trademark infringement arising out of the defendant’s use of the term “Filipino Yellow Pages”. The District Court for the Central District of California granted summary judgment in favour of the defendants. While affirming the said decision, the Ninth Circuit pointed out that the law recognises four different categories of terms with respect to trademark protection. They are (i) generic (ii) descriptive (iii) suggestive and (iv) arbitrary or fanciful. A generic term is one that refers or has come to be understood as referring, to the genus, of which the particular product or service is its species. The test to determine whether a term is generic or not, was spelt out by the Court in the following lines:-

86. Holding that though at times generic terms are also referred to as “common descriptive” names, the Court held that if it is so feeble as to be perilously close to the generic line, it cannot be a valid trademark, unless it had acquired strong secondary meaning.

87. In *(2008) EWHC 361 (Ch.)*, a person who carried on business as a mobile caterer in the name and style of “Mr. Spicy”, selling Afro-Caribbean and Halal South Asian Snacks

from a van and a trailer, sued the search engine “Yahoo U.K.” and Another company which provided sponsored search engine technology, for damages resulting from infringement. His claim was that whenever a browser typed in the keyword “Mr. Spicy” on Yahoo U.K., it would direct them to the website of Sainsbury’s Supermarket Ltd. It would also direct them to the website of Pricegrabber.com Ltd. Both these references would appear under the heading “Sponsored Results”. Therefore, the plaintiff sued the search engine for damages for infringement.

**88.** Allowing the application of the defendants for summary judgment and dismissing the claim of the plaintiff in entirety, the Chancery Division (Intellectual Property Division) of the High Court of Justice, London, following the decision of the European Court of Justice in *2003 ETMR 19*, held that the function of a trademark is to guarantee the identity of origin of the marked goods or services to the end user, by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin.

**89.** Pointing out that the typing of the word “Mr. Spicy” by the browser was actually the use of the trademark by the browser, but not the use of the trademark by the search engine, the Court held as follows:-

**90.** Explaining as to how things operate on the search engine, Justice MORGAN held as follows:-

**91.** After pointing out that the search engine yahoo can make available any word, probably in any language, the Court considered the issue of use of the mark in relation to the goods or services rendered by Yahoo and held as follows:-

**92.** In *2009 EWHC 1094 (Ch.)*, a dispute arose between L’ Oreal, a group of companies engaged in the manufacture and supply of professional products, consumer products, luxury products, active cosmetics and body shop on the one hand and e-Bay, which is an online market place and few others who were engaged in the sale of cosmetic preparations, on the other hand. L’ Oreal and its group of companies were the registered proprietors of several trademarks which were either word marks or stylised word marks. Two of them were Community Trade Marks, one of which was also a device mark.

**93.** The complaint of L’ Oreal against their competitors was that they were advertising, offering for sale and selling cosmetic preparations using the name “Lancome”, thereby committing infringement of their registered trademark. The substantial complaint of L’ Oreal against the online market place e-Bay was (i) that they were jointly liable for the infringement committed by others (ii) that they were liable for the use of Link Marks in sponsored links on third party search engines and on the site and (iii) that in the event of L’ Oreal’s success against its competitors, they would also be entitled to injunction against e-Bay, restraining future infringements.

**94.** It was common ground in that case that e-Bay Europe purchased keywords consisting of the link marks which trigger sponsored links on third party search engines including Google, MSN and Yahoo. The effect of this was that a search on any one of the search engines, using one of the Link Marks would cause a sponsored link to the site to be displayed. If the user clicked

on the sponsored link, he would be taken to a display of search results on the site for products by reference to the Link Marks. e-Bay Europe admittedly chose the keywords based on the activity on the site and paid a certain amount for each click-through of each keyword.

**95.** After referring to Articles 5, 6 and 7 of the Trade Marks Directive (First Council Directive 89/104), the Chancery Division of the High Court of Justice, London, in its decision rendered on 22.5.2009, pointed out that the proprietor of a registered trademark can succeed in a claim under Article 5(1)(a) of the aforesaid Directive, only if six conditions are satisfied viz.,

there must be use of a sign by a third party;

the use must be in the course of trade;

it must be without the consent of the proprietor of the trademark;

it must be of a sign which is identical to the trademark;

it must be in relation to goods or services which are identical to those for which the trademark is registered; and

it must affect or be liable to affect the functions of the trademark, in particular its essential function of guaranteeing to consumers the origin of the goods or services.”

**96.** On the question as to whether the online service provider e-Bay was jointly liable for the infringement committed by the others, Justice ARNOLD held (in para 344 of the judgment) that since Articles 5 to 7 of the Trade Marks Directive embody only the rules relating to infringement of the rights conferred by registration of a mark within the Community, the question of accessory liability was only a matter of national law. However, he pointed out that in England and Wales, accessory liability even for statutory torts such as trademark infringement is governed by the common law and in particular, the law relating to joint tortfeasorship.

**97.** e-Bay Europe were alleged to have become joint tortfeasors, in two ways viz., (i) by procurement and/or (ii) by participation in a common design. Participation in a common design was alleged on the ground that e-Bay actively promoted the listing of items upon the site in a variety of ways and also on the ground that they exercised some degree of control over the content of listings by using software filters. Accepting this argument, the learned Judge held in para 370 of his opinion that “e-Bay and its competitors had created a new form of trade which carries with it a higher risk of infringement than more traditional methods of trade” and that “having created that increased risk and profited from it, the consequences of that increased risk should fall upon e-Bay rather than upon the owners of the intellectual property rights that are infringed”.

**98.** Having said that, the learned Judge came to a conclusion in paragraph 375 of his decision that “as a matter of domestic common law, e-Bay Europe are under no legal duty or obligation to prevent infringement of third parties’ registered trademarks”. However, the said conclusion was qualified by a further statement that “e-Bay Europe may come under such a duty or obligation with regard to future infringements as a result of operation of Article 11 of Enforcement Directive, but that does

not affect their liability for past infringements on the ground of joint tortfeasorship”.

99. Interestingly, the learned Judge held in paragraphs 381 and 382 of his judgment that despite the fact that e-Bay Europe did facilitate the infringement of third parties’ trademarks by sellers and despite the knowledge of e-Bay Europe about such infringements and e-Bay Europe profiting from such infringements, they were not factors enough to make e-Bay Europe liable as joint tortfeasors. By taking such a view, the learned Judge held that e-Bay Europe were not liable as joint tortfeasors on account of two factors viz., (i) that they were under no legal duty to prevent infringement and (ii) that e-Bay’s facilitation with knowledge and an intention to profit, were not enough.

100. After holding e-Bay to be not under any legal obligation to prevent infringement by third parties, the Court then took up the question as to whether e-Bay could at least be enjoined from being made use of as a platform for others to commit infringement. In other words, the question was whether the proprietor of the trademark was entitled to a remedy under Article 11 of the Enforcement Directive.

101. While considering this question, the attention of the learned Judge was invited to three decisions of the Bundesgerichtshof (Federal Court of Justice of Germany known by its acronym “BGH”). Those decisions are popularly known as Internet Auction I, Internet Auction II and Internet Auction III cases. The first case related to a complaint by Rolex SA (manufacturers of Rolex watches) against another company which provided an online auction sale service, in which imitation Rolex watches were offered for sale in website. Though the claim for damages was dismissed, Bundesgerichtshof sustained the claim for injunction on the basis of the German legal principle of Storerhaftung, which means “disturber” or “interferer” liability. This act of balancing (granting an injunction but dismissing the claim for damages) was hailed by Prof. Dr. Joachim Bornkamm, President of the First Civil Chamber, as “one which strikes a fair balance between intellectual property rights and the interests of host providers”. He pointed out that such an approach, on the one hand, does not impose an unreasonable burden on the provider, but on the other hand makes sure that the provider takes all reasonable steps to prevent further infringements.

102. Though it was argued before Justice ARNOLD (in *L’Oreal S.A and Others v. e-Bay International AG and Others* (supra)) that the Doctrine of Storerhaftung was peculiar to German Law, the learned Judge opined that the English Court nevertheless had power to grant an injunction against an intermediary if that was what Article 11 required. However, the learned Judge ultimately concluded in para 465 of his opinion that the scope of the obligation placed on Member States by Article 11 and the scope of the injunction available against intermediaries, was unclear and that the guidance of ECJ was required in that regard.

103. Ultimately, the learned Judge held (i) that the defendants other than e-Bay had committed infringement and (ii) that e-Bay Europe are not jointly liable for the infringements committed by others. However, the learned Judge held that two crucial questions required the guidance of the ECJ. These two crucial questions are (i) whether e-Bay infringed the link marks by use

in sponsored links and on the site in relation to infringing goods and (ii) what was the scope of the relief under Article 11, in the light of the fact that as a matter of domestic law, the Court has power to grant an injunction against e-Bay Europe by virtue of the infringements committed by others.

104. In *2010 US Dist. Lexis 18208*, the Court held that even if one accepts as true, the allegation that a sponsored link might confuse a consumer, it is hardly likely that several different sponsored links appearing on a page that a consumer might believe each one is the true producer or the origin of the product. The Court also held that Google’s key word suggestion tool is covered by 230CDA, which merely helped third parties to refine their content. The Court further opined that Google merely provided neutral tools and its ad words program simply allowed competitors to host their digital fliers where they might be most readily received in the cyber market place.

105. In *Video Professor Inc. v. Amazon.com* (1:09-CV-00636-REB-KLM), Amazon used the words “VIDEO PROFESSOR” as the key word to trigger its advertisements. On some occasions, a click on the advertisement led users to land up on pages on which the competitor’s products were advertised. But, the Court rejected the claim in view of the express stipulations in the vendor manual (an agreement between Video Professor and Amazon) whereby Video Professor granted a non exclusive, world wide, perpetual and royalty free license to Amazon to use all trade marks in the product information.

106. In the case of *Organizacion Veraz v. Open Discovery*, (Which arose in Argentina and about which there is a reference in the paper submitted by SCT of WIPO) the plaintiff, a financial services company, sued the defendant for purchasing its mark VERAZ as a keyword. The Court held that the defendant had engaged in an unauthorized use in commerce of the plaintiff’s mark with the aim of attracting consumers that were interested in the plaintiff’s services. According to the Court, this use could cause confusion or mistake as to the origin of the services or could suggest an association between the two companies. The Court held that in these circumstances, the trademark holder could prevent the unauthorized use of its mark by a competitor.

107. The Australian Competition and Consumer Commission (ACCC) brought an action against Google and a ‘classified’ website named “Trading Post” because the latter purchased keywords constituting the marks of car dealerships. Though ACCC did not found its claim on trademark infringement, it alleged a violation of the Trade Practices Act, 1974, claiming that there was misleading or deceptive conduct and a false representation of an approval or affiliation. Trading Post settled the case out of Court by giving an undertaking not to continue the advertising practices complained of. As per the paper submitted by the SCT of WIPO on 31-8-2010, the case against Google appears to be still pending. Though not founded upon trademark infringement, the case deals with the issue of consumer confusion, which is determinative of trademark infringement.

108. In Austria, the online wine store by name “Wein & Co” sued a competitor by name “Weinwelt” for purchasing its mark as a keyword. When a user entered the term “Wein & Co” the first link which appeared at the top of the results page was the defendant’s website. The Austrian Supreme Court ruled that this

use of the mark as a keyword, infringed the rights of the plaintiff, on the ground that the appearance of the link above the search results, using the plaintiff's mark as a header, created a danger of consumer confusion and gave the impression that the defendant was a company closely related to the plaintiff. It is important to note that as in the case on hand, the Austrian case involved the use of the plaintiff's trademark in the header of the ad itself.

**109.** A case identical to the one on hand arose even before the District Court of Tel Aviv-Jaffa (Israel) in *Matim Li Fashion Chain for Large Sizes Ltd., v. Crazy Lines Ltd. Google Israel Ltd.*, was cited as the third defendant in the case. The plaintiff as well as the first defendant in that case were running women fashion retail chains. The grievance of the plaintiff was that Google offered to the first defendant, the registered trade marks of the plaintiff as keywords, resulting in the advertisements of the first defendant appearing alongside the search results of the plaintiff's sites and that the same constituted infringement. But, the Court analogized the situation to that of a shoe shop owner 'K', hanging the advertisement posters of his shop, on the walls of an escalator or in the exit from the parking lot of a Mall where the shop of his competitor 'M' is located. After adopting such an analogy, the Court posed a few questions, which read as follows:-

The Court answered all the above questions in the negative and held that the same which applied to the physical world, should be true of even the virtual shopping mall in google. Nevertheless, the Court held that the use of the trade marks as between computers cannot be said to fall outside the scope of "use" within the meaning of trademark law. However, the Court went on to hold as follows:-

Therefore, ultimately, the Court of Tel Aviv-Jaffa, dismissed the claims of unfair burdening, distraction/diversion and initial interest confusion raised by the plaintiff. However, it must be remembered that in the case before the Israel Court, there was no complaint that the first defendant had adopted the trademark of the plaintiff in the adwords or adtext or adtitle of their advertisements. Their use was restricted only to the use of the trademark of the plaintiff in the keywords alone.

(Note: The extracts from the judgment of the District Court of Tel Aviv, Israel, given above, are as per the translated version given in an Article published by Zohar Efroni of Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich)

**110.** The French Cour de Cassation (Court of Cassation) sought the opinion of the European Court of Justice on three references. The details of these references are as follows:-

The first reference arose in proceedings between Google and Louis Vuitton Malletier SA. The complainant was the proprietor of the community trade mark (CTM) known as Vuitton and the French National Trademarks Louis Vuitton and LV. Their grievance was that Google offered advertisers, the possibility of selecting keywords which corresponded to Louis Vuitton's trademarks and hence when these trademarks are keyed in, Google's search engine triggered the display of advertisements for sites offering counterfeit versions of LV's products. The Regional Court, Paris (known as Tribunal de grande instance de Paris) found the search engine guilty of infringement and the same was upheld on appeal by Cour d'appel de Paris (Court of

Appeal, Paris). The further appeal filed by Google on points of law to the Cour de Cassation was referred to the European Court of Justice for a preliminary ruling on three questions.

The second reference arose in the context of proceedings between Google on the one hand and Viaticum SA and Luteciel SARL on the other hand. The complainants were the proprietors of the French trademarks "bourse des vols", "bourse des voyages" and "BDV". Their grievance was that entering these trademarks into the search engine triggered the display of ads for sites offering identical or similar products and that Google offered advertisers, the possibility of selecting keywords which corresponded to these trademarks. Google was found guilty of trademark infringement by the Regional Court, Nanterre (Tribunal de grande instance de Nanterre). The Appellate Court (Cour d'appel de Versailles) found Google guilty of being an accessory to trademark infringement. The further appeal filed by Google was referred by Cour de Cassation, for a preliminary ruling on two questions.

The third reference arose out of proceedings between Google, Mr. Raboin and Tiger SARL on the one hand and Mr. Thonet and Centre national de recherche en relations humaines SARL, on the other hand. The complainant was the holder of a license for the French trademark "Eurochallenges". Their grievance was that if the browser keyed in the trademark of the complainant, the search engine displayed advertisements for sites offering identical or similar products and that Google incited the advertisers to select keywords which were the same as or similar to the trademark of the complainant. As in the case of other two references, Google and the other two were found guilty of infringement by Regional Court, Nanterre (Tribunal de grande instance de Nanterre) and that decision was upheld on appeal by Cour d'appel de Versailles. Therefore, separate appeals were filed before the Cour de Cassation, which referred three questions to the European Court for a preliminary ruling.

**111.** Although the language in which the references in the three cases were couched, was different, the fundamental issue raised for a preliminary ruling was just the same. It was:

**112.** The Grand Chamber of the European Court of Justice, while considering the questions referred to it by the Cour de Cassation, divided its discussion into three portions viz., (i) the first comprising of the first question in all the three references as well as the second question in the third reference (ii) the second question in the first reference and (iii) the third question in the first reference, the second question in the second reference and the third question in the third reference.

**113.** The first part of the discussion of the Grand Chamber was on the following:-

The second part of the discussion of ECJ focussed on the following questions:-

The third part of the discussion was on the following questions:-

**114.** Since the first part of the discussion of the Grand Chamber revolved around Article 5(1)(a) and (b) of Directive 89/104 and Article 9(1)(a) and (b) of Regulation No. 40/1994, it is necessary to extract these provisions, in order to have a contextual

understanding of the opinion delivered by the European Court of Justice. Article 5(1)(a) and (b) of Directive 89/104 reads as follows:-

Article 9(1)(a), (b) and (c) of Council Regulation No. 40/94 reads as follows:-

**115.** After considering the scope of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No. 40/94 in relation to Community trademarks, the Court held that the proprietor of a trademark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trademark, when that use is in the course of trade, is in relation to goods or services which are identical with or similar to those for which that trade mark is registered and affects or is liable to affect the functions of the trademark. (A Community Trademark is one, registered with the European Community Trademark Office, located at Alicante, Spain. It was created on the approval of the European Council of Ministers, for the purpose of enabling single trademark registration that will provide protection to trademarks from infringement in all European Community nations)

**116.** On the question as to when the use of a trademark constitutes "use in the course of trade", the Court held that "the use of a sign identical with a trademark constitutes use in the course of trade, where it occurs in the context of commercial activity with a view to economic advantage and not as a private matter". To come to the said conclusion, the Court relied upon the decision in Arsenal Football Club.

**117.** Applying the above principle, the Court held that from the advertiser's point of view, the selection of a keyword identical with a trademark has the object and effect of displaying an advertising link to the site on which he offers his goods or services for sale and that since the sign selected as a keyword is the means used to trigger that ad display, the advertiser must be held to be using it in the context of commercial activity and not as a private matter. Even from the point of view of the referencing service provider (search engine), the Court held that the storage as keywords, of trademarks, for the benefit of the clients of the search engine constituted a commercial activity carried on with a view to economic advantage. Consequently, the Court held that the referencing service provider was actually operating "in the course of trade" while permitting advertisers to select, as keywords, signs identical with trademarks, stores those signs and displays its clients' ads on the basis thereof. However, the Court clarified that it does not follow as a corollary that the service provider itself uses those signs within the terms of Article 5 of Directive 89/104 and Article 9 of Regulation No. 40/94. The Court then pointed out that the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign.

**118.** After ruling as aforesaid that a referencing service provider is not involved in use in the course of trade within the meaning of the above mentioned provisions, the ECJ then took up for consideration, the question whether the conditions relating to "use in relation to goods or services" were satisfied. On this question, the Court held that in most cases an internet user, entering the name of a trademark as a search term, would be looking for information covered by that trademark. Therefore, when advertising links to sites offering goods or services of

competitors of the proprietor of that mark are displayed beside or above the natural results of the search, the internet user may perceive those advertising links as offering an alternative to the goods or services of the trademark proprietor. In such a situation, the ECJ held that since a sign identical with a trademark is selected as a keyword by a competitor, with the aim of offering internet users, an alternative to the goods or services of the proprietor of the trademark, there was use of that sign, in relation to the goods or services of that competitor.

**119.** The ECJ then went to the extent of holding that even in cases in which the advertiser does not seek, by its use, as a keyword, of a sign identical with the trade mark, to present its goods or services to internet users as an alternative to the goods or services of the proprietor of the trade mark but, on the contrary, seeks to mislead internet users as to the origin of its goods or services by making them believe that they originate from the proprietor of the trade mark or from an undertaking economically connected to it, there is use 'in relation to goods or services'. Therefore, the Court concluded that the use by an advertiser of a sign identical with a trademark as a keyword in the context of an internet referencing service, falls within the concept of "use in relation to goods or services" within the meaning of Article 5(1)(a) of Directive 89/104.

**120.** However, in view of the fact that the essential function of a trademark is to guarantee the identity of origin to the consumer by enabling him to distinguish the goods or service from others which have another origin, the ECJ held in para-87 of its opinion as follows:-

Consequently, the ECJ opined in paragraphs 88 to 90 as follows:-

**121.** Taking up then, the question of adverse effect on the advertising function, the ECJ accepted that the use by internet advertisers of a sign identical with another man's trademark as a keyword for the purposes of displaying advertising messages, is liable to have certain repercussions both on the advertising use of that mark by its proprietor and on the latter's commercial strategy. However, having regard to the facts and the findings recorded by the Cour de Cassation, the ECJ held in para 98 of its opinion that the use of a sign identical with another person's trademark in a referencing service such as that at issue, in the cases in the main proceedings, was not liable to have an adverse effect on the advertising function of the trademark.

**122.** Taking up the second part of the discussion, relating to the second question in the first reference, the ECJ concluded that an internet referencing service provider, which stores as a keyword, a sign identical with a reputable trademark and arranges the display of ads on the basis of that keyword, does not use that sign within the meaning of Article 5(2) of Directive 89/104 or of Article 9(1)(c) of Regulation No. 40/94.

**123.** Coming to the question of liability of the referencing service provider (third part of the order of the Grand Chamber), the ECJ held, with reference to Article 14 and recital 42 in the preamble to Directive 2000/31 that the exemption from liability would cover only cases in which the activity of the information society service provider is of a mere technical, automatic and passive nature. In other words, the service provider should have had neither knowledge of nor control over the information which is transmitted or stored. The role of the service provider should

be neutral, in order to establish that its liability was limited under Article 14.

124. Though the ECJ held in para 117 of its opinion that concordance between the keyword selected and the search term entered by an internet user is not sufficient by itself to justify the view that Google had knowledge of or control over the data entered into its system by advertisers, the ECJ nevertheless held that it is for the National Court to find out on facts the role played by Google in the drafting of the commercial message that accompanies the advertising link or in the establishment or selection of keywords. If the service provider had not played such a role, the ECJ pointed out that they cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously.

125. After a detailed analysis as indicated above, The Grand Chamber answered all the references to the following effect:-

126. After the ECJ rendered its opinion on 23.3.2010, the French Cour de Cassation took back the case of Louis Vuitton and by an order dated 13.7.2010, remitted the case back to the Court of appeal to examine the factual matters more closely, keeping in mind the ECJ's ruling.

(Note: In an opinion titled "From Biblical Questions to Delphian Confusion: ECJ's decision on Google France C-236/08", posted in Austrotrabant's blog, the decision of the European Court of Justice was criticised as one where the Biblical statement "'Seek and you shall find' found it's end in a judgment which is as confusing as a statement of the Oracle in Delphi.)

127. Primakabin v. Portakabin (Case C-558/08), was another case, which was referred to the ECJ for opinion by The Hoge Raad der Nederlanden (the Supreme Court of Netherlands). In that case, both parties were temporary cabin makers (or mobile buildings). Primacabin chose the key words PORTAKABIN, PORTACABIN, PORTOKABIN and PORTOCABIN as its search terms for Google ad words. ECJ re-iterated its position that a trade mark proprietor can oppose to the use of a key word identical with its mark, if that use is liable to cause detriment to any of the functions of that mark. Those functions include not only the essential functions of the trade mark, which is to guarantee to the customers the origin of the goods or services, but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertisement.

Relevance of the above discussion

128. The decisions of various international Courts, discussed in the preceding paragraphs, have obviously arisen out of (i) the laws relating to Trade Marks in their own jurisdictions or (ii) the European Union Directives or Council Regulations. As seen above, they have also evolved only over a period of time, with infringements arising out of commercial greed, always scoring a march over the laws, just as crimes always march ahead of law enforcement. Therefore, the road so far travelled appears to have been bumpy and as Austrotrabant's blog put it, the law on the issue has become as confusing as the statement of the

Oracle of Delphi could be. In any case, the decisions of various Courts cited above, have to be read only in the context of the laws with reference to which they were rendered and hence let us now see the relevant laws in the backdrop of which, those decisions were rendered.

129. In U.S., the Lanham Act is a federal trade mark Act of 1946, to which several amendments have been made in the past three decades. They are (1) The Trademark Counterfeiting Act of 1984; (2) The Trademark Law Revision Act of 1988, making major revisions and creating an "Intent to Use" system; (3) legislation in 1993 and 1994 implementing the provisions of the NAFTA treaty and the GATT agreement; (4) a 1996 enactment which added an anti-dilution prohibition to federal law; (5) the 1999 "Anti-cybersquatting Consumer Protection Act," directed at preventing the Cybersquatting on the Internet of domain names that are confusingly similar to trademarks and person names; (6) legislation in 2002 implementing the provisions of the MADRID PROTOCOL, facilitating the international registration of marks.

130. Similarly, in Europe, the European Union issued Council Directive No. 89/104, on 21.12.1988, to approximate the laws of the member States relating to trade marks. It was designed to harmonise the disparities in the respective trade mark laws, which had the potential to impede the free movement of goods and provision of services and distort competition within the European Union. Articles 5 and 6 of the said Council Directive around which most of the decisions cited above revolved, read as follows:-

131. Subsequently, the European Union recognised that the barrier of territoriality of the rights conferred on proprietors of trademarks, by the laws of the member States, cannot be removed by approximation of laws. Therefore, in order to open up unrestricted economic activity in the whole of the common market for the benefit of undertakings and to create trademarks which are governed by uniform Community Law, the Council issued regulations known as COUNCIL REGULATION (EC) No. 40/94 of 20.10.1993 on the Community Trade Mark (CTM). Articles 9, 10 and 12 of the said Council Regulations, which were also considered in some of the decisions cited above, read as follows:-

132. However, Regulation No. 40/94 was repealed by Council Regulation (EC) No. 207 of 2009 of 26.2.2009 on the Community Trade Mark (codified version) (OJ 2009 L 78, p. 1), which entered into force on 13.4.2009. But Articles 9, 10 and 12 did not undergo any change.

133. On 8.6.2000, the European Parliament and the Council of European Union issued Directive 2000/31/EC on certain legal aspects of information society services, and in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Article 14 of the said Directive, reads as follows:-

134. Therefore, the decisions referred to by me from paragraphs 50 to 127 above have to be understood in the context of the respective laws. The principles enunciated in those decisions can be of persuasive value to the extent, the laws in India are similar. Therefore, let me now turn on to the Indian context.

Indian context

**135.** It is needless to say that the dispute on hand has to be decided in the context of the provisions of the Trade Marks Act, 1999. Section 28 of the Act gives an indication of the rights conferred by registration of Trade Marks. Under Sub-Section (1) of Section 28, the registration of a trade mark confers upon the registered proprietor of the mark

the exclusive right to the use of the trade mark,

in relation to the goods or services in respect of which the mark is registered and (iii) to obtain relief in respect of infringement in the manner provided under the Act. Thus, there are 3 limbs to Section 28(1) of the Act. However, the right recognised by sub-Section (1) is made subject to the other provisions of the Act. Section 28 (1) indicates both (i) the right as well as (ii) the remedies.

**136.** In the case on hand, there is no dispute about the fact that the plaintiff as well as the defendants 2 to 4, are engaged in the business of rendering the same type of services. Though there was an initial dispute about the proprietorship of the trade marks, the same got cleared by virtue of the amendments to the pleadings. Therefore, the plaintiffs are the registered proprietors of the trade marks in question, viz., those listed in the table in paragraph -3 above. Consequently, by virtue of Section 28 (1), the plaintiffs have (i) the exclusive right to the use of the trade marks in question (ii) in relation to the services in respect of which, registration is made. Thus, 2 limbs of Section 28(1) stand satisfied in the case on hand, in so far as defendants 2 to 4 are concerned. Nevertheless, there is a dispute about what constitutes “the use of the trade mark”, within the meaning of Section 28 (1).

**137.** Similarly, the liability of the first defendant (search engine) is also in question since the search engine is not engaged in the same line of business as the plaintiff and the alleged infringement by the search engine is not “in relation to the same type of goods or services”. However, the allegation against them is that of “contributory infringement” or “ancillary infringement” and they are alleged to have facilitated the infringement by the other defendants, by providing the trade marks of the plaintiff as key words and by allowing them to use those marks in the adtitle and adtext of their advertisements.

**138.** On a perusal of the admitted averments and the averments supported by documents, it is clear (i) that the plaintiff has established that they are the proprietors of registered trade marks (ii) that the defendants 2 to 4 are also engaged in the business of rendering same type of services and (iii) that the defendants 2 to 4 were using at least the words Bharat, Tamil, Matrimony etc., in the adtitle and/or adtext of their advertisements. Therefore, we will now have to examine whether the act of the defendants would still not amount to infringement.

Defence of Defendants

**139.** A perusal of the pleadings would show that the defence put up by the defendants could be grouped under the following categories:-

Though the plaintiffs are the proprietors of the trade marks BHARATMATRIMONY etc., they have not obtained registration

of the words “TAMIL, ASSAMESE, MATRIMONY” etc., which form the constituent parts of such registered marks. The use of the constituent parts of the registered trademarks of the plaintiff, in the keywords suggestion tool, cannot be termed as infringement since those constituent parts are generic or descriptive terms used in common parlance.

The plaintiff has obtained registration of only a combination of 2 words such as “TAMIL” and “MATRIMONY” or “BHARAT” and “MATRIMONY” etc. They have not and could not also have, obtained registration of the individual words TAMIL, ASSAMESE, MATRIMONY etc., and hence they can claim exclusive rights only over the mark as a whole and not over the individual words constituting the registered mark.

The use of the words “MATRIMONY, TAMIL, TELUGU” etc., by the respondents 2 to 4 in the adtext and/or adtitle of their advertisements in the search engine, is not in the trade mark sense, but only in a descriptive sense. Therefore in view of Section 2(2)(b), 2(2)(c) and Section 29(6), there is no protection, when parts of a trade mark are used as adwords, adtitle or adtext. The use of the words constituting a trademark, as an adword or keyword, would not amount to “use of a mark” within the meaning of Section 2(2)(b) and Section 2(2)(c) of the Act, in view of the provisions of Section 29(6).

The plaintiffs themselves are making use of the same keywords suggestion tool and are advertising their services in the search engine, in the same manner in which the defendants 2 to 4 do. When the websurfers search for the sites of the respondents 2 to 4, advertisements of the plaintiff’s sites also appear on the right hand side as sponsored links. Therefore, they are guilty of what they are seeking to injunct and hence they are estopped from questioning the policy of the search engine, after having submitted to the same

The very registration of the trademarks of the plaintiff is contrary to Section 9(1)(b) of the Trade Marks Act, 1999.

The suit is not maintainable in view of the Uniform Domain Name Resolution Policy adopted by ICANN

Since a search engine is like a directory, the reference to certain words in the directory cannot be termed as infringement. The use of the words constituting the registered trademarks of the plaintiff in the keyword suggestion tool, is not a use in the course of trade.

**140.** One more dispute was sought to be raised by the counsel appearing for the second defendant. It was, that Class 16 in respect of which most of the trade marks of the plaintiff were registered, related to paper, card board etc., and that since the defendants are not in the business of selling paper, cardboard or printing material, the claim of infringement was ridiculous. But the said contention, in my view, seeks to belittle the claim of the plaintiff, only with a view to spite them. It does not merit any consideration, in view of the fact that the plaintiff has also obtained registration under Class 42, which takes within its fold, “services that cannot be classified in other classes”. Therefore, let me now take up the defences categorised in the preceding paragraph, one after another.

**141.** As pointed out above, the first defence of the respondents is that the registered trademarks of the plaintiff contain a combination of generic and descriptive words and hence there is no protection. McCarthy's Desk Encyclopedia of Intellectual Property defines a 'descriptive mark' as 'a word, picture or other symbol that directly describes something about the goods or services in connection with which it is used as a mark. Such a term may be descriptive of a desirable characteristic of the goods; the intended purpose, function or use of the goods; the size or colour of the goods; the class of users of the goods; or the end effect upon the user. According to McCarthy, 'the issue of descriptiveness is usually tested from the view point of the hypothetical customer, who has the basic amount of knowledge about the product, which is conveyed by advertising and promotion currently available in the market place'.

**142.** McCarthy defines a 'generic name' as 'a word used by a majority of the relevant public to name a class or category of product or service'. A generic name is incapable of exclusive appropriation or registration as a protectable trade mark or service mark. Interestingly, McCarthy calls a generic mark as an oxymoron, akin to 'a square circle or a flat mountain'. Whether a term is a generic name is ultimately determined by majority public usage of the term. A generic term is one that refers to the genus of which the particular product is a species.

**143.** The test to determine whether certain words are descriptive or not, is laid down in *Corpus Juris Secundum*, Vol.87 in paras 34 and 35, at pages 271 as follows :

**144.** Courts have held that when descriptive words are involved, even a small distinguishing element in the use would be regarded as adequate. In *Office Cleaning Services Limited v. Westminister Window and General Cleaners Limited* (1946 (63) RPC 39), the Court of Appeal held that where the name of the business consists of words descriptive of that business and have not acquired a secondary meaning, a slight difference between the two business names will, in the absence of fraud, be a sufficient distinction. While upholding the decision of the Court of Appeal, the House of Lords held as follows :

**145.** But, Courts also have held that if by long association with a person's products or services, a descriptive word has acquired a secondary meaning, then they are entitled to protection. In one of the earliest cases, (*1896 AC 199*), it was held that the term 'camel hair belting' had acquired a secondary meaning. But in (*1899 AC 326*), LORD SHAND observed :

**146.** Insofar as the case on hand is concerned, the words 'Tamil', 'Muslim', etc., are descriptive terms, indicating a race, language, ethnic group or a community and no one is entitled to monopolise the use of these words. Similarly, the word 'matrimony' is descriptive of the state of marriage of a person. The words 'marriage', 'wedding', etc., may all signify the same meaning, though the origin of these words are from different sources. While the word 'wedding' is an English word denoting a marriage ceremony, the word 'matrimony' is derived from the Latin word 'matrimonium' meaning thereby a rite or state of marriage. On the other hand, the word 'marriage' is derived from

the French term 'marier' meaning both a legal union of a man and a woman as well as the act or ceremony marking this. The World Book Dictionary states that while the term 'marriage' emphasises the legal union of a man and woman, the term 'matrimony' is a formal and religious word, applied to the religious bond established by the union and the term 'wedding' is the common word for the ceremony or celebration.

**147.** Therefore, it is needless to point out that the plaintiff cannot claim monopoly over the individual words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', 'matrimony', 'Bharath' etc. But, the plaintiff has obtained registration of a combination of these words and claims that it is an arbitrary combination of two ordinary words, which have become distinctive. Therefore, the plaintiff claims that by virtue of the registration, they are entitled to prevent others from using these words in such a manner, as would mislead the customers about their origin. In other words, the plaintiff is not aggrieved per se, (and cannot be aggrieved) by the use of these words by the defendants independently and individually. The grievance of the plaintiff is that when the defendants use the very same combination of words with or without a space in-between, it causes confusion in the minds of the consumers. It is also the contention of the plaintiff that despite the combination of words, which constitute their registered trade marks, being descriptive in nature, they have acquired secondary meaning and hence, the plaintiff is entitled to prevent the infringement thereof.

**148.** The question as to whether the registered trade marks of the plaintiff have acquired secondary meaning or not, has to be tested only on the strength of the evidence let in. But, irrespective of whether they have acquired secondary meaning or not, the use by the defendants 2 to 4, of the very same combination of words, namely 'Tamil "Matrimony', 'Bharath "Matrimony', 'Assamese-Matrimony' etc., even if they leave a space in-between the two words, certainly provides a likelihood of confusion. Therefore, under normal circumstances, the plaintiff will be entitled to an injunction, for the simple reason that the others are not entitled to use the very same combination of words with just a space in-between and claim that both these words are just generic or descriptive. As a matter of fact, if the defendants 2 to 4 use one of the words constituting the registered trade marks of the plaintiff, in conjunction with a different word (which is not part of the registered trade mark), the plaintiff would have had no case at all. It must be borne in mind that the same mark test is different from a similar mark test. For instance, if the defendants 2 to 4 use the words 'Tamil Alliance' or 'Tamil wedding' etc., (and yet convey the same meaning), the plaintiff would have had no right to injunct the defendants from using the word 'Tamil' in their advertisements. Similarly if the defendants use the words 'Bharat' or 'Punjabi' or 'Muslim' etc., in conjunction with any word other than 'Matrimony', the plaintiff cannot maintain an action. But, the objection of the plaintiff is to the use of the very same combination of words by the defendants, as contained in the registered trademarks of the plaintiff.

**149.** Though the objection of the plaintiff to the use by the defendants, of the very same combination of words, is well founded prima facie, the same cannot take them to the desired destination. It is on account of a subsidiary question that would then automatically arise for consideration. That question is as

to whether the defendants 2 to 4 would be left with any other choice, to advertise their services, if the use of the combination of the above words is prohibited.

150. We have already seen that the defendants 2 to 4 are also in the same line of business as the plaintiff. Therefore, they have no alternative except to advertise their services, only in a manner descriptive of such services. For instance, in a website providing services to men and women looking for suitable life partners from Kerala, the defendants would have no alternative except to use either of the 2 words 'Kerala' or 'Malayalam'. While there are a few synonymous terms for the word 'Matrimony', there are no synonyms for the words like 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc. Therefore, there is no way the defendants 2 to 4 could be prohibited from using these words, which have no synonyms. Consequently, even if the plaintiff's case is accepted in total, an injunction could be issued only to the extent of preventing the defendants from using the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc, in combination with the word 'Matrimony'. This would leave the defendants 2 to 4 with a very limited choice, to choose the expression 'Tamil Wedding' or 'Tamil Marriage' or 'Tamil Alliance' etc, instead of the expression 'Tamil Matrimony'. But, the grant of an order which would lead to the consequence of reducing the choice of words available to the competitors, to a very few and resulting in the plaintiff monopolising the English word 'Matrimony', will be very disastrous.

151. More over, Section 35 of the Act saves the use by any person, of any bona fide description of the character or quality of his goods or services. Therefore, in the light of the fact that there are no synonyms for the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., and also in the light of the fact that any curtailment of the use of the word 'Matrimony' would leave the defendants 2 to 4 with a very limited choice of two or three equivalent words only, the use by the defendants 2 to 4 of the combination of words could only be taken to be an inevitable and unavoidable, even if presumed to be not a bona fide description of the character or quality of their services, saved by Section 35.

152. In an article titled "EXPRESSIVE GENERICITY: TRADEMARKS AS LANGUAGE IN THE PEPSI GENERATION" 65-Notre Dame L.Rev.397, the author Rochelle Cooper Dreyfuss warned of the danger of losing vocabulary and suppressing expressive communication because of overly broad trademark protection and proposing to solve it by rendering terms "expressively generic" if society wishes to appropriate them for cultural use. Similarly, Prof. WENDY GORDON stated in his article "ON OWNING INFORMATION: INTELLECTUAL PROPERTY AND THE RESTITUTIONARY IMPULSE" 78 Va. L.Rev.149 that "culture could not exist if all free riding were prohibited within it".

153. Even before the advent of this issue in the internet age, the Supreme Court (of USA) allowed, in *Saxlehner v. Wagner* 216 US 375 (1910), a natural water producer to use its competitor's mark to identify the product that it was copying. Justice HOLMES explained that as long as the defendants did not create confusion about the real source of their product, they were free "to tell the public what they are doing and to get whatever share they can in the popularity of the trademarked product by advertising that they are trying to make the same article and think that they succeed". The Court held that by flagging its product as an

imitator of the original, they are not trying to get the goodwill of the name but the goodwill of the goods.

154. In (2007(35) PTC 474), a similar question came up before me for consideration. But, in that case, the plaintiff had a word mark as well as a device mark, both registered in their favour. The defendants copied not only the very same word mark "Health and Glow" but also the device mark. Therefore, I found in that case (para 36 of the report) that there was no honest concurrent use, but only dishonest subsequent use, by the defendants in that case. After analysing the precedents on the issue, I also held in para 48 of the decision that the objection relating to inventiveness of a registered mark could be raised only at the pre registration stage. But the case on hand falls under a different category. In *Health and Glow*, the availability of the choice of synonyms (or equivalent terms), for describing the products and services of the parties, did not arise. But in the case on hand, I have found that out of the 2 words constituting the registered trademarks of the plaintiff, one does not have a synonym and the choice with respect to the other, is limited to a very few words. Therefore, I accept the first defence set up by the defendants 2 to 4, in view of the peculiar features of the case.

#### Defence-II (Two or more words constituting a Trade Mark)

155. The second defence of the defendants is that the plaintiff has obtained registration of a combination of two words and that they have not obtained registration of each of the two independent words constituting the registered trade marks. Therefore, the defendants claim that the plaintiff cannot claim monopoly over each of those independent words, which constitute the registered trade marks.

156. This defence of the defendants 2 to 4 stems out of Sections 15 and 17 of the Act, which read as follows :

157. But, the second defence taken by the defendants, on the basis of Sections 15 and 17, cannot be sustained for one simple reason. The plaintiff does not seek an injunction restraining the defendants from making use of the individual words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', 'Matrimony' etc., independently. The plaintiff does not even seek an injunction to restrain the defendants 2 to 4 from using any of the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc in combination with any word other than 'Matrimony'. The injunction that they seek is to prevent the defendants 2 to 4 from using any of these words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., in combination with the particular word 'Matrimony'. Therefore, the second defence taken by the defendants 2 to 4 cannot be accepted.

#### Defence III (Use of the Mark)

158. The third defence of the defendants is that the use of the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., in their advertisements, is not in the trade mark sense, but in a descriptive sense. It is their contention that their use of the words do not constitute the 'use of a mark' within the meaning of Section 2(2)(b) or 2(2)(c) and that therefore, it could not be categorised as an infringement, within the meaning of Section 29 of the Act.

159. Sections 2(2)(b) and 2(2)(c) read as follows :

160. Section 29 reads as follows :

161. As seen from Section 29 (1), an infringement happens when a person uses in the course of trade an identical or a deceptively similar mark, in relation to the same goods or services and in such a manner as to render the use of the mark likely to be taken as being used as a trade mark. Under sub-section (2), an infringement happens when a person uses in the course of trade, a mark similar to or identical with a registered trade mark, on similar goods or services, which is likely to cause confusion on the part of the public. Sub-section (3) raises a presumption in favour of likelihood of confusion, if the mark used by a person in the course of trade has identity with the registered trade mark and the goods or services, on which such mark is used, also have identity with the goods or services in respect of which, the mark is registered. Sub-section (4) speaks of infringement in relation to trade marks which have acquired transborder reputation. Sub-section (5) seeks to prevent a person from adopting someone else's trade mark as part of his trade name or business name.

162. However, sub-section (6) clarifies that for the purpose of Section 29, a person uses a registered mark,

if he affixes it to goods or the packaging thereof;

if he offers or exposes those goods or services for sale under the registered trade mark;

if he imports or exports the goods under the mark; or

if he uses the registered mark on business papers or in advertising;

163. Under sub-section (7), even the application of a registered trade mark on a material intended to be used for labelling or packaging goods or as a business paper or for advertising goods or services, would constitute infringement. Sub-section (8) goes a step further, by prescribing that a trade mark is infringed even by advertising that trade mark, if such advertising-

takes unfair advantage of and is contrary to honest practices in industrial or commercial matters or

is detrimental to its distinctive character or

is against the reputation of the trade mark.

164. Thus, a careful reading of Section 29, which contains an exhaustive list of various acts constituting infringement, shows that those various acts of infringement revolve either around the use of the mark in the course of trade or the use of the mark as a trade/business name or the use of the mark on packages, labels and advertisements. While sub-sections (1) to (4) lay emphasis on 'use in the course of trade', sub-sections (5) and (6) merely speak about use of the registered mark on trade name, business name or labels or packages or on business papers or in advertising. In contrast, sub-section (7) speaks of the application of the registered mark on labels, packages, business papers, etc., or on advertisements. Sub-section (8) does not speak either of

the 'use of the mark' or 'application of the mark'. It speaks merely of the advertisement of the mark. Thus, Section 29 in its entirety, brings within its fold, (i) the use of the mark (ii) the application of the mark and (iii) the advertisement of the mark.

165. Coming to the definition under Section 2(2)(b) and 2(2)(c), it is seen that Sub-Clause (ii) of Clause (c) of Sub-Section (2) of Section 2 steers clear, of any doubt that one may have as to what constitutes an use of the mark in relation to services. According to it, the use of the mark as or as part of any statement about the availability, provision or performance of certain services, would tantamount to 'the use of the mark in relation to such services'.

166. In the light of the provisions of Sections 2(2)(b), 2(2)(c), 29(6)(d), 29(7) and 29(8), if we examine the case on hand, it is clear that the defendants 2 to 4, use in the course of their trade, the two words, which form the component parts of the registered trade marks of the plaintiff, on their advertisements. Whenever a websurfer searches for the sites of the plaintiff, the links to the sites of the defendants 2 to 4 appear in the 'sponsored links' column. If the defendants 2 to 4 actually use in the adtitle and adtext of their advertisements in the 'sponsored link' column, the words which form part of the registered trade marks of the plaintiff, then it would certainly be an use in advertising and an use in the course of trade. A similar view was echoed by the High Court of Australia in *Shell Company of Australia Ltd., v. Esso Standard Oil (Australia) Ltd.*, (1961) 1 B IPR 523. The question which arose in that case was as to whether the use of an animated cartoon oil-drop character in a television commercial, amounted to use of the constituent pictures of a trademark. The Court was called upon to decide whether in the setting in which the particular pictures referred to were presented, they would have appeared to the television viewer, as possessing the character of the devices or brands, which the appellant was using or proposing to use in relation to petrol for the purpose of indicating or so as to indicate, a connection in the course of trade between the petrol and Shell. The High Court held that "the use of a mark in an advertisement of goods is a use in the course of trade and is of course a use in relation to the goods advertised." However, *KITTO, J.*, ultimately held that the use of the oil-drop character was to convey a message that it is that the chemical composition of Shell petrol gives it advantages over its rivals and that since the mark was being used descriptively rather than as a badge of origin, the action for infringement should fail.

167. However, the question whether a mere use by a person, of someone else's registered trademark, even if unauthorisedly, would constitute infringement has attracted the attention of various Courts internationally. But, Courts have not uniformly deemed all unauthorised uses of trademarks in metatags, to be actionable. In particular, where the junior user of a trademark, acts in good faith while using the mark in its metatags, to index the legitimate content of its website, Courts have held such use to be a permissible fair use. For instance, in *Playboy Enters., Inc. v. Welles* 279 F.3d 796 9th Cir. 2002, the Court held that internet searchers would have a much more difficult time locating relevant websites if they could do so only by correctly guessing the long phrases necessary to substitute for trademarks. Similarly, someone searching for critiques of Playboy on the internet would have a difficult time if internet sites could not list the object of their critique in their metatags.

**168.** Similarly, the unauthorised use of another person's trade mark, was held to be a fair use in cases-- (i) where the defendant used the plaintiff's mark in a descriptive sense as in the decision in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (174 F.3d at 1066), by using simple English words "movie" and "buff" with a space in-between (ii) where the defendant's website was critical of the plaintiff's business activities as in the case of *Bihari v. Gross* (supra) (iii) where the defendant distributed the plaintiff's products or had a similar legitimate business relationship with or connection to the plaintiff and its products as in the case of *Transunion* 142 F.Supp. 2d at 1040 and (iv) where the defendant's fame or notoriety was due to its affiliation to the plaintiff as in *Welles* 279 F.3d at 802. However, despite these exceptions, Courts have not extended the fair use defence to *Cyber Stuffing* in which another's trademark is used multiple times in website metatags to obtain more prominent placement on a search engine research space *Transunion* 142 F.Supp. 2d at 1040.

**169.** A use is considered to be a permitted nominative fair use, if it meets three requirements, viz., (i) the product or service in question must be one not readily identifiable without use of the trademark; (ii) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (iii) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. see *New Kids on the Block v. News Am. Publ'g Inc.*, 971 F.2d 302, 308 (9th Cir. 1992); *Caims v. Franklin Mint Co.* 292 F.3d 1139, 1153-55 (9th Cir. 2002).

**170.** Nominative fair use and initial interest confusion were at the center of the dispute in *J.K. Harris & Co. v. Kassel*. In this case, J.K.Harris and Kassel were rendering the services of negotiating reductions in tax assessments and resolution of past due tax obligations for clients. Both of them promoted their services online. On its website, *taxes.com*, Kassel began publishing negative information about Harris on a page that was designed so as to be prominently featured in the search engine results of those seeking information about Harris. Kassel did this by creating "keyword density" on the page in question: Harris' trade name was used seventy-five times, header and underline tags were placed around sentences containing Harris's trade name, the font size was increased, and links to websites containing information about Harris were included.

**171.** In the searches for Harris's trade name, Kassel's site prominently featured in the results. Harris sought to prevent Kassel from using its trade name anywhere on the *taxes.com* site, arguing that Kassel caused initial interest confusion by attracting customers to Kassel's site, where, after reading the negative information posted there about Harris, they might be dissuaded from doing business with Harris. The Court held that Kassel's use of Harris's trade name would be permitted if it was a nominative fair use. Further, the Court found that Harris' service could not be adequately described without using the "J.K.Harris" trade name, but that, given the negative nature of the information posted on Kassel's site, no user would believe it was sponsored or endorsed by Harris.

**172.** Nevertheless, the Court also held that it was necessary that "only so much of the mark or marks may be used as is reasonably necessary to identify the mark holder's product or services".

After reviewing Kassel's uses, the Court held that "defendants' use of plaintiff's trade name in links to other web pages and when disseminating truthful factual information about plaintiff is a nominative fair use". However, the Court explained that it was not necessary either to use header or underline tags around sentences containing Harris' trade name or to increase the font size or page prominence of sentences containing Harris' trade name, or to increase the keyword density of its page by using Harris' trade name, or variations thereof.

**173.** Finding that there was no nominative fair use defence, the Court held that Harris was likely to prevail on its initial interest confusion claim as consumers were likely to be confused by Kassel's use of Harris' trade name. Since irreparable harm is presumed under the Lanham Act after a demonstration of likelihood of confusion, the Court issued a preliminary injunction, enjoining Kassel from using 'J.K. Harris' or any permutation thereof as a keyword for the *taxes.com* website more often than is necessary to identify the content of the website and from using header and underline tags around sentences containing Harris' trade name, or from increasing the prominence and font size of sentences which include Harris' trade name.

**174.** However, in the context of the statutory provisions in India, there are only 2 questions which are relevant in this context. They are:-

(1) whether the defendants are using the registered trade mark in the course of trade or using it in advertisements within the meaning of Section 2(2)(b) and (c) and 29(6); and (2) whether such use or application constitutes infringement within the meaning of Section 29(8).

If the defendants 2 to 4 use the individual words constituting the registered trade marks of the plaintiff, in their advertisements in the sponsored links column, then such use would certainly fall within Section 2(2)(c)(ii) and 29(6)(d).

**175.** Therefore, we have to see if such use in advertising, satisfies the ingredients of sub-Section (8) of Section 29 also, so as to constitute infringement.

**176.** In the case on hand, it is the contention of the defendants that even if they use the individual words or parts of the plaintiff's registered trade marks in their advertisements, such use will not be an use in the trade mark sense, but only in a descriptive sense. This contention has to be viewed in the light of the fact that a web portal rendering online matrimonial services for different Sections of the public, will have no alternative, except to describe the nature of the services rendered by them, in their advertisements, with reference to-

the caste/community/race/ethnic group and

the type of services rendered.

**177.** Therefore, the defendants 2 to 4, in my view, cannot be said to be taking unfair advantage of and acting contrary to honest practices in industrial or commercial matters, within the meaning of Section 29(8)(a) of the Act. These 2 terms unfair advantage of and honest practices appear not only in Section 29(8)(a) but also in Section 30, which prescribes the limits on the effect of

registered trade marks. The relevant portion of Section 30 reads as follows:-

**178.** Despite Section 29(8)(a) and Section 30(1)(a) speaking of “honest practices”, there is no indication anywhere in the Act as to what constitute “honest practices”. It may perhaps be due to the fact that persons who follow honest practices in everyday life do not need a definition from the statute book, while for the others, no amount of definition would be of any use. However, the European Court of Justice in *Michael Holterhoff v. Ulrich Freiesleben* (2002) F.S.R. 23, 362, p.376, expressed the view that, “by its very nature, such a concept must allow of a certain flexibility. Its detailed contours may vary from time to time and according to circumstances, and will be determined in part by various rules of law which may themselves change, as well as by changing perceptions of what is acceptable. However, there is a large and clear shared core concept of what constitutes honest conduct in trade, which may be applied by the Courts without great difficulty and without any excessive danger of greatly diverging interpretations...” The Court further described the concept as “expressing a duty to act fairly in relation to the legitimate interests of the trade mark owner, and the aim as seeking to “reconcile the fundamental interests of a trade-mark protection with those of free movement of goods and freedom to provide services in the common market” in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain”.

**179.** The European Court further referred to Article 10b of the Paris Convention for Protection of Industrial Property which uses the very same expression “honest practices in industrial or commercial matters”. Article 10bis defines an “act of unfair competition” as one which is contrary to such practices. The said Article runs thus:

The following in particular shall be prohibited:

all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

**180.** Honesty is actually an animus of mind. It can never be discovered either by the words spoken by a person or by the acts of omission and commission committed by him. Therefore one can only make inferences from the circumstances. Keeping in mind the concept of what constitutes “honest practices”, if we look at the third defence set up by the defendants 2 to 4, it cannot be said that the defendants are guilty of infringement in terms of Section 29(8), especially in view of the descriptive nature of the individual words, whose combinations have been registered as trade marks by the plaintiff. However, I wish to clarify that if the registered trade marks of the plaintiff were not descriptive of (i) the consumers of the services rendered, such as Tamils, Telugus, etc., and (ii) the nature of the services rendered, namely matrimonial services, I would not have accepted the third

defence set up by the defendants, since even an application of the registered trade mark in advertisements, would be an use in the course of trade and may at times constitute infringement in terms of Section 29(6) and (8) respectively. Say for instance, the plaintiff had adopted the name of its founder “Murugavel” as the trademark for the online matrimonial services rendered by them, the same would not fall under the category of generic or descriptive word insofar as the offering of matrimonial services are concerned. In that case, the defendants will not be heard to contend that they would use the same mark and that such use did not take unfair advantage of or fell within the meaning of honest practices.

**181.** Therefore, in my considered view, the use by the defendants, of the individual words constituting the registered trademarks of the plaintiff, in the advertisements in internet, may not amount to taking unfair advantage of and contrary to honest practices in industrial or commercial matters. The ingredients of Section 29(8)(b) and (c) are also not satisfied, since it is not shown that the use is detrimental to the distinctive character of the mark or against the reputation of the mark. Therefore, I hold that though the use by the defendants would be an use in the course of trade and an use in advertising, such use does not amount to an infringing use, in view of the reasons stated above.

Defence IV (Estoppel)

**182.** The fourth contention of the defendants 2 to 4 is that the plaintiff is equally guilty of what the defendants 2 to 4 are alleged to be. According to them, whenever the web surfers attempt to access the sites of the defendants 2 to 4, the links to the sites of the plaintiff are automatically displayed on the right hand side under the sponsored links. Therefore, the defendants 2 to 4 contend that under the law relating to grant of injunctions, a person, who himself is guilty of something, is not entitled to seek a prohibitory order restraining others from doing what he is also guilty of.

**183.** Interestingly, the third defendant has filed a print-out of an interview given by Janakiraman Murugavel, Founder and CEO of the plaintiff to “MediaNama”, probably a web journal, as document No. 2. The interviewer appears to have questioned him regarding the advertisements of plaintiff on the search engine, which also fall in the same line. The relevant portion of the interview is as follows:-

Therefore, the fact that the plaintiff is also enjoying the unlimited choice of keywords offered by Google, which at times, trespasses into others’ territories, is quite obvious.

**184.** However, in response to the said contention, Mr. T.V.Ramanujun, learned senior counsel appearing for the plaintiff contended that irrespective of who is guilty of infringement, the search engine owns the responsibility to prevent the same and that the plaintiff has no qualms about being prevented by the search engine, if their advertisements tend to infringe the registered trade marks of the defendants 2 to 4. **185.** Though, on principle, the contention of the defendants 2 to 4 in this regard is legally well founded, there is a lacuna in their contention. As pointed out in the preliminary portions of this order, the defendants 2 to 4 also have as their trade marks, words which are descriptive. Therefore, the first defence that they set up against the plaintiff’s claim, would apply equally against them, if and when

they seek an injunction against the plaintiff. Therefore, I do not wish to decide the dispute, on the basis of this fourth contention, since all the parties hereto, have actually adopted ordinary English or Hindi words in combination with other words that are descriptive in nature, as their trade marks or domain names.

#### Defence V (Registration of the Mark was wrongful)

**186.** The fifth ground of attack of the defendants 2 to 4 to the claim of the plaintiff is that since the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., are in publici juris, the very registration obtained by the plaintiff, is in violation of Section 9(1) (b) of the Act.

**187.** The relevant portion of Section 9 reads as follows :

**188.** But, unfortunately, the contention based on the validity of registration, cannot be accepted in view of Sections 31 and 32. Under Section 31(1), the registration of a trade mark is considered prima facie evidence of its validity. Under sub-section (2) of Section 31, a registered trade mark cannot be held to be invalid in a legal proceeding on the ground that it was not registrable under Section 9. By virtue of Section 32, it is open to the plaintiff to establish in the course of trial that after the registration of the mark, but before the commencement of the legal proceedings, the mark has acquired a distinctive character, in consequence of its use. Therefore, the contention that the trade marks in question ought not to have been registered, cannot be accepted.

#### Defence VI (ICANN)

**189.** The next contention of one of the defendants is that the plaintiff ought to have availed of the remedy provided under the Uniform Domain Names Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) and that they should not have rushed to this Court. But, the said contention cannot be accepted since the jurisdiction conferred upon this Court by statute, is not ousted by the said Policy. There is no bar of jurisdiction of this Court, to adjudicate a dispute relating to the alleged infringement of a registered trade mark and of passing off in the internet.

**190.** The Internet Corporation for Assigned Names and Numbers (ICANN) is a non profit consensus organisation designated to carry on the administration of the Internet name and address system. It has control over domain names in the global or generic top level domain names (gTLDs). It administers the Internet Protocol and addresses issues of space allocation, protocol parameter assignment, Domain Name System management and root server system functions. It administers the Uniform Dispute Resolution Procedure, for resolving certain disputes by a non judicial process. Paragraph 4.1 of the said Policy enables ICANN to adjudicate a dispute between a third party and a Provider (i) if his domain name is identical or confusingly similar to a trade mark or service mark in which the complainant has rights (ii) if he has no rights or legitimate interests in respect of the domain name and (iii) if his domain name has been registered and is being used in bad faith. Paragraph 5 makes it clear that all disputes regarding domain name registration which are not brought pursuant to the mandatory administrative proceeding provisions of paragraph 4, shall be resolved through Court, Arbitration or other proceedings. Therefore it is a non-exclusive remedy.

#### Defence VII (Role of Search Engine)

**191.** The next contention of the defendants is that a search engine is like a directory containing references to various products and services as well as references to the manufacturers of those products and providers of services. Therefore, according to the defendants, the use of the words which constitute the registered trademarks of persons, in the keyword suggestion tool would not amount to an use in the course of trade of the search engine and would not in any case constitute an infringement.

**192.** But, analogizing a search engine to a directory, may not be appropriate for various reasons. In a directory, the name of a person would invariably appear in one or two locations or sites. Say for instance, the name and address of a timber merchant or his advertisement may appear in a directory, at the location where the names and addresses/advertisements of all timber merchants are grouped and displayed. At the most, it may appear (not very often) also at a location where wood products are listed. The reason for this is (i) that there is a constraint of space in a directory and (ii) that the listing in various locations unconnected with the advertiser's products or services would not be of any utility value. But in a search engine, there is no constraint of space, since it operates in the virtual world. Moreover, the selection of locations at which a person's name could appear, is made mechanically in a search engine and not manually. Consequently, the names are prone to appear in the "organic results" column, at as many locations as one could imagine, irrespective of whether or not, the location has any relevance to the name, product or service. Even in respect of advertisements, search engines offer unlimited choice, in the form of keywords, to enable service providers and manufacturers to display or hang their advertisements, in as many locations as possible. Since there is no constraint of space, the advertisers prefer to post their advertisements in several locations in the search engine. Therefore, the comparison of a search engine to a directory may not be appropriate. In such circumstances, what then is the role and the responsibility of the search engine, in respect of the choice of keywords offered by them ?

**193.** According to Google, their relationship with a person advertising his products and services in the search engine is governed by (1) Advertising Program Terms (2) Advertising Policy and Editorial Guidelines and (3) Adwords and Adsense Trademark Policy. In the "Advertising Program Terms", Google has made the customer (advertiser) solely responsible for ad targeting options and keywords and all ad content, ad information and ad URLs. Similarly, in their "Advertising Policies", a copy of which is filed by them, the search engine has stated as follows:-

**194.** By adopting the policy extracted above, the search engine appears to have shown concern, about the possible infringement of trademarks by the potential advertisers. It has also provided a mechanism for redressal of complaints. What is important is that the second paragraph of the policy extracted above, shows that even a person who is not an adwords advertiser in Google, is welcome to send a complaint. In other words, the policy to honour registered trademarks, is not merely confined to those who advertise in Google, but also available to all, who have a grievance of infringement.

**195.** In the third document filed by Google viz., "Adwords and Adsense Trademark Policy", it is stated that depending upon the region in which trademark rights are asserted, Google would investigate the use of trademarks, (i) in adtext only or (ii) in adtext and keywords. In the said document, Google has given a list of

regions, where their investigation would be confined to the use in adtext only and a list of regions where they would investigate the use in both adtext and keywords. India is placed along with United States and United Kingdom, in the first list of regions, where the investigation would be confined only to adtext. Many of the European countries such as France, Italy etc., are included in the second list. China is also included in the second list, perhaps due to the controversies created in the recent past.

196. In the document mentioned in the preceding paragraph, just below the list of regions where the investigation is confined to adtext only, it is stated as follows:-

Just below the list of regions where the investigation would be on both adtext and keywords, it is stated as follows:-

197. The reason for adopting different policies in different regions, is actually not very clear. However, in document No. 6 filed by Google, containing sample printouts, depicting the component of an ad and explaining the process of search in Google, the first defendant has stated that in accordance with their adwords policy, the plaintiff's registered trademarks, would not appear in the adtext i.e., the title or the text of the ad of others.

198. However, in the screen shots of the defendant's webpages, showing sponsored links ads, filed by the plaintiff as document Nos. 48, 49, 50, 51, 52 and 53, the terms "Tamilmatrimony", "Sindhimatrimony", "Punjabimatrimony", "Bengalimatrimony", "Assamesematrimony" etc., are shown to have appeared in the ad title of the advertisements released by the defendants 2 to 4, in the sponsored links column. In some of those webpages, the ad title contains the term as one single term and in some, they appear as separate words such as "Tamil Matrimony" etc.

199. As I have pointed out elsewhere in the judgment, the appearance of the separate words cannot be taken exception to, in this particular case, in view of the peculiar nature of the combination of the two words constituting the registered trademarks. As held elsewhere, there is no synonym for the words "Tamil", "Telugu" etc., and the synonyms available for the word "Matrimony" are a few. Therefore, there would be difficulty in giving a title to these advertisements, if the use of both the words together, is prohibited. In such circumstances, I am of the view that if the search engine enforces the policy that is reflected in document Nos. 2, 3, 4, 5 and 6 filed by them, that would be a sufficient safeguard for the rights conferred upon the plaintiff by the registration of the trademarks.

200. Normally, an advertisement in a search engine, is triggered when the hands of the websurfer, types a search term, which matches the adwords selected by the advertiser, with or without the help of the keyword suggestion tool. While the search engine may have a control over the selection of keywords by the advertiser, the search engine may not have any control over the surfer, on the choice of a search term. It is also not possible for a search engine to be aware of all the trademarks registered in all the jurisdictions, in respect of all the goods and services. Therefore, the offer of words by a search engine, in their keyword suggestion tool, may not per se amount to an infringing use of a registered trademark, though it may amount to a use in the course of their own trade. It is true that the number of visitors that a site has on a daily basis, may induce the search engine to include the whole or part of the name or title of the site, in the keyword suggestion tool, to enable the competitors of the site to

choose those words as adwords. But, it may or may not happen with the knowledge that such names constitute registered trademarks. There cannot be a presumption that the inclusion of those names in the keyword suggestion tool, happened with the knowledge of the search engine, about the registration of those words as trademarks. It is only in cases where a completely arbitrary or fanciful name, which has no nexus or connection with the nature of the goods or services, is adopted as a trademark, that the offer by a search engine of that trademark in their keyword suggestion tool, to the competitors of the proprietor of the mark, could be considered as amounting to vicarious or contributory infringement. In cases of the nature on hand, the benefit of doubt would go to the search engine, since the choice of the words 'Tamil', 'Matrimony' etc., in the keyword suggestion tool, need not necessarily have happened deliberately.

201. One more contention of the plaintiff is that the search engine is guilty of double standards, in the sense that sponsored links do not appear for certain categories of persons, products and services such as Aircel, HDFC, Microsoft, Nike, ICICI Bank, Oracle, Facebook etc. In support of the said contention, the plaintiff has also filed the print-outs of the relevant webpages as part of document No. 69. However, the first defendant has denied this. The first defendant has also filed as document No. 16 series, the screen shots of the webpages, where multiple sponsored links appear for HDFC, Oracle, Microsoft and even Google. Therefore, the question as to whether the search engine is adopting double standards, has to be examined only at the time of trial and as on date, the match is equally poised on this issue.

202. Therefore, I hold that the inclusion of the words "Tamil", "Matrimony" etc., in the keyword suggestion tool of the search engine, would not amount to an infringing use, nor would it amount to a contributory infringement, in view of my findings against the plaintiff vis-a-vis defendants 2 to 4. However, it is made clear that Google has a duty to explain in the course of the main proceedings (suit), the rationale behind the difference in policy adopted by them in different regions.

O.A. Nos. 977 and 978 of 2009

203. In the light of the above discussion, I am of the view that the plaintiff is not entitled to the injunctions sought for, as they have failed to pass the triple tests of (i) prima facie case (ii) balance of convenience and (iii) irreparable hardship. But, it shall not be construed to mean that the first defendant (Google) need not anymore adhere to their Adwords Trademark Policy, as reflected in document Nos. 2, 3 and 4 filed by them. This is on account of the fact that as a result of my judgment, the plaintiff should not be singled out and deprived of the benefit of a policy that the first defendant is adopting uniformly, not only for the benefit of its own customers, but also for the benefit of persons who do not advertise in their search engine. As a matter of fact, the plaintiff is admittedly one of the advertisers in Google. Therefore, they have a contractual relationship with Google. Consequently, the benefit of the "Adwords Trademark Policy" would enure to them, at least out of such contractual relationship. Therefore, even while dismissing O.A. Nos. 977 and 978 of 2009, I make it clear that the first defendant (Google) shall not deprive the plaintiff of the benefit of their Trademark Policy.  
A. No. 6001 of 2009

204. As pointed out in paragraph 7, this is an application filed by the plaintiff under Order 39, Rule 2A, CPC for punishing the first defendant, by ordering the attachment of its properties, for

allegedly disobeying the orders of this Court dated 7.10.2009 in O.A. Nos. 977 and 978 of 2009.

**205.** As pointed out earlier, this Court granted interim orders of injunction as prayed for, in O.A. Nos. 977 and 978 of 2009, on 17.9.2009. The operative portion of the said order read as follows:

**206.** On 7.10.2009, the Court heard the arguments on both sides. After advertizing to the prayers made and the rival contentions in paragraphs 1 to 8, in its order dated 7.10.2009, the Court pointed out in paragraphs 10 and 13 that the plaint as it stood on that date, required modifications and that therefore, the plaintiff was not justified in seeking ex parte injunction with those defective pleadings. Thereafter, the Court referred to the policy of the search engine on the issue and held in paragraphs 19 and 20, which constitute the operative portion of the order, as follows:

**207.** Complaining that despite the directions of this Court to adhere to their business policy, the first defendant was continuing to use the plaintiff's trade marks as part of their "ad words" program and that they have been allowing the others to use the plaintiff's trade marks in part of their advertisement, the plaintiff has come up with this application to punish the first defendant.

**208.** The first defendant (Google) has filed a counter, contending inter alia that as per their Adwords Trademark Policy, recorded by this Court in paragraph 8 of its order dated 7.10.2009, the first defendant did not allow the registered trademark of any one from being used as adwords by any other person and that the impression "Adword" as used in the industry would mean the use of the words in the title and text of the advertisement. The first defendant has also pointed out that since the number of advertisements created using the adwords program is substantial and voluminous, there may be some odd instance of an advertisement which is non compliant with the policy, to appear. However, in paragraph 9 of the counter affidavit, the first defendant has reiterated its commitment that they would adhere to the present business policy. The first defendant has also indicated that its current adwords policy does not permit the use of any trademarked term in the ad text, i.e., the title and text of the advertisement.

**209.** In view of the stand taken by the first defendant and in view of what was recorded by this Court in paragraph 8 of its order dated 7.10.2009, it is not possible for me to conclude that there was any wilful and deliberate disobedience of the order dated 7.10.2009. Therefore, A. No. 6001 of 2009 is dismissed.

A.Nos. 6380, 6382 & 6383 of 2009

**210.** While A. No. 6380 of 2009 is by the fourth defendant under Order 7, Rule 11, CPC to reject the plaint, A. Nos. 6382 and 6383 of 2009 are by the second defendant praying for (i) rejection of plaint under Order 7, Rule 11, CPC; and (ii) stay of further proceedings in the suit.

**211.** The stay of suit is sought on the short ground that in the plaint, the plaintiff has given a false and fictitious address for the second defendant, despite the fact that there are several litigations between the parties and the plaintiff was well aware of the correct address of the second defendant. The second defendant relies upon the provisions of Order 6, Rule 14A (5)(a) of the Code of Civil Procedure, for seeking stay of the suit.

**212.** However, I do not think that there is any necessity to stay the suit. The second defendant has entered appearance through counsel and has also filed counter affidavits to the applications for injunction. The second defendant has also come up with substantial applications for stay of suit and rejection of plaint. Therefore, the stage at which the provisions of Order 6, Rule 14A(5) are to be invoked, has already passed. As a matter of fact, a careful perusal of the provisions of sub rules (5), (6), (7) and (8) of Rule 14A of Order 6 would show (i) that at any time, the plaintiff can seek the setting aside of the order of stay, after furnishing the true address of the defendant; and (ii) that as per sub rule (8), nothing in Rule 14-A shall prevent the Court from directing the service of process at any other address.

**213.** Now that the second defendant has effectively defended itself, there is no occasion to invoke the said provision. We have already crossed the stage at which the provisions of Order 6, Rule 14A(5) could be invoked. Therefore, there is no question of staying the suit. Hence, A. No. 6383 of 2009 is dismissed.

**214.** The rejection of plaint under Order 7, Rule 11 is sought by defendants 2 and 4 in their applications A. Nos. 6382 and 6380 of 2009 respectively, on the following grounds:

that the plaintiff did not produce any evidence regarding registration of trade marks in its name;

that it is only the registered proprietor of the trade marks, who is entitled to the rights conferred by registration and since the plaintiff is not the registered proprietor, he is not entitled to protection;

that the second defendant is not engaged in any line of business connected with those mentioned in Class 16 and hence, even the proprietor of the trade marks in relation to goods falling under Class 16, would have no cause of action against the second defendant; and

that all disputes regarding the registration and use of domain names are governed by a separate regime under the Uniform Domain Names Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) and hence, the dispute raised by the plaintiff is out of the jurisdiction of this Court.

**215.** Insofar as the first two contentions (regarding the person in whose name the trade marks stand registered) are concerned, it is true that at the time when the plaintiff came up with the above suit, the pleadings were defective. Admittedly, the proprietor of a majority of the 22 registered trade marks was Mr. Janakiraman Murugavel. Originally, he was not made a party to the suit in his individual capacity and there were also no pleadings about any assignment made by him in favour of the plaintiff, of which he is the Chief Executive Officer. This is why the defendants 2 and 4 came up with applications for rejection of plaint, on the ground that a majority of 22 registered marks did not stand in the name of the plaintiff Company and that therefore, the protection available only to the registered proprietors, cannot be extended to the plaintiff. However, the plaintiff later got his plaint amended by virtue of an order dated 21.1.2010 passed in A. No. 6379 of 2009. The order dated 21.1.2010, allowing the application for amendment, was not challenged by any of the parties.

**216.** It is true that I also gave liberty to the defendants 2 and 4 to raise all these objections in the applications for injunction and

in the suit. I have noted this in paragraph 10 of this order, even while providing the reasons which persuaded me to allow the amendments.

217. Therefore, all that the defendants 2 and 4 can claim is that these objections can be taken note of in deciding the applications for injunction and in deciding the suit. But, it does not mean that the suit can be thrown out at the threshold, on the ground of defective pleadings, especially after the amendments were allowed.

218. Order 7, Rule 11 enables this Court to reject a plaint (i) where it does not disclose a cause of action; (ii) where the relief is under valued; (iii) where the relief is properly valued, but the plaint is insufficiently stamped; (iv) where the suit appears from the statement in the plaint to be barred by any law; (v) where it is not filed in duplicate; and (vi) where the provisions of Rule 9 are not complied with.

219. A reading of the averments in the affidavits in support of the applications for rejection of plaint would show that the defendants 2 and 4 are attempting to bring the applications within clauses (a) and (d) of Order 7, Rule 11. But, the plaint does actually disclose a cause of action. It is well settled that for deciding an application under Order 7, Rule 11, the Court has to look only into the averments contained in the plaint and the documents filed by the plaintiff. The averments contained in the plaint, certainly disclose a cause of action. Whether such cause of action is true or false, is a matter of evidence and hence, the plaint cannot be thrown out without trial.

220. The defendants 2 and 4 are unable to point out as to how the suit is barred by any law (so as to bring it within clause (d) of Order 7, Rule 11), except depending upon the Uniform Domain Names Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN). But, I have already pointed elsewhere that the jurisdiction conferred upon this Court, is not ousted by the said Policy. Therefore, the case will not even fall under clause (d) of Order 7, Rule 11.

221. Thus, there are no grounds to reject the plaint. Hence, A. Nos. 6380 and 6382 of 2009 are dismissed.

A. No. 247 of 2010

222. This is an application taken out by the plaintiff to implead Google Inc., USA, as the fifth defendant in the suit. This application is taken out on the ground that the first defendant has taken a stand in their counter affidavit that it is a wholly owned subsidiary of Google Inc., USA and that Google Inc., is the owner of the search engine.

223. There is no dispute about the fact that Google Inc., USA is the holding company and the first defendant herein is its wholly owned subsidiary. All the policies of the search engine google, including the adwords policy, are framed by Google Inc., USA. Perhaps, the policies are trimmed by the subsidiaries in different jurisdictions, depending upon the local laws. But, ultimately, it is the holding company which owns the search engine. Therefore, the proposed defendant is a proper party, even if construed to be not a necessary party. Hence, A. No. 247 of 2010 is allowed.

224. In fine

O.A. Nos. 977 and 978 of 2009 are dismissed. But, the dismissal of these applications shall not be construed to mean that the first defendant (Google) may henceforth deprive the plaintiff, of the benefit of their Adwords Trademark Policy, as reflected in document Nos. 2, 3 and 4 filed by them.

A. No. 6001 of 2009 is dismissed.

A. Nos. 6380, 6382 and 6383 of 2009 are dismissed.

A. No. 247 of 2010 is allowed.

The parties shall bear their own costs. It is made clear that the main suit shall proceed, uninfluenced by all observations and findings recorded herein.

*Ordered accordingly.*

# Judgment

by Justice Ramasubramaniam

Panel Forum: "A Comparative Approach in Judicial Decision Making"

Day 2: 11.30am

## Dorothy Thomas v. Rex Arul [2011] 6 MLJ 475

Madras Law Journal - Civil (Case Law)/ 2011 / Volume 6 / Dorothy Thomas Versus Rex Arul - [2011]\_6\_MLJ\_475

IN THE HIGH COURT OF JUDICATURE AT MADRAS

V. Ramasubramanian, J.

O.A. No. 191 of 2011 in CS. No. 135 of 2011

27 July 2011

*(A) Code of Civil Procedure (5 of 1908), Sections 2(6), 13 and 14--Conclusiveness of foreign judgment--Custody of minor child--Suit for declaration and permanent injunction--Final order passed by American Court challenged by applicant/wife--Grant of decree of divorce by U.S. Court and grant of permanent custody of minor to respondent/husband--Verdict of American Court on basis of oral and documentary evidence let in by husband--Failure of applicant to reply to counter claim and non-appearance before Court twice despite invoking jurisdiction of Court herself--Decision of Court not merely based on account of absence of applicant--Applicant/wife cannot allege lack of opportunity of hearing when she failed to avail such opportunity--Held, case not falling under Section 13(b) and (d)--Divorce proceedings initiated by wife merely on reason that she grew out of marriage--Applicant/wife not willing to sacrifice her career prospects in India whereas defendant ready to make any kind of sacrifice for interest and welfare of child--Defendant proved to be a good father--Interest and welfare of child requires the return of child to U.S at request made by father--Prayer for interim injunction of applicant/wife rejected--Wife directed to seek variation/modification of final order before the American Court whose jurisdiction she invoked.--*

*Held:* Inasmuch as the foreign Court did not pronounce a verdict merely on account of the absence of the plaintiff, either by way of penalty or in a formal manner, but decided the case on the basis of the oral and documentary evidence let in by the defendant, Court has no doubt that it was on the merits of the case. The fact that oral and documentary evidence were let in by the defendant is borne out by the transcript of the proceedings dated 18.10.2010. The foreign Court, conducted the proceedings very elaborately, questioning the defendant and his counsel on various aspects. The Court even rejected some of the prayers made by the defendant. Therefore, there has been an application of mind.

[Para 27]

The structure in which a judgment is produced, may vary from person to person and from country to country. What is important is its substance and not form. Unlike in India, the whole proceedings are video or audio recorded in the Courts in a few countries. They form part of the records. Once they disclose an active participation by a Judge, in the course of recording of evidence and also while considering the reliefs to be granted, the ultimate decision rendered by him, cannot be said to be without application of mind, merely because all the reasons are not incorporated in the judgment itself. To make a case come within Section 13(b), what is to be seen is whether the decision was on merits or not. Court is not sitting on appeal against the foreign judgment. The decision in *Mohinder Singh Gill v. Chief Election Commissioner* AIR 1978 SC 851 relates to orders passed by statutory authorities and it cannot be imported to judgments of Courts. Therefore, the first contention that the foreign judgment was not merits, is rejected.

[Para 29]

A person who initiates proceedings before a Court of competent jurisdiction and withdraws it at the last minute, after a counter claim is lodged, can never be allowed to contend that the Court should have put him on notice of its intention to proceed with the hearing of the counter claim. Such a contention can be termed only as an unnatural demand for natural justice. What makes the cry of the plaintiff for natural justice foul, is the fact that even today she seeks to retain a benefit that has accrued out of the very same order that she assails. She has accepted that portion of the order of the American Court by which her marriage has been dissolved. Therefore, to term the proceedings before the Court of Cobb County as opposed to the principles of natural justice, is very uncharitable, especially from a litigant who is also a practitioner of law.

[Para 49]

The other limbs of the argument relating to violation of the principles of natural justice, relate to (i) proper opportunity of being heard (ii) notions of fair play and (iii) arrangements to be made to enable a woman to contest the proceedings. These limbs of the contention also have to fail, in view of the fact (i) that it was she who initiated the proceedings, (ii) that she was put on notice of the counter claim as well as a Motion for Emergency Hearing (iii) that she did not choose to reply to the counter claim (iv) that she repeatedly assured the defendant that she would attend the hearing on 18.10.2010 and that a Mediation could also be arranged and (v) that at the last minute, she refused to attend the hearing, but requested her petition to be dismissed. Therefore, a person who was aware of the date of hearing and who was represented by counsel on the date of the hearing (at least for the purpose of getting her petition dismissed), cannot

be allowed to contend that proper opportunity of hearing was not granted. What transpired on 18.10.2010 was a matter of choice made by the plaintiff and not a matter of chance. A person who fails to avail the opportunity of hearing, cannot contend that there was no proper opportunity. Therefore, the attack to the foreign judgment under Section 13(d) is bound to fail.

[Para 52]

***(B) Code of Civil Procedure (5 of 1908), Sections 2(6), 13 and 14--Conclusiveness of foreign judgment--Final order passed by American Court in regard to custody of child in favour of respondent/husband, challenged by applicant/wife--Allegation of fraud and misrepresentation against husband in procuring favorable foreign decree--Withdrawal of divorce petition by wife without replying counterclaim filed by husband--Re-location of wife and child to India--Allegation of fraud against husband for pursuing counter claim and for obtaining favourable decree despite knowledge and consent of re-location--Husband disputes his consent on re-location--Agreement on permanent re-location not established on evidence--Withdrawal of appearance from Court by applicant/wife despite knowledge of representations of husband before Court--Attack to foreign judgment on ground of vitiation of fraud held, not sustainable.--***

*Held:* The only ground on which the plaintiff alleges fraud is that after having consented for their permanent re-location in India, the defendant misled the Foreign Court as though he was unaware of her re-location. But, this would hardly amount to a fraud or misrepresentation. The question as to whether the defendant agreed for the plaintiff's permanent re-location in India or not, has become a contentious issue. While the plaintiff claims that by consent, she was relocated in India, the defendant disputes it. As a matter of fact, the defendant has been consistent in contending that there was no agreement for permanent relocation.

[Para 60]

Once an issue becomes contentious, it is for the parties to lead evidence in support of their rival contentions. A party who fails to appear before Court and lead evidence in respect of a contentious issue cannot even accuse the opposite party of misleading the Court and of perpetrating a fraud upon the Court. What is done behind the back of a person, is what would actually amount to fraud. If a person takes a particular stand with regard to a matter in issue, consistently, to the knowledge of another, he cannot be accused of misleading the Court, when he takes the same stand in Court.

[Para 63]

Even the documents filed before the Court by the plaintiff disclose (i) that what was agreed was only a temporary relocation in the first instance (ii) that it was conditional (iii) that within 20 days of her arrival in India, the plaintiff committed a breach of those conditions and moved the foreign Court for divorce. If on the basis of the documents filed on both sides, the Court cannot come to a conclusion that the defendant consented unconditionally to the plaintiff's permanent relocation in India, it is impossible for the Court to think that the defendant misled the Foreign Court about this issue and obtained an order by fraud or misrepresentation. If there had been a permanent relocation

to India, by mutual consent, in July, where was the necessity for the plaintiff to file a petition for divorce and for primary custody of the child, on 16th August, within about 20 days of her arrival in India?

[Para 71]

Assuming for a moment that the defendant misrepresented to the Court of Cobb County certain facts, it was not as though the plaintiff did not have any opportunity to expose the falsity of his claim. The plaintiff is an Attorney who was represented by a local Attorney in the case. The plaintiff was aware of the claim made by the defendant about the circumstances under which she moved to India. Therefore, she owed a duty to the Court, if there was actually a misrepresentation on the part of the defendant, to bring it to the notice of the very Court whose jurisdiction was actually invoked by her and not by the defendant. The transcript of the proceedings (page-4) shows that Mr. Manely, the Attorney engaged by the plaintiff was present at the time when the case was called. After informing the Court of the plaintiff's decision to withdraw her petition, the counsel left. This fact has been recorded by the learned Judge in pages 4 and 5 of the transcript.

[Para 72]

As an Attorney by profession and as a person who had engaged a local Attorney to represent her, the plaintiff owed a duty to the Court of Cobb County, at least as a matter of professional commitment, to inform the Court, if there was any attempt by the defendant to mislead the Court. The stand taken by the defendant, which is alleged now to be a misrepresentation, was laid bare in the Motion for Emergency Hearing filed by the defendant on 24.8.2010 itself. Therefore, it is not as though the plaintiff was not aware of the representations that the defendant was making before the foreign Court. Despite being aware, sufficiently in advance, of the very foundation upon which the defendant proposed to proceed with his counter claim, the plaintiff withdrew her appearance from Court. Therefore, the plaintiff has lost the moral authority to contend that the Court was misled by the defendant through his misrepresentations. Hence, the attack to the judgment of the Foreign Court on the ground that it was vitiated by fraud, cannot be sustained.

[Para 73]

#### RATIONES DECIDENDI

- i. ***A foreign judgment on custody of minor child cannot be recognized in India as per Section 13 (b) of the Code of Civil Procedure unless it is rendered on merits of the case.***
- ii. ***A person who fails to avail opportunity of hearing provided in the proceedings of the foreign Court cannot contend violation of principles of natural justice and any attack to such foreign judgment under Section 13 (d) of the Code of Civil Procedure is not sustainable.***

#### CASES CITED/REFERRED TO:

*Adams v. Cape Industries PLC (1990) Ch. 433 at 557*  
[Para 34]

*Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112*  
[Paras 14,88,89,90,92,98,103,109]

*Dr. C. Chendroyaperumal v. National Institute of Port Management* (2006) 4 MLJ 989  
[Para 49]

*Elizabeth Dinshaw v. Arvind M. Dinshaw* AIR 1987 SC 3  
[Paras 14,86,87,89,92,104,109]

*Emirates Bank International v. Vijay Talwar* MANU/DE/2799/2009  
[Para 23]

*Godard v. Grey* (1870) L.R. 6 Q..B. 139  
[Paras 77]

*Gujarat Bottling Co. Ltd v. Coca Cola Ltd* AIR 1995 SC 2372  
[Para 124]

*In Re.H (infants)* 1966 1 All ER 886  
[Paras 86,89]

*In Re.L (minors)* 1974 (1) All ER 913  
[Para 89]

*International Wollen Mills v. Standard Wool (U.K.) Ltd* (2001) 3  
MLJ 99 (SC)  
[Paras 22,23,25]

*McKee v. McKee* (1951) 1 All ER 942  
[Paras 88,89]

*Mohamed Kasim v. Seeni Pakir Bin Ahmed* (1927) 1 MLJ 240 (Mad-  
FB)  
[Para 25]

*Mohinder Singh Gill v. Chief Election Commissioner* AIR 1978 SC  
851  
[Paras 28,29]

*Ponnuswamy v. Periasami Pillai* (1980) 2 MLJ 155  
[Para 26]

*R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid* AIR 1963 SC 1  
[Paras 7,32]

*Rajaratnam v. Muthuswami Kangani* AIR 1958 Mad 203  
[Para 25]

*Ruchi Majoo v. Sanjeev Majoo* LNIND 2011 SC 541  
[Paras 14,96,98,100,101,103]

*Russell v. Smyth* (1842) 9 M & W 810  
[Para 77]

*Sankaran Govindan v. Lakshmi Bharathi* AIR 1974 SC 1764  
[Paras 35,36,56,59]

*Sarita Sharma v. Sushil Sharma* AIR 2000 SC 1019  
[Paras 14,91,98,109]

*Satya v. Teja Singh* AIR 1975 SC 105  
[Paras 14,59,82,83,85,98]

*Shilpa Aggarwal v. Aviral Mittal* (2010) 2 MLJ (CrI) 313  
[Paras 14,92,98,109,125]

*Sivagaminatha Pillai v. K. Nataraja Pillai* AIR 1961 Mad 385  
[Para 25]

*Surinder Kaur Sandhu v. Bax Singh Sandhu* AIR 1984 SC 1224  
[Paras 14,85,92,100,102,103,109]

*T. Sundaram Pillai v. Kandasamy Pillai* AIR 1941 Mad. 387  
[Para 68]

*V. Ravichandran (Dr)(2) v. Union of India* (2010) 1 SCC 174  
[Paras 14,93,98,103,109,110,125]

*Wazir Sahu v. Munshi Das* AIR 1941 Pat 109  
[Para 22]

*Wood v. Wood* (1957) 2 All E.R. 14  
[Para 11]

*Y. Narasimha Rao v. Y. Venkata Lakshmi* (1991) 3 SCC 451  
[Paras 13,14,20,21,36,53]

#### ADVOCATES APPEARED:

*J. Sivanandaraj*, for Applicant *Ms. A. Arulmozhi*, for Respondent

#### ORDER

1. Pending suit for a declaration that the final order dated 1.11.2010 passed by the Superior Court of Cobb County, State of Georgia, USA in Civil Action File No. 10-1-8238-48, to the extent that it deals with issues of custody of the minor child Rhea Immaculate Arul, aged about 4 years is inconclusive, unenforceable, null and void and not binding on the plaintiff and the minor child and for consequential decrees of permanent injunction, the plaintiff, who is the mother of the minor child, came up with 3 applications, viz., (i) O.A. No. 191 of 2011 seeking an interim order of injunction restraining the respondent - father from in any manner seeking to enforce the said order of the Superior Court of Cobb County, State of Georgia, insofar as the custody of the minor child is concerned (ii) O.A. No. 192 of 2011, seeking an interim order of injunction restraining the defendant from in any manner publishing any defamatory or derogatory material, lowering the reputation of the plaintiff in the eyes of the right minded persons and (iii) A. No. 1220 of 2011, seeking a stay of operation of the final order dated 1.11.2010, passed by the Superior Court of Cobb County, State of Georgia, U.S.A., in Civil Action File No. 10-1-8238-48.

2. On 28.2.2011, when the above applications were moved for ad interim *ex parte* orders, I granted an order of interim injunction in favour of the applicant/ plaintiff in O.A. No. 191 of 2011. In the other two applications, notice was ordered. After service of notice, the defendant came up with a counter in O.A. No. 191 of 2011 along with a set of documents and both parties agreed to argue O.A. No. 191 of 2011 in the first instance, since it concerned the custody of a minor child aged 4 years.

3. Therefore, O.A. No. 191 of 2011 was taken up for hearing and I have heard Mr. J. Sivanandaraj, learned counsel appearing for the applicant/plaintiff and Ms. A. Arulmozhi, learned counsel appearing for the respondent/defendant.

4. The brief facts on which the parties are not and cannot, be in dispute and which are borne out by the documents filed on either side, are as follows:

- (a) The plaintiff married the defendant on 23.9.2005 in Atlanta, USA. Both of them were divorcees at the time of their marriage;
- (b) Out of the said wedlock, the minor girl Rhea Immaculate Arul was born on 18.5.2007. The marriage between the plaintiff and the defendant ran into rough weather leading to the plaintiff herself filing a petition for divorce on 7.5.2010 on the file of the Superior Court of Cobb County, State of Georgia, USA;
- (c) After filing the petition for divorce on 7.5.2010 in the said Court, the plaintiff left USA on 11.5.2010 along with the child and arrived in India on 12.5.2010.
- (d) But, she returned to U.S., on 22.5.2010 and withdrew her petition for divorce on 3.6.2010, after service of summons on the defendant on 1.6.2010;
- (e) On 26.7.2010, the plaintiff again came back to India with the child. Thereafter, she filed a petition in Civil Action File No. 10-1-8238-48 on the file of the same Court namely Superior Court of Cobb County, State of Georgia, praying not only for divorce, but also for primary custody of the minor child and for the grant of child support in accordance with the Child Support Guidelines. This petition dated 16.8.2010 was filed on 17.8.2010 by the plaintiff, through her counsel in U.S., though the plaintiff herself was in India at that time;
- (f) Upon receipt of summons in the second petition filed by the plaintiff, the respondent/defendant filed an 'Answer and Counter Claim' on 24.8.2010, seeking divorce as well as primary custody of the minor child;
- (g) Along with his Answer and Counter claim, the respondent also moved a 'Motion for Emergency Hearing' on his counter claim insofar as the issue of custody of child is concerned, expressing an apprehension that the plaintiff may settle down in India with the child. But the plaintiff opposed the motion for emergency hearing on the ground that she was due to attend the regular hearing on 18.10.2010 and that it would be difficult to make an emergent trip to U.S. Then the parties agreed not to press for an early hearing, on the understanding that the plaintiff would attend the regular hearing on 18.10.2010 with the child.
- (h) But, the plaintiff and child did not return to United States for the hearing on 18.10.2010. On the contrary, the plaintiff requested the dismissal of her petition for divorce and it was accordingly dismissed. Therefore, the respondent proceeded with his counter claim and after examining the defendant and marking 24 exhibits, the Superior Court of Cobb County, State of Georgia passed a final order dated

1.11.2010. The final order comprises of several parts. By the first part, the marriage between the plaintiff and the defendant was dissolved by a decree of divorce. By the second part, the plaintiff was directed to return the minor child to USA on or before 24.11.2010. This date was fixed by the Court, taking into account the fact that the plaintiff had a confirmed return journey ticket for her and the child on 23.11.2010. By the second part of the order, the defendant was also granted sole physical custody of the minor child with visitation rights to the plaintiff on the fourth week end of every month. The parenting schedule to be followed during holidays was spelt out in the third part of the order. The other parts of the order dealt with child support, health insurance, division of property, marital debts, alimony and attorney's fees;

- (i) Since the plaintiff did not return to USA with the child as per the final order passed by the said Court and as per the return journey ticket with which she arrived in India, the defendant filed a petition for the issue of a Writ of *Habeas Corpus* on the file of the same Court on 16.12.2010.
- (j) The summons on the Writ of *Habeas Corpus* in Civil Action File No. 10-1-12222-48 were served on the plaintiff herein on 8.1.2011 in India, by a Special Process Server appointed by the Superior Court of Cobb County. Despite service of summons in the *Habeas Corpus*, the plaintiff herein did not take any steps. Therefore, by an order dated 15.2.2011, the Superior Court of Cobb County, State of Georgia issued a Writ of *Habeas Corpus* to attach the body of the child and to deliver the child to the defendant-father;
- (k) Simultaneously with the *habeas corpus* petition, the defendant also filed a contempt petition on 10.12.2010 in Civil Action File No. 10.1.12096.48. The Superior Court of Cobb County issued summons to the plaintiff herein in that contempt petition. The summons, the motion for contempt and the other relevant papers, were all served in India, on the plaintiff herein by a Special Process Server appointed by the Court of Cobb County, on 8.1.2011.
- (l) After receiving the summons both in the Writ of *Habeas Corpus* and the Contempt Petition, on 8.1.2011, the plaintiff filed the above suit. The papers were presented originally on 28.1.2011 along with an application for leave to sue under Clause 12 of the Letters Patent. On 1.2.2011, leave was granted in A. No. 561 of 2011. Thereafter, the suit got numbered as above and an interim order of injunction was granted by me in O.A. No. 191 of 2011 on 28.2.2011;
- (m) In the meantime, the defendant also filed a petition for grant of a Writ of *Habeas Corpus* in H.C.P. No. 213 of 2011 on the file of this Court in January 2011. The said *Habeas Corpus* petition is pending adjudication in view of the fact that larger issues are raised in the above suit;
- (n) Though the contempt proceedings in Civil Action File No. 10-1-12096-48 was filed by the defendant on 10.12.2010 and the service of process on the plaintiff was also completed, the plaintiff did not respond. Therefore, the Court passed an order on 12.4.2011, directing the plaintiff herein to return the child on or before 25.5.2011, in order to purge herself of the

contempt. The order also stated that if the plaintiff failed to return the child by the designated date and time, the order itself will serve as an order for incarceration.

- (o) In view of the orders of the Superior Court of Cobb County (1) granting primary custody of the child to the defendant herein (2) finding the plaintiff herein guilty of contempt *prima facie* (3) issuing a writ of *habeas corpus* to return the child to U.S.A., and in view of the resistance on the part of the plaintiff in complying with every order of the said Court, it appears that a red corner notice has also been issued through the U.S. Consulate.

It is in the background of these facts that the above application was taken up for hearing.

5. Admittedly, there is a final order passed by the Court of competent jurisdiction namely the Superior Court of Cobb County of the State of Georgia as on date, granting permanent custody of the minor child to the defendant. Therefore, the main prayer in the above suit is for a declaration that the said judgment, which is a foreign judgment within the meaning of Section 2(6) of the Code of Civil Procedure, is not conclusive and binding upon the parties.

6. Under Section 14 of the Code of Civil Procedure, a presumption arises that the foreign judgment produced before the Court, was pronounced by a Court of competent jurisdiction. But, it is a rebuttable presumption. Section 13 of the Code makes a foreign judgment conclusive as to any matter thereby directly adjudicated between the same parties. But, Section 13 lists out six exceptions to the general rule that a foreign judgment is conclusive. The exceptions are:

- (i) where it was not pronounced by a Court of competent jurisdiction;
- (ii) where it was not given on the merits of the case;
- (iii) where it appears on the face of the proceedings to be founded on an incorrect view of International Law or a refusal to recognise law of India;
- (iv) where the proceedings were opposed to natural justice;
- (v) where it was obtained by fraud; and
- (vi) where it sustains a claim founded on a breach of any law in force in India.

7. In *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid* AIR 1963 SC 1, the Supreme Court pointed out that Section 13 incorporates a branch of the principle of *res judicata*. However, the Supreme Court also clarified that though both rules are founded upon the principle of sanctity of judgments competently rendered, the rule of conclusiveness of a foreign judgment as enacted in Section 13 is some what different in its operation from the rule of *res judicata* incorporated in Section 11. But, the rule of conclusiveness of a foreign judgment applies only to matters directly adjudicated upon and hence, what is conclusive is the judgment. While the competence of a Court, for the application of the rule of *res judicata*, is determined strictly by the Municipal Law, the competence of the foreign Court is determined by the dual test of competence by the laws of the State, in which the Court functions as well as in an international sense. To apply the rule of *res judicata*, the adjudication should have been in a former suit. But, for the application of rule of conclusiveness, it is not necessary that the judgment must have been delivered by

the foreign Court, before the institution of the suit in which the plea is set up. Again, what is conclusive in respect of a foreign judgment is only the final adjudication and not the reasons. More importantly, the Supreme Court held in *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid* (*supra*) that in adjudging the competence of the foreign Court, it would not be open to the Indian Court to ignore the course of practice in that Court, even if it be not strictly warranted by the procedural law of that State. Whether the procedure of the foreign Court, which does not offend natural justice is valid or not, is for the foreign Court to decide and not by the Court in which the foreign judgment is pleaded as conclusive.

8. Keeping in mind, the above fundamental principles laid down by the Apex Court with regard to the scope of Section 13 of the Code, if we analyse the contents of the plaint, the following picture emerges. According to the plaintiff -

- (i) her life with the defendant became extremely difficult to manage, forcing her to file a petition for divorce on 7.5.2010 in the Superior Court of Cobb County in Georgia.
- (ii) after the filing of the divorce petition, she came to India on 12.5.2010 on the advise of her family members.
- (iii) mediatory discussions were held, which made the defendant adopt a conciliatory approach.
- (iv) it was agreed that the couple would shift to India permanently.
- (v) the defendant agreed to shift to India, after obtaining U.S., citizenship.
- (vi) after both of them agreed for permanent relocation in India, she did several things such as (A) got the child admitted to a school in Chennai on 28.5.2010, (B) withdrew her first petition for divorce on 3.6.2010, (C) put up the house in US for sale, (D) sold her car, (E) withdrew the child from the school in U.S., on 8.6.2010 and (F) came back to India on 26.7.2010.
- (vii) after the plaintiff came to India, the defendant changed his mind and started torturing her, compelling the plaintiff to file a second petition for divorce on 16.8.2010 from India itself, through her counsel in U.S.
- (viii) the defendant filed a counter claim in the said action and also moved an application for emergency hearing, compelling the plaintiff to agree to go to U.S., to attend the hearing scheduled for 18.10.2010.
- (ix) she did not have adequate financial resources to travel to U.S., and she did not even have any assurance for her return to India and hence she sent a mail dated 14.10.2010, asking the defendant to provide funds for her travel to U.S., and also to provide an assurance that she would be permitted to travel back to India.
- (x) the plaintiff could not go to U.S., for the hearing scheduled for 18.10.2010, in view of the failure of the defendant to provide funds for her travel and in view of a sense of insecurity regarding her return to India.
- (xi) taking advantage of her inability to travel to U.S., and attend the hearing on 18.10.2010, the defendant proceeded with his counter claim on 18.10.2010 and also obtained a final order, behind her back by playing fraud and by misleading the Court.

9. A scan of the plaint averments and the contentions raised at the time of hearing would show that the plaintiff assails the final order of the Superior Court of Cobb County, on 3 distinct grounds viz., (a) that it was not given on the merits of the case (b) that the

proceedings were opposed to the principles of natural justice and (c) that it was obtained by fraud and misrepresentation. In other words, the plaintiff stakes her claim in terms of clauses (b), (d) and (e) of Section 13 CPC.

10. Apart from the above 3 grounds, the plaintiff has also made a feeble attempt to assail the decision of the foreign Court, on the ground that it had no territorial jurisdiction, to try and decide a claim relating to physical custody of the child. This is seen from para 32 of the plaint. This contention is raised on the ground that the child was in India at the time when original complaint for divorce was filed and also at the time when the counter claim was made, by the defendant. But, this contention was not pressed hard at the time of hearing, in view of the fact that it was the plaintiff who fired the first salvo, by filing the petition for divorce before the Superior Court of Cobb County, Georgia, seeking both divorce as well as primary custody of the child. Therefore, the jurisdiction of the foreign Court to decide the issue of custody of the child, was invoked by the plaintiff herself even when she was in India and hence she cannot now question the jurisdiction of that Court, whose jurisdiction she voluntarily invoked, not once but twice. It must also be remembered that the plaintiff is no ordinary person, but a legal practitioner in India, carrying on her shoulders, an important position in a leading law firm. Even in U.S., she was running the office of the said law firm. Therefore, realising the fact that it was she who invoked the jurisdiction of the foreign Court, the plaintiff did not press hard on the question of jurisdiction at the time of hearing. Hence, we may have to test the claim of the plaintiff only with reference to the 3 grounds relatable to Section 13 (b),(d) and (e) of the Code of Civil Procedure 1908.

11. But before taking up those 3 grounds, I would first deal with one interesting submission made by Mr. J. Sivanandaraj, learned counsel for the plaintiff. The submission is that while a decree of dissolution of marriage, passed by a foreign Court, may require recognition out of necessity, an order relating to the custody of children, being in the nature of an ancillary order, need not be recognised. In support of the said contention, the learned counsel relied upon the 65th Report of the Law Commission of India, which dealt with the topic of 'Ancillary Orders' under Chapter 19. After tracing the history of the jurisdiction of Courts to pass ancillary orders in matrimonial causes and Section 8(3) of the English Act of 1971, the Law Commission referred to the decision of the Court of Appeal in *Wood v. Wood* (1957) 2 All E.R. 14. In that decision, the Court of Appeal drew a distinction between matters of status and matters of personal right and obligation. The Court accepted a foreign decree as terminating the status of marriage, but did not accept a decree discharging personal rights. The Law Commission also referred to a few American cases, where the impact of Article IV, Section 1 of the American Constitution, containing the 'full faith and credit clause' was examined. Thereafter, the Law Commission recommended the adoption of the principle on which Section 8(3) of the English Act of 1971, was based. The suggestion made by the Law Commission in paragraph 19.15 reads as follows:

' 19.15. The need for such a provision arises by reason of the combined operation of the following two factors:

(a) The divorce granted by the foreign Court is to be recognised under the proposed law, and the parties would no longer be husband and wife.

(b) At the same time, since the proposed law is going to provide (in effect) that the ancillary order passed by the foreign Court may not be recognised, the ancillary order will be of no consequence in India.

The result will be that there will be an hiatus, in regard to matters governed by ancillary orders. It is in order to fill up this hiatus that a provision of the nature suggested above is needed.'

12. Based on the above recommendation of the Law Commission, the learned counsel for the plaintiff contended that the order of the foreign Court, insofar as it concerns the custody of the child, need not be recognised by this Court, as it is only an ancillary order.

13. But the said contention cannot be countenanced for the simple reason that no law was made on the basis of the above recommendation. As a matter of fact, the Supreme Court pointed out in *Y. Narasimha Rao v. Y. Venkata Lakshmi* (1991) 3 SCC 451 that the labours of the Law Commission poured in its 65th Report on this very subject, had not fructified ever since April 1976, when it was submitted. In paras 11 and 12 of the said decision, the Apex Court pointed out the following:

- (i) In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc., the problem in India is complicated due to the existence of different personal laws.
- (ii) The distinction between matters concerning personal and family affairs and matters concerning commercial relationships, civil wrongs etc., is well recognised in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations and public policy plays a special and important role in shaping it.
- (iii) No country can afford to sacrifice its internal unity, stability and tranquility for the sake of uniformity of rules and comity of nations. These considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc. alone.

14. But interestingly, the decision in *Y. Narasimha Rao v. Y. Venkata Lakshmi* (*supra*), took note of only one earlier decision, viz., the one in *Satya v. Teja Singh* AIR 1975 SC 105: (1975) 1 SCC 120. The decisions in (i) *Surinder Kaur Sandhu v. Bax Singh Sandhu* AIR 1984 SC 1224: (1984) 3 SCC 698 (ii) *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw* AIR 1987 SC 3: (1987) 1 SCC 42 and (iii) *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SCC 112, which were rendered in 1984, 1987 and 1988 (which I shall deal with later) were not taken note of in *Y. Narasimha Rao v. Y. Venkata Lakshmi* (*supra*). The decisions which came after *Y. Narasimha Rao v. Y. Venkata Lakshmi* (*supra*), viz., (i) *Sarita Sharma v. Sushil Sharma* AIR 2000 SC 1019: (2000) 3 SCC 14 (ii) *Shilpa Aggarwal v. Aviral Mittal* (2010) 2 MLJ (CrI) 313 (iii) *V. Ravichandran (Dr) (2) v. Union of India* (2010) 1 SCC 174 and (iv) *Ruchi Majoo v. Sanjeev Majoo* LNIND 2011 SC 541 : CDJ 2011 SC 553, dealt with these issues in greater detail, specifically with reference to the question of child custody. In the 7 cases in which the Supreme Court dealt with this issue, specifically on the subject of custody of child, the Court laid down 3 basic principles, which we shall see later. These principles were evolved on the basis of International

Conventions, to some of which, India was a party and to others India was not. Therefore, a foreign decree on the custody of the child cannot anymore be treated as an ancillary order, which can be disregarded by this Court. It may be a temporary order capable of being varied by the very same Court on change of circumstances. Even here, every child custody order is treated as temporary, entitling the parties to seek modification of the same at any time, upon change of circumstances. But a custody order passed by a foreign Court of competent jurisdiction cannot be treated as an ancillary order, which can be disregarded totally. In fact, the Courts in US, do not regard even decrees of divorce obtained in certain jurisdictions, such as mail order divorces granted by Mexican Courts. Therefore, the distinction sought to be made between decrees of divorce and decrees for maintenance and custody passed by foreign Courts, has to be seen in the context of the law laid down by Courts. The field is occupied only by Judge made law. Whenever a foreign decree relating to custody of a child is produced, the Court has to decide (i) whether by a summary order, the parties should be directed to seek redressal from the foreign Court itself or (ii) whether the Court should conduct a detailed inquiry into the question of interest and welfare of the child, taking the foreign decree as one of the several inputs. This is how the law has evolved from out of the 7 decisions so far rendered by the Apex Court. Therefore, I cannot rely upon the report of the Law Commission and reject the foreign Court order outright. Hence, let me now move on to the other issues.

#### *Judgment not given on the merits of the case*

15. The first ground on which the foreign judgment is assailed is that it was not given on the merits of the case. This contention is based primarily upon the fact that the plaintiff withdrew her petition for divorce and remained *ex parte* to the counter claim made by the defendant. Therefore, a draft text of the judgment was prepared and presented by the Attorney for the defendant, as seen from the endorsement towards the end of the "Final Order" dated 1.11.2010, passed by the learned Judge of the Superior Court of Cobb County, State of Georgia, filed as plaint document No. 45. This, according to the plaintiff, shows that whatever was prepared as a draft text of the judgment by the Attorney of the defendant, was accepted by the Foreign Court without any independent application of mind, merely because the plaintiff remained *ex parte* to the counter claim. Moreover, the plaintiff contends that there is no discussion in the judgment, on the merits of the case and the evidence available on record. Even a judgment rendered *ex parte* in India, is supposed to contain some discussion on the merits. But, there is no discussion even on the issue of interest and welfare of the child, though the plaintiff has been asked to pay 600 per month to the child. Therefore, it is the plaintiff's contention that the foreign judgment was not rendered on merits, making it vulnerable for an attack under Section 13(b), CPC.

16. But, there are 3 strong reasons for me reject the said contention. They are:

(i) The preamble part of the Final Order, dated 1.11.2010, contains a gist of what had actually transpired in Court. The defendant has also filed a Transcript of the proceedings that really took place on 18.10.2010 in the Court hall. The entire

conversation that took place between the learned Judge and the counsel for the defendant as well as the oral evidence tendered by the defendant on oath, are recorded verbatim in the transcript of the proceedings. The transcript runs to about 26 pages and it reflects the active participation of the learned Judge, while recording the oral evidence of the defendant. To be fair to the whole system, the evidence of the defendant had been recorded *in extenso*, despite the fact that the plaintiff herein did not participate. In other words, the proceedings were not short circuited merely because they were *ex parte* proceedings. What is contained in the transcript, is an uncensored faithful version of every thing that transpired in Court, except perhaps gestures, yawning, sneezing and the physical movements of persons present in Court. Therefore, the contention that there was no application of mind, is uncharitable. As a matter of fact, the questions put by the learned Judge to the counsel for the defendant, before the commencement of the examination of the defendant as a witness, runs to nearly 6 pages. The transcript shows that even in the course of examination of the defendant by his counsel, the Court intervened and asked several questions. Some of the questions related to the employment of the plaintiff and the employment of the defendant. At one stage, the learned Judge had even put a question to the defendant about the reasons for the plaintiff seeking a divorce or moving back to India. When the defendant marked exhibits 23 and 24, which were the affidavits of friends and neighbours, who were aware of the situation and when the counsel asked the defendant to spell out the contents of a few of them, the learned Judge intervened and said that he could read the affidavits. Therefore, the judgment was actually a considered one on merits.

(ii) It is seen from the transcript that after the completion of the evidence of the defendant, the counsel for the defendant sought the permission of the Court to make a brief statement of the case. The learned Judge permitted him. Thereafter, a conversation ensued between the learned Judge and the counsel for the defendant. This is recorded in pages 22 to 26 of the transcript. This conversation revolves around (a) the question as to whether it would be a temporary or final order (b) the question as to when the plaintiff was served with the counter claim of the defendant and whether she had sufficient time (to respond) and (c) the question as to whether the time limit for the return of the child could be prescribed in such a manner as to tally with her expected date of return to US in November, as per her original schedule. This conversation between the Judge and the counsel for the defendant shows the extent to which the learned Judge analysed each and every aspect of the matter, in depth.

(iii) It is also seen from the transcript that the defendant asked for \$1,000/- for child support from the plaintiff, but the learned Judge slashed it to \$600/- per month. Before winding up, the counsel for the defendant seems to have requested the Judge to pass an order that would result in the incarceration of the plaintiff, without the necessity for filing a contempt petition, if she failed to comply with the order for the return of the child. But, the learned Judge refused that prayer and said that the defendant had to file a separate petition for that.

17. Thus the proceedings that had taken place on 18.10.2010 before the Superior Court of Cobb County, leaves not an iota of doubt in my mind that despite the plaintiff being absent, the learned Judge applied his mind to each and every detail, small or big, before arriving at the decision. The decision does not appear to be in the nature of *ex parte* orders that we are familiar with, in this part of the world and the transcript would actually make any of our Judicial Officers feel envious of the time, the facility and the infrastructure available there and the kind of assistance provided to the Courts there.

18. Coming to the issue of draft order circulated by the counsel for the defendant, the same appears to be an accepted practice in U.K. and U.S.A. As a matter of fact, in the U.K., 'Practice Direction 40E-Reserved Judgments', which was issued to supplement the Civil Rules of Practice Part 40, provides for inviting the views of the parties, whenever a judgment is reserved. Clause 2.1 of those Practice Directions stipulates that where a judgment is to be reserved, the Judge may, at the conclusion of the hearing, invite the views of the parties' legal representatives as to the arrangements made for the handing down of the judgment. If the judgment will not attract any special decree of confidentiality or sensitivity, the Court may, under Clause 2.3 of those Practice Directions, provide a copy of the draft of the judgment to the parties' legal representatives by 4.00 p.m., on the 2nd working day before handing down the verdict. Under Clause 2.9, the case will be listed for judgment and the judgment will be handed over thereafter. Under Clause 3.1 of the Practice Directions, the parties are entitled to notify the clerk of the Judge, any proposed corrections to the draft judgment. Under Clause 4.1, the parties must seek to agree to consequential orders, after the circulation of the judgment.

19. The above procedure, of circulating copies of the draft of the judgment, to the parties, even before the pronouncement of the judgment, may be surprising if not shocking, to a conservative mind. But, it has the sanction of law in those countries, where the Civil Rules of Practice provide for the same. Therefore, the fact that a draft was circulated, as indicated in the final order dated 1.10.2010 of the Superior Court of Cobb County, does not mean that there was no application of mind. Nor would it mean, that the judgment was not given on the merits of the case, so as to fall within Clause (b) of Section 13 of the Code. The decision has been rendered on merits, with respect to each and every issue viz., (i) divorce (ii) permanent custody (iii) visitation (iv) the time for return of the child (v) child support (vi) division of properties (vii) health insurance (viii) marital debts and (ix) alimony. The decision was rendered after considering the pleadings and the evidence of the defendant, which included his oral testimony and 24 documents taken as exhibits. It is relevant to note that despite being an *ex parte* hearing, the questions put to the defendant as a witness, were not entirely leading questions requiring mono syllable answers. There has been an active participation of the learned Judge throughout the proceedings. Therefore, the contention on the basis of Section 13 (b) CPC, is not well founded.

20. However, the learned counsel for the plaintiff relied upon the following passage from the decision of the Supreme Court in *Y. Narasimha Rao v. Y. Venkata Lakshmi* (*supra*):

"16. Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the Courts in

this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign Court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the Court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the Court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case. In this respect, the general rules of the acquiescence to the jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemed inappropriate."

21. The decision in *Y. Narasimha Rao v. Y. Venkata Lakshmi* (*supra*) arose under extraordinary circumstances. The parties married at Tirupati and the husband filed a petition for divorce first in Tirupati, claiming to be a resident of New Orleans, USA. But subsequently, he obtained a decree of divorce from the Circuit Court of St. Louis County, Missouri, claiming that he was a resident of that State for 90 days preceding the date of filing of the petition. The Supreme Court found (i) that the Circuit Court assumed jurisdiction on a patently false statement about the residential status and (ii) that it granted a divorce on the ground of irretrievable break down, a ground not available here in India. But, in the case on hand (i) it was the plaintiff who invoked the jurisdiction of the Superior Court of Cobb County, not once, but twice (ii) the parties were married in USA, as per the laws of the State (iii) the child was born there and was thus a US citizen. Therefore, this is a case, where the plaintiff who fired the first shot, cannot ward off the plea of acquiescence. The plaintiff not only invoked the jurisdiction of the foreign Court, but has also benefited by one portion of the final order passed by that Court, viz., the portion relating to divorce. As pointed out earlier, she has accepted the decree of divorce granted by that Court and is challenging only the portion relating to custody. A person who seeks to retain a benefit, out of a judgment, cannot be allowed to attack the other portions of the judgment on the ground that the decision was not rendered after contest.

22. The learned counsel for the plaintiff next relied upon the decision in *International Wollen Mills v. Standard Wool (U.K.) Ltd.* AIR 2001 SC 2134: (2001) 5 SCC 265: (2001) 3 MLJ 99 and contended that since the judgment did not discuss anything about the interest and welfare of the child at all, it cannot be construed as one on merits. But, the said decision is of more assistance to the defendant than to the plaintiff. Towards the end of para 29 of the said decision, the Supreme Court approved the view of the Patna High Court (in *Wazir Sahu v. Munshi Das* AIR 1941 Pat 109) to the effect the real test to find out whether it was on merits or not, is to see if it was delivered as a matter of course or by way of penalty for the non appearance of the defendant. No doubt, it was pointed out therein that merely on the basis of the presumption under Illustration (e) of Section 114 of the Evidence Act, an *ex parte* decree cannot be presumed to be one on merits. Though an *ex parte* decree may be a decree regularly passed, it may not still be a decree on merits, the Supreme Court held. A

foreign judgment would be treated as one given on merits if some evidence had been adduced on behalf of the plaintiff and if the foreign judgment, however brief, was based on a consideration of that evidence. It is only in cases where no evidence was adduced on the side of the plaintiff and yet the Court proceeded to decree the suit merely because of the absence of the defendant, either by way of penalty or in a formal manner that the judgment cannot be considered to be one on the merits of the case. On facts, the Supreme Court found in that case that the foreign Court had pronounced judgment simply on the basis of the (i) affidavit filed by the Solicitor for the respondent, before service of summons on the appellant and (ii) the affidavit of service filed by the respondent. No affidavit in evidence nor any oral evidence was let in, before the foreign Court, in that case and this compelled the Supreme Court to hold that it was not a judgment on merits. But in the case on hand, oral evidence was let in and the defendant marked 24 exhibits. Therefore, the case on hand cannot be equated to the case before the Supreme Court in *International Wollen Mills v. Standard Wool (U.K.) Ltd. (supra)*.

23. The learned counsel for the plaintiff then relied upon a decision of the Punjab High Court in CDJ 1999 PHC 1070 and a decision of the Division Bench of the Delhi High Court in *Emirates Bank International v. Vijay Talwar* MANU/DE/2799/2009. In the case before the Punjab High Court, the Court found in para 26 of the decision that there was nothing on record to show that the documents said to have been filed before the London Court were examined by the Court. Even the 2 affidavits said to have been filed by the Solicitor before the London Court, did not find a mention in the judgment. Therefore, the Punjab High Court came to the conclusion that the judgment was not on merits. Similarly, in the case before the Division Bench of the Delhi High Court (*Emirates Bank International v. Vijay Talwar (supra)*), two things were borne out, viz., (i) the Dubai Court did not even take care to see if service of summons on the defendant had been properly effected or not and (ii) in any case the Dubai Court proceeded to decree the claim on the basis of photo copies of documents taken on record without examining any witness. Therefore, the Delhi Court followed the ratio in *International Wollen Mills v. Standard Wool (U.K.) Ltd. (supra)*. In para 16 of its decision, the Delhi High Court extracted the law laid down in *International Wollen Mills v. Standard Wool (U.K.) Ltd. (supra)* to the effect that “where no evidence is adduced on the plaintiff’s side and his suit decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case”. This is exactly the test I have applied to the case on hand and I find that the judgment of the Superior Court of Cobb County, Georgia, was one on merits.

24. I must also point out that there are distinguishing factors between the case on hand and all the 3 decisions relied on by the plaintiff, (one of the Supreme Court, the other of the Punjab High Court and the third of the Delhi High Court). They are, (i) while those cases arose either out of execution proceedings or out of suits, filed by persons who secured foreign decrees, for their enforcement in India, the case on hand is by a person who seeks to set aside the foreign decree; and (ii) while in those cases the very service of summons on the defendants before the foreign Courts became the subject matter of controversy, it is not so in the case on hand, since the plaintiff herein was the plaintiff before the foreign Court also. It was the plaintiff who initiated the proceedings before the foreign Court.

25. In *Mohamed Kasim v. Seeni Pakir Bin Ahmed* AIR 1927 Mad 265:(1927) 1 MLJ 240, (referred to by the Supreme Court in *International Wollen Mills v. Standard Wool (U.K.) Ltd. (supra)*), a Full Bench of this Court held that a foreign judgment given on default of appearance of the defendant, on the plaint allegation, without any trial or evidence, is not a judgment given on the merits of the case within the meaning of Section 13(b). But, after considering the said decision of the Full Bench, a Division Bench of this Court held in *Rajarithnam v. Muthuswami Kangani* AIR 1958 Mad 203, that though a foreign judgment might have been passed *ex parte*, the decision must be deemed to be on merits, if it was passed on a consideration of the evidence. A similar view was taken by another Division Bench in *Sivagaminatha Pillai v. K. Nataraja Pillai* AIR 1961 Mad 385, that a decree of a foreign Court, even if passed *ex parte*, will be binding on the parties thereto and will be conclusive under Section 13, if it was passed on the evidence taken and the decision was on consideration of the evidence.

26. In *Ponnuswamy v. Periasami Pillai* (1980) 2 MLJ 155, this Court was concerned with a foreign decree for recovery of money passed by a District Court at Ceylon, by consent of parties. The main contention raised before this Court was that since the foreign judgment was not rendered on merits, the case would fall under the exception (b) to Section 13. But S. RATHNAVEL PANDIAN, J., as he then was, held that “what is conclusive under Section 13 C.P.C., is the judgment, that is, the final adjudication and not the reasons” and that “the true test for deciding whether a judgment has been given on the merits or not is to see whether it has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff’s case”.

27. Therefore, inasmuch as the foreign Court did not pronounce a verdict merely on account of the absence of the plaintiff, either by way of penalty or in a formal manner, but decided the case on the basis of the oral and documentary evidence let in by the defendant, I have no doubt that it was on the merits of the case. The fact that oral and documentary evidence were let in by the defendant is borne out by the transcript of the proceedings dated 18.10.2010. As pointed earlier, the foreign Court, conducted the proceedings very elaborately, questioning the defendant and his counsel on various aspects. The Court even rejected some of the prayers made by the defendant. Therefore, there has been an application of mind.

28. As a last straw, the learned counsel for the plaintiff contended that the application of mind on the part of the learned Judge, to the evidence on record, should be reflected in the judgment itself and that merely on the strength of the transcript of the proceedings, an application of mind to the ultimate decision, cannot be inferred. To buttress his contention, the learned counsel relied upon the decision in *Mohinder Singh Gill v. Chief Election Commissioner* AIR 1978 SC 851: (1978) 1 SCC 405.

29. But, the contention is far fetched. The structure in which a judgment is produced, may vary from person to person and from country to country. What is important is its substance and not form. Unlike in India, the whole proceedings are video or audio recorded in the Courts in a few countries. They form part of the records. Once they disclose an active participation by a Judge, in the course of recording of evidence and also while considering

the reliefs to be granted, the ultimate decision rendered by him, cannot be said to be without application of mind, merely because all the reasons are not incorporated in the judgment itself. To make a case come within Section 13(b), what is to be seen is whether the decision was on merits or not. I am not sitting on appeal against the foreign judgment. The decision in *Mohinder Singh Gill v. Chief Election Commissioner (supra)* relates to orders passed by statutory authorities and it cannot be imported to judgments of Courts. Therefore, the first contention that the foreign judgment was not merits, is rejected.

*Proceedings opposed to natural justice:*

30. The next ground of attack is that the proceedings before the foreign Court were opposed to natural justice. Since natural justice is something which is normally identified with administrative and quasi-judicial authorities, it is necessary to find out the facets of natural justice that are applicable to Court proceedings.

31. For a long time, the English Courts regarded natural justice (in relation to foreign judgments) as being confined only to two requirements namely (i) due notice; and (ii) proper opportunity to be heard. As DENMAN, C.J. said in one of the earliest cases, "that injustice has been done is never presumed, unless we see in the clearest light that the foreign law or at least some part of the proceedings of the foreign Court are repugnant to natural justice and this has even been made the subject of enquiry in our Courts".

32. Quoting from CHESHIRE ON PRIVATE INTERNATIONAL LAW, the Supreme Court pointed out in *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid (supra)*, that "What the Courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case". Cheshire indicated two cases. The first is that of assumed jurisdiction over absent defendant. Second is that of a litigant, who, though present at the proceedings, was unfairly prejudiced in the presentation of his case to the Court."

33. But in paragraphs 40 and 41 of the report, the Supreme Court indicated a slight deviation from the rigidity of the English rule and held as follows:

"...Whatever may be the content of the rule of Private International Law relating to 'natural justice' in England or elsewhere (and we will for the purpose of this argument assume that the plea that a foreign judgment is opposed to natural justice is now restricted in other jurisdictions only to two grounds - want of due notice and denial of opportunity to a party to present case) the plea has to be considered in the light of statute law of India, and there is nothing in Section 13 of the Code of Civil Procedure, 1908, which warrants the restriction of the nature suggested.

By Section 13 of the Code of Civil Procedure a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a Court that it must be obtained after due observance of the judicial process i.e. the Court rendering the judgment must observe the minimum requirements of natural justice - it must be composed of impartial persons, acting fairly, without bias, and in good faith,

it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent Court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured; correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the municipal Court. Neither the foreign substantive law, nor even the procedural law of the trial be the same or similar as in the municipal Court. As observed by CHARWELL, J, in *Robinson v. Fenner (28)*, "In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough : *Godard v. Gray (1870) L.R. 6 Q.B. 139 (29)* and whatever the expression 'contrary to natural justice', which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does." A judgment will not be conclusive, however, if the proceeding in which it was obtained is opposed to natural justice. The words of the statute make it clear that to exclude a judgment under Clause (d) from the rule of conclusiveness the procedure must be opposed to natural justice. A judgment which is the result of bias or want of impartiality on the part of a Judge will be regarded as a nullity and the 'trial coram non-judice' *Vassilades v. Vassilades (30)* and *Manik Lal v. Dr. Prem Chand (31)*."

Therefore, the question whether the procedure adopted by the foreign Court was opposed to natural justice or not is to be considered in the light of the above principles.

34. But before doing so, I must also take note of the fact that though natural justice was traditionally regarded as being confined only to the requirements of (i) due notice; and (ii) proper opportunity to be heard, the English Courts also made an attempt to expand the scope of the principles of natural justice, in later years, by holding that the Court may consider whether there had been a procedural defect such as to constitute a breach of an English Court's views of substantial justice *Adams v. Cape Industries PLC (1990) Ch. 433 at 557*. However, in Cheshire and North's Private International Law, 13th Edition, the learned Authors have the following to say, on the issue of expanding the concept of natural justice, so as to include the theory of 'want of substantial justice':

"It opens up a gap between, on the one hand, commercial cases and, on the other hand, cases of recognition of foreign divorces and annulments, where the natural justice defence is expressly confined to instances of want of due notice and opportunity to be heard. "Want of substantial justice was a much criticised concept, and is no longer a basis for the refusal of recognition of foreign divorces, etc." The use of the concept of substantial injustice in relation to the recognition and enforcement of foreign judgments creates new uncertainty over the ambit of the defence of natural justice. Cases of procedural unfairness which do not involve a lack of due notice or opportunity to be heard would be better dealt with under the defence of public policy.'

35. Apart from the fact that the theory of “want of substantial justice” has been criticised even in England, it did not gain recognition here in India. In *Sankaran Govindan v. Lakshmi Bharathi* AIR 1974 SC 1764: (1975) 3 SCC 351, K.K. MATHEW, J. pointed out that even if there was any breach of the rule of procedure prevailing in the forum where the proceedings were conducted, that would not be material, as what we have to see is whether the proceedings have been conducted in substantial compliance with the prevailing notions of fair play. Therefore, the allegation of violation of natural justice has to be tested on the touchstone of (i) due service of notice; (ii) opportunity of being heard; and (iii) compliance with the prevailing notion of fair play.

36. In *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)*, the Supreme Court held that what is stated in Section 13(d) of the Code is no more than an elementary principle on which any civilized system of justice rests. But in matters concerning family law, the Court held, that this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. Explaining what would be considered to be sufficient compliance with the principles of natural justice, the Supreme Court laid down 2 tests. They are:

- (i) It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the proceedings; and
- (ii) If the foreign Court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the cost of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice.

Therefore, in addition to the traditional requirements of (i) want of notice (ii) opportunity of being heard and (iii) compliance with the prevailing notion of fair play (prescribed in *Sankaran Govindan v. Lakshmi Bharathi (supra)*), let me also test the contention relating to natural justice, on the touchstone of the principles evolved in *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)*.

37. As stated elsewhere, the plaintiff pitches her claim under Section 13(d) of the Code on the ground that she did not have notice, either of the intention of the defendant or of the inclination of the Foreign Court to proceed with the final hearing of the counter claim made by the defendant on 18.10.2010 and that therefore, the entire proceedings before the Foreign Court and the Final Order passed therein, without putting the plaintiff on notice of the intention to proceed with the counter claim, were opposed to the principles of natural justice.

38. In order to test the validity of the above contention, we may take note of a few facts. The facts relevant for this issue, on which there is or there can be, no controversy, are as follows:

- (i) The plaintiff and the defendant were earlier married to different persons and those marriages were already dissolved by competent Courts.
- (ii) The plaintiff and the defendant entered into matrimony in U.S.A., on 23.9.2005, as seen from the Marriage Certificate, issued by the Probate Court.
- (iii) The child was born on 18.5.2007 at Wellstar Cobb Hospital in the Town of Austell. Therefore, the minor child is a U.S., citizen.

- (iii) On 7.5.2010, the plaintiff applied for divorce in Civil Action No. 10.1.4230.48, on the file of the Superior Court of Cobb County, Georgia, through her counsel by name Michael E. Manely. The reliefs sought by the plaintiff included a prayer for primary custody of the minor child, as seen from the copy of the petition filed as plaint document No. 3.
- (iv) Within 4 days of filing of the petition for divorce, the plaintiff came to India along with the child on 11/12.5.2010, stayed here for about 10 days and returned on 22.5.2010. The petition was listed for hearing on 24.5.2010, but somehow summons were not served on the defendant till 1.6.2010.
- (v) After the service of summons on the defendant on 1.6.2010, the plaintiff filed a memo on 3.6.2010, into Court for the dismissal of her petition for divorce without prejudice. Till 1.6.2010, the defendant was kept in the dark about such a petition.
- (vi) On 26.7.2010, the plaintiff returned to India. From India, she filed a second petition for divorce in Civil Action File No. 10.1.8238.48, through the same counsel that she had earlier engaged. Summons on this Civil Action, were served on the defendant on 17.8.2010.
- (vii) Immediately, the defendant filed an “Answer and Counter Claim” on 24.8.2010 through a counsel by name Mr. Todd A. Orston, Esq. The reliefs sought for in the Counter Claim were the grant of divorce, primary physical custody of the minor, child support, equitable division of the properties etc.
- (viii) On the same day viz., 24.8.2010, the counsel for the defendant served a “Motion for Emergency Hearing” on the counsel for the plaintiff, expressing an apprehension that the plaintiff may refuse to return to the U.S., after service of the copy of the “Answer and Counter Claim”.
- (ix) The Motion for Emergency Hearing along with the Answer and Counter Claim of the defendant, were served on the counsel for the plaintiff on 25.8.2010, by fax as seen from the copy of the same filed by the plaintiff herself as part of plaint document Nos. 23 and 24.
- (x) The plaintiff filed a “Response to Motion for Emergency Hearing” on 9.9.2010. She stated therein that the original case was already scheduled for hearing on 18.10.2010 and that it would be unjust to make her travel to U.S., for an unnecessary Emergency Hearing.
- (xi) On the Motion for Emergency Hearing, a “Rule Nisi” was taken on 15.9.2010, for informing the parties that a hearing was scheduled on 5.10.2010 and that the child is to be returned to the jurisdiction of that Court. It was also served on the counsel for the plaintiff. (This Rule Nisi dated 15.9.2010 is filed as plaint document No. 25).
- (xii) By a mail dated 21.9.2010 filed as part of defendant’s document No. 22 series, the counsel for the plaintiff herein requested the counsel for the defendant herein to withdraw the Rule Nisi issued for Emergency Hearing on 5.10.2010 and also requested for Mediation on 15.10.2010, with a commitment that the plaintiff herein would return to U.S., by that time. The relevant part of the mail dated 21.9.2010 sent by the plaintiff’s counsel to the defendant’s counsel, reads as follows:  
“Also, I received your *Rule Nisi*, scheduling this matter for October 5th. As you may know, on August 31 we scheduled this matter for a *Rule Nisi* on October 18th. Ms. Thomas had already made arrangements for her return for the week before the hearing to prepare.

I am writing to ask that you consent to the *Nisi* on the 18th and withdraw the *Nisi* on the 5th. Additionally, I think it would be beneficial to mediate this matter on the 15th, while Ms. Thomas is here. We would need to find a mediator who could work with our date. Are you available on that day?."

(xiv) In response to the said mail dated 21.9.2010, the defendant's counsel sent a mail dated 24.9.2010 (part of defendant's document No. 22 series), making it clear that the defendant was agreeable to withdraw the Motion for Emergency Hearing, if the plaintiff assures to return the child to Georgia for the hearing on 18.10.2010.

(xv) By a mail dated 27.9.2010, the counsel for the plaintiff herein confirmed to the counsel for the defendant that the plaintiff would return to U.S., with the child and that he would like to mediate on 15.10.2010.

(xvi) By a mail dated 28.9.2010, the defendant's counsel agreed to withdraw the Motion for Emergency Hearing and also agreed to the request for Mediation, on the basis of the assurance given by the counsel for the plaintiff that she would return to U.S.A., with the child.

(xvii) Consequently, by a letter dated 29.9.2010, the counsel for the defendant also made a request to the Staff Attorney of the Court, requesting the Judge to remove the case from the Calendar for 5.10.2010, stating very clearly that it was being done on the basis of the assurance given by the plaintiff's counsel to return the child for the hearing scheduled on 18.10.2010.

(xviii) It appears that thereafter, the counsel for the plaintiff and the counsel for the defendant also had discussions and a referral was made to Mediation by the ADR Office. This is seen from a letter dated 8.10.2010 sent by the counsel for the plaintiff to the defendant's counsel, informing him that they (the plaintiff and her counsel) had given a deadline of 11.10.2010 for selecting a Mediator. In this letter dated 8.10.2010, the counsel for the plaintiff asserted that the plaintiff was returning on the 15th and that she would come to the house to stay along with the child.

(xix) But on 14.10.2010, the plaintiff herein sent a mail to the defendant. In this mail filed as plaintiff document No. 40, she claimed that the defendant was well aware of their relocation to India and that she would come to U.S., for the hearing of the case on 18.10.2010, if certain assurances were made. The relevant part of the mail, reads as follows:

"Hence, if you can provide me with a written assurance that I can return to India with Rhea to care of my work, commitments here and Rhea can go back to school without disruption of her classes and that you agree that we can once again come back to the US during thanksgiving as originally planned and during Rhea's December vacation for a one month period. During Rhea's vacation in December either she will come to the US or you can choose to be with her in India (this will be your choice), if this can be agreed within 24 hours I will come for the hearing. I believe this is really a fair proposition. If not, I fear you are calling us to just ensure we are trapped in place where I have no family or income or support."

(xx) The above mail dated 14.10.2010 appears to be a sudden twist in the drama. Till 8.10.2010, as it appears from the letter of the plaintiff's counsel in U.S., the plaintiff had been

repeatedly promising to return to U.S., with the child on 15.10.2010. But the mail of the plaintiff dated 14.10.2010, refusing to go over to U.S., unless an assurance, as extracted above was given, was really a bolt out of the blue.

(xxi) Eventually, the plaintiff not only failed to return to U.S., with the child on 15.10.2010, but also failed to turn up for the hearing of the case on 18.10.2010.

(xxii) On 18.10.2010, the counsel for the plaintiff informed the learned Judge in the Court of Cobb County, that the plaintiff was dismissing her petition for divorce. Immediately, the defendant who was present with his Attorney, announced that he would proceed with the counter claim. Therefore, the learned Judge proceeded to hear the counter claim. As pointed out elsewhere in this order, the defendant examined himself as a witness and marked 24 exhibits in order to prove his counter claim. Thereafter, the Court passed an order on 1.11.2010, after 13 days of the conclusion of the hearing.

39. The sequence of events narrated above, which are borne out by records reveal the following:

- (i) It was the plaintiff who first invoked the jurisdiction of the Court of Cobb County, by filing a petition for divorce on 7.5.2010, then leaving the country for India on 11.5.2010, but returning to U.S., on 22.5.2010 and later requesting the Court to dismiss her petition for divorce on 3.6.2010. The defendant was kept completely in the dark about this first petition, until 1.6.2010.
- (ii) It was the plaintiff who invoked the jurisdiction of the Court of Cobb County, for a second time, by filing another petition for divorce on 17.8.2010, even while she was in India. It is relevant to note here that the second petition was filed by the plaintiff when she was in India.
- (iii) The plaintiff was aware of the "Answer and Counter Claim" filed by the defendant on 24.8.2010, whereby the defendant sought the dismissal of the plaintiff's claim apart from seeking divorce and primary physical custody of the child.
- (iv) The plaintiff did not choose to file any response to the counter claim made by the defendant on 24.8.2010.
- (v) The defendant's Motion for Emergency Hearing, applied on 24.8.2010, was opposed by the plaintiff through her response dated 9.9.2010. In that "Response to the Motion for Emergency Hearing" filed on 9.9.2010, the plaintiff made it clear that she was due to go over to U.S., for the hearing originally scheduled for 18.10.2010.
- (vi) Through her counsel, the plaintiff gave two assurances viz., (A) that she would return to U.S., with the child on 15.10.2010 to participate in the hearing scheduled for 18.10.2010 and (B) that a Mediation could take place through the ADR Centre after her arrival.
- (vi) Contrary to the assurances that the plaintiff was giving through her counsel during the period from 9.9.2010 till 8.10.2010, she suddenly demanded an assurance from the defendant, for the first time through her mail dated 14.10.2010. Thereafter, taking umbrage under the said mail, she not only failed to turn up for the hearing on 18.10.2010, but also sought a dismissal of her own petition for divorce, despite being fully aware of the existence of the counter claim.

40. It is interesting to note that the State of Georgia has an Enactment called "Uniform Child Custody Jurisdiction and Enforcement Act", known in short as "Georgia UCCJEA". Article

19-9-70 of the said Act, prescribes the procedure for the Court to order a party to a child custody proceeding to appear before the Court with or without the child. Clause (d) of Article 19-9-70 stipulates that if a party to a child custody proceeding, who is outside the State of Georgia, is directed to appear or desires to appear personally before the Court, with or without the child, the Court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

41. In this case, as pointed out earlier, it was the plaintiff who filed the case before the Superior Court of Cobb County. The defendant filed a response and a counter claim. The date of hearing of the case was fixed as 18.10.2010. From 24.8.2010 till 14.10.2010, the plaintiff maintained that she would return to US with the child before 15.10.2010. She also had a confirmed return journey ticket for 23.11.2010. But on 14.10.2010, she sent a mail to the plaintiff asking for several assurances. On the premise that the defendant did not respond to her mail dated 14.10.2010, the plaintiff did not appear before Court on 18.10.2010. On the contrary, she requested the Court to dismiss her petition for divorce. At the time when she made that request, to dismiss her petition, the plaintiff had an option to make a request to the Superior Court of Cobb County, under Article 19-9-70 (d), to require the defendant to pay reasonable and necessary travel and other expenses for so appearing with or without the child. In other words, the last minute demand made by the plaintiff by her mail dated 14.10.2010 for appearing for the hearing on 18.10.2010, could have been made by her even to the Court under Article 19-9-70 (d). A person who is an Attorney at Law, who invoked the jurisdiction of the Foreign Court, cannot now take advantage of her own mistake in not availing a provision of the local law which was available to her benefit.

42. It is in the background of these facts that we have to see if her allegation that the whole proceedings before the Court of Cobb County, were opposed to the principles of natural justice, is justified or not.

43. Interestingly, the grievance of the plaintiff is not that she did not have due notice of the counter claim itself. Her grievance is that she was not put on notice of the intention of the defendant and the intention of the Court to proceed with the hearing of the counter claim.

44. But the said grievance, in my considered view, is wholly unjustified. The petition for divorce filed by the plaintiff and the counter claim made by the defendant, were both slated for hearing on 18.10.2010. Every case is listed before every Court, only with the intention of taking it up for hearing, irrespective of whether it actually happens or not. Therefore, the listing of the case on 18.10.2010 before the Court of Cobb County, was with the intention of taking up both the petition for divorce filed by the plaintiff and the counter claim filed by the defendant. No client is entitled to think that a case will be listed for hearing on one day and that the Court will also put the client on notice of its intention to hear it on that date. Once a case is listed for hearing, on a specified date, with the consent of the counsel on both sides, it reflects the intention of the Court to take it up for hearing. There is no obligation on the part of the Court to put on notice, a party who fails to appear on the appointed day and who also withdraws her claim on that date.

45. On 18.10.2010, when the petition for divorce filed by the plaintiff and the counter claim made by the defendant came up for hearing, the plaintiff's counsel Mr. Manely was present in Court. This is seen from the preamble to the final order dated 1.11.2010. At the commencement of the hearing, the plaintiff's counsel informed the Court of the plaintiff's decision to have her petition dismissed. Immediately, the counsel for the defendant informed the Court that he would proceed with the counter claim. In the course of hearing of the counter claim, the plaintiff's counsel appears to have walked out of the Court hall as he was disengaged by the plaintiff. In the transcript of the proceedings that happened before Court on 18.10.2010, (filed as one of the defendant's document) it is recorded in page No. 4 that Mr. Manely left the Court saying that he was no longer involved in the case. Therefore, it is clear that the plaintiff's counsel was very much aware of the intention of the defendant to proceed with the counter claim. The plaintiff cannot now take advantage of her own action in dismissing her claim and disengaging her counsel at the last minute on the date of the hearing and contend that the proceedings were vitiated for want of due notice.

46. Even if the petition for divorce had been filed by the plaintiff in an Indian Court and the defendant had filed a counter claim, our Court would have done the same thing as the Superior Court of Cobb County had done in this case. This is the mandate of the law under Order 8, Rules 6A to 6G of the Code of Civil Procedure, 1908. Under Rule 6D of Order 8, CPC, the Court is obliged to proceed with the counter claim, in cases where the suit of the plaintiff is stayed, discontinued or dismissed. Rule 6E goes a step further by entitling the Court to pronounce judgment against the plaintiff in relation to the counter claim, if the plaintiff makes default in putting in a reply to the counter claim made by the defendant.

47. As pointed out earlier, the plaintiff filed the petition for divorce on 17.8.2010. The defendant filed his "Answer and Counter Claim" on 24.8.2010. The Answer and Counter Claim were served on the plaintiff's counsel along with a Motion for Emergency Hearing. For reasons best known to her, the plaintiff chose to respond to the Motion for Emergency Hearing, but not to the counter claim. Therefore, if the case was before an Indian Court, Rule 6E of Order 8 of the Code, could have been validly invoked, due to the failure of the plaintiff to put up a reply to the counter claim. If really this had happened, the plaintiff would not be heard to allege any violation of the principles of natural justice.

48. The plaintiff, as pointed out by the defendant, is no ordinary litigant, but a legal practitioner, heading a unit of one of the leading law firms of the country. Therefore, she must be deemed to be aware of the consequences of (i) her non-appearance before the Court of Cobb County, whose jurisdiction she herself invoked voluntarily, not once but twice and (ii) her dismissal of her petition for divorce, at the last minute, despite the pendency of the counter claim.

49. As pointed out by a Division Bench of this Court, to which I was a party, in *Dr. C. Chendroyaperumal v. National Institute of Port Management* (2006) 4 MLJ 989, the principles of natural justice are for thoroughbred horses and not wild horses. Therefore, a person who initiates proceedings before a Court of competent jurisdiction and withdraws it at the last minute, after a counter claim is lodged, can never be allowed to contend that the

Court should have put him on notice of its intention to proceed with the hearing of the counter claim. Such a contention can be termed only as an unnatural demand for natural justice. What makes the cry of the plaintiff for natural justice foul, is the fact that even today she seeks to retain a benefit that has accrued out of the very same order that she assails. She has accepted that portion of the order of the American Court by which her marriage has been dissolved. Therefore, to term the proceedings before the Court of Cobb County as opposed to the principles of natural justice, is very uncharitable, especially from a litigant who is also a practitioner of law.

50. In any case, the hearing of the counter claim took place on 18.10.2010, when the defendant was examined on oath and 24 documents were marked as exhibits. But the decision of the Court was pronounced only on 1.11.2010. The fact that the hearing of the counter claim had taken place on 18.10.2010 and that the written orders were expected in a few days, was posted by the defendant in the net on 20.10.2010 itself. The plaintiff herself has filed a copy of this mail as her document No. 43. Even then, she did not take any steps from 20.10.2010 till 1.11.2010 when the Court pronounced final order. Just as the plaintiff was permitted to file her petition for divorce on 17.8.2010 through her counsel in U.S., even while she was in India, it was possible for her to make her counsel file an application for reopening the hearing, at least after coming to know through the mail dated 20.10.2010, of the hearing that took place on 18.10.2010. The plaintiff did not choose to do it.

51. Now we may look at her conduct after the mail dated 20.10.2010. In response to the mail dated 20.10.2010 sent by the defendant, the plaintiff sent a reply dated 20.10.2010. She has filed a copy of this mail as plaint document No. 44. In that mail, she never even whispered that the hearing of the counter claim was proceeded, in violation of the principles of natural justice, without due notice to her. Therefore, her claim that the entire proceedings were opposed to the principles of natural justice, is entirely frivolous.

52. The other limbs of the argument relating to violation of the principles of natural justice, relate to (i) proper opportunity of being heard (ii) notions of fair play and (iii) arrangements to be made to enable a woman to contest the proceedings. These limbs of the contention also have to fail, in view of the fact (i) that it was she who initiated the proceedings, (ii) that she was put on notice of the counter claim as well as a Motion for Emergency Hearing (iii) that she did not choose to reply to the counter claim (iv) that she repeatedly assured the defendant that she would attend the hearing on 18.10.2010 and that a Mediation could also be arranged and (v) that at the last minute, she refused to attend the hearing, but requested her petition to be dismissed. Therefore, a person who was aware of the date of hearing and who was represented by counsel on the date of the hearing (at least for the purpose of getting her petition dismissed), cannot be allowed to contend that proper opportunity of hearing was not granted. What transpired on 18.10.2010 was a matter of choice made by the plaintiff and not a matter of chance. A person who fails to avail the opportunity of hearing, cannot contend that there was no proper opportunity. Therefore, the attack to the foreign judgment under Section 13(d) is bound to fail.

53. Even if the tests prescribed in *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)* are applied, the plaintiff had a return journey ticket to US, only with which she always assured to return for the hearing fixed for 18.10.2010. Admittedly, she had an add-on credit card, for which the payments were to be made by the defendant. In any event, the Court, while passing the order dated 1.11.2010, fixed the date for the plaintiff's return to coincide with the date on which she had a confirmed booking for her return journey. As pointed out repeatedly, the date of hearing 18.10.2010 was not a date fixed at the instance of the defendant in respect of any case independently filed by him. It was a date fixed for the hearing of a case filed by the plaintiff herself. Therefore, the plaintiff cannot take refuge under the dictum of *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)*, just by relying upon a mail sent on 14.10.2010 to create a record. In paragraphs 20 and 21 of the decision in *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)*, the Court held as follows:

"20...The jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case."

The case on hand obviously falls within the exceptions stated above. Moreover, the plaintiff had ample opportunities to take recourse to Article 19-9-70 (d) of Georgia UCCJEA, which I have extracted earlier. Despite the fact that the case was filed by her in the first instance, she could have applied to the American Court for remedy under the said Article for payment of the expenses for travel and stay. If the Court had refused, she may perhaps be entitled to invoke the tests laid in *Y. Narasimha Rao v. Y. Venkata Lakshmi (supra)*. Since she failed to do it, the challenge to the order on the ground of violation of natural justice should also fail. *Fraud and misrepresentation*

54. The next ground on which the foreign judgment is assailed is that it was obtained by fraud and misrepresentation by the defendant. In paragraph 29 of the plaint, the plaintiff has claimed that she withdrew her petition for divorce on the *bona fide* belief that the defendant would also be withdrawing his counter claim. She has claimed that the root cause of all the problems was perceived by the defendant to be her divorce petition and that therefore based upon the representations and assurances, she withdrew the petition. But according to her, the defendant pursued his counter claim and fraudulently obtained a decree.

55. It is contended by the plaintiff in paragraph 34 of the plaint that a misrepresentation was made to the Court by the defendant, as though he was not aware of the plaintiff's shifting to India. The decision to come to India, according to the plaintiff, was consensual and that therefore, the Court of Cobb County was misled by the defendant by false representations.

56. In *Sankaran Govindan v. Lakshmi Bharathi (supra)* K.K. MATHEW, J. cited DE GRAY, C.J. in *The Duchess of Kingston's* case to explain the nature of fraud that would vitiate a judgment. It was pointed out therein that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, it may not be permissible to show that the Court was mistaken. However, it could be shown that it was misled. There is a clear distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits, the decision was one which should not have been rendered, but that it can be set aside if the Court was imposed upon or tricked into giving the judgment. There is a clear distinction between mistake and trickery.

57. To bring out the distinction between a Court being mistaken and a Court being misled, the Supreme Court referred to English, Canadian and American decisions and thereafter summed up the legal position in paragraphs 31 and 32 as follows :

“Although there is general acceptance of the rule that a foreign judgment can be impeached for fraud, there is no such accord as to what kind of fraud is sufficient to vitiate a foreign judgment. Must it be only fraud which has not been in issue or adjudicated upon by the Court which gave the judgment ? Must the Court in the subsequent action where fraudulent misleading of the foreign Court is alleged refrain from going so far in its search for such fraud as to re-try the merits of the original action? The wide generality of the observations of COLERIDGE, C.J. in *Abouloff v. Oppenheimer (supra)* and of LINDLEY, J in *Vadala v. Lawes (supra)* in favour of the vitiating effect of fraud to the utter disregard of the *res judicata* doctrine certainly departs from the usual caution with which the Courts proceed when dealing with a subject, the law of which is still in the making. We have already referred to what COLERIDGE, C.J. said in *Abouloff v. Oppenheimer (supra)*, namely that the question whether the foreign Court was misled in pronouncing judgment never could have been submitted to it, never could have been in issue before it and, therefore, never could have been decided by it. This is, generally speaking, true. But it is also axiomatic that the question of credibility of witnesses, whether they are misleading the Court by false testimony, has to be determined by the Tribunal in every trial as an essential issue, decision of which is a prerequisite to the decision of the main issue upon the merits. A judgment on the merits, therefore, necessarily involves a *res judicata* of the credibility of witnesses insofar as the evidence which was before the Tribunal is concerned. Thus, when an allegation is made that a foreign judgment is vitiated because the Court was fraudulently misled by perjury, and issue is taken with that allegation and heard, if the only evidence available to substantiate it is that which was used in the foreign Court, the result will be a re-trial of the merits. It is hard to believe that

by his dictum Lord COLERIDGE, C.J. ever intended, despite the abhorrence with which the common law regards fraud, to revert to the discredited doctrine that a foreign judgment is only prima facie evidence of a debt and may be re-examined on the merits, to the absolute disregard of any limitation that might reasonably be imposed by the customary adherence to the *res judicata* doctrine. DUFF, J with his usual felicity put the point thus in *MacDonald v. Pier (1923) SCR 107 , 120-121*: ‘One is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the Court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this : such jurisdiction exists but in the exercise of it the Court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an issue which transivit in *rem judicatam*, under the guise of impugning a judgment as procured by fraud. Therefore, the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial.’

As GARROW, J said in *Jacobs v. Beaver (supra)* the fraud relied upon must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial which were met with counter statements and the whole adjudicated upon by Court and so passed into the limbo of estoppel by the judgment. That estoppel cannot be disturbed except upon allegation and proof of new and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.”

58. It is seen from the statement extracted above, that the supreme Court first addressed itself to the question as to whether in an action alleging fraudulent misleading of the foreign Court, the Court would refrain from going so far in search of such fraud, as to retry the merits of the original action. Then the Supreme Court pointed out that the fraud relied upon, must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial which were met with counter statement and the whole adjudicated upon by Court and so passed into the limbo of estoppel by the judgment. That estoppel, according to the Supreme Court, cannot be disturbed except upon allegation and proof of new and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.

59. Similarly, the Supreme Court pointed out in *Sathya v. Teja Singh (supra)*, that “in order to render a foreign decree subject to collateral attack on the ground of fraud, the fraud in procurement of the judgment must go to the jurisdiction of the Court”. Keeping the principles laid down in *Sankaran Govindan v. Lakshmi Bharathi (supra)* and *Sathya v. Teja Singh (supra)*, if we analyse the facts of the case, it will be clear that the Foreign Court was neither mistaken nor misled by the defendant. On the contrary, it was the plaintiff, who is guilty of misleading the defendant even with regard to the Court proceedings. When the defendant moved a Motion for Emergency Hearing, along with his answer and counter claim on 24.8.2010, the plaintiff managed to make the counsel for the defendant agree not to press for

an Emergency Hearing on 5.10.2010 by promising two things viz., (i) that she would return to U.S., along with the child and be present in Court for the hearing and (ii) that there could also be a mediation on 15.10.2010. Going back on the repeated assurances, the plaintiff failed to return to U.S., and also sought the withdrawal of her petition for divorce, at the last minute.

**60.** The only ground on which the plaintiff alleges fraud is that after having consented for their permanent re-location in India, the defendant misled the Foreign Court as though he was unaware of her re-location. But, this would hardly amount to a fraud or misrepresentation. The question as to whether the defendant agreed for the plaintiff's permanent re-location in India or not, has become a contentious issue. While the plaintiff claims that by consent, she was relocated in India, the defendant disputes it. As a matter of fact, the defendant has been consistent in contending that there was no agreement for permanent relocation.

**61.** Assuming for a moment, that the plaintiff came to India in July 2010 by consent, for a relocation, there was no necessity for her to file a petition for divorce on 24.8.2010 in the U.S., Court, while she was in India. Even in the petition for divorce filed by the plaintiff, it is not stated that by consent of parties, she had shifted to India permanently. On the contrary, it was stated by the plaintiff in her complaint for divorce that "she was currently vacationing in India".

**62.** Moreover, in the Motion for Emergency Hearing, the defendant made an allegation that the plaintiff took the minor child to India for a vacation with an understanding that she would return the minor child to U.S., at the end of the vacation. In paragraph-7 of the Motion for Emergency Hearing, the defendant specifically pleaded that after reaching India, the plaintiff notified the defendant about her intention to relocate permanently in India. This stand taken by the defendant in his Motion for Emergency Hearing, was stoutly denied by the plaintiff in her response to the Motion for Emergency Hearing. Thus, the question as to whether the parties agreed for the permanent relocation of the plaintiff and the child to India, became a contentious issue.

**63.** Once an issue becomes contentious, it is for the parties to lead evidence in support of their rival contentions. A party who fails to appear before Court and lead evidence in respect of a contentious issue cannot even accuse the opposite party of misleading the Court and of perpetrating a fraud upon the Court. What is done behind the back of a person, is what would actually amount to fraud. If a person takes a particular stand with regard to a matter in issue, consistently, to the knowledge of another, he cannot be accused of misleading the Court, when he takes the same stand in Court.

**64.** As a matter of fact, the transcript of the Foreign Court proceedings filed by the defendant as one of his documents would show that the defendant was honest enough to bring to the notice of the Court, a mistake that had crept in to the transcript. To a question by his counsel, which appears in page 18 of the transcript, the defendant appears to have replied that he was not in Town when the plaintiff actually packed up and left for India. The copy of the transcript was made applicable to the defendant on 16.6.2011. Upon perusal of the same, the defendant

found a few mistakes and applied to the Court for correction of the mistakes. One of the mistakes which the defendant pointed out was that he was not in Town when the plaintiff packed up and shifted her property to India and that she used the time when he was out of Town to remove the personal property and that he was in Town when she actually left.

**65.** It must be remembered that the entire transcript is filed in this case by the defendant and not by the plaintiff. The plaintiff did not even have a copy of the transcript. Therefore, it was possible for the defendant to have left the transcript of the proceedings to remain as such without any corrections. The plaintiff was not even aware of the mistake that had crept in the transcript. Yet the defendant took steps to have the mistakes corrected in the transcript, disclosing the fact that there was no attempt on his part to mislead the Foreign Court.

**66.** The circumstances under which the plaintiff left U.S., were narrated by the defendant to the Court of Cobb County on the following lines, which itself would disclose that there was no attempt at misleading the Court or playing fraud upon the Court: "The first time she ever broke the news of having to want a divorce was 22.4.2010. On May 7th she filed a divorce suit in this very august Court but she did not serve the papers until June 1st when I strongly refused her to go back to India. But once I agreed to a temporary trip of three to four months, she immediately wanted to dismiss her divorce suit on 3.6.2010 in this august Court. And she left for India on 26.6.2010, with the kid under the real notion that it's going to be a temporary trip. But immediately after landing in India, within 18 days she again filed a second divorce suit in this county Court again and sued me, which is the current selection case. So now, since she is having some concerns of probably not having the facts straight, she is trying to file a dismissal here and kind of like go and file a similar complaint back in India because she feels that it might be a favourable Court for her. And I'm not an Attorney. So I'm literally at the mercy of the justice system here and in India."

**67.** Moreover, the actual arrangement reached between the parties, is reflected by a mail dated 18.5.2010. When the plaintiff was in India during the period from 12.5.2010 to 22.5.2010, the defendant sent a mail on 18.5.2010 to the sister and brother-in-law of the plaintiff. A copy of this mail is filed as plaint document No. 12. A perusal of this mail shows that when the relationship got strained by the end of April 2010, the plaintiff threatened to return to India with the child. This mail also discloses that attempts were made by the plaintiff's sister and brother-in-law to arrive at a mediated settlement. The points that the defendant wanted to be part of any amicable settlement, were indicated by him in the said mail, some of which are extracted as under:

1. Between May 13th and May 18th, you had several rounds of conversations with Dorothy and suggested the following for both of us to consider.
2. Dorothy will take Rhea to Chennai (Madras) on a round-trip ticket somewhere towards last week of July or first week of August returning back to the US sometime in early January 2011.
3. The US Courts will continue to be the venue and of natural jurisdiction because of Rex's domicile and residency,

notwithstanding the fact that Dorothy will be travelling to Chennai on a temporary experiment. She will continue to be the tax-payer at Cobb-County, Georgia and will continue to own the house and other liabilities, including driving-license and an address.

8. Dorothy will try a temporary assignment/ experiment of working in her Chennai Office of her current employer Kochhar & Company.

9. During this time, she will rent her own apartment and will put Rhea on a temporary play-school. She would want to experiment and see how much it costs for her and Rhea and so she will manage her salary/monies that she will get in India. I offered to send in additional monies from US, if for any reason, there is shortage of monies in Chennai for Dorothy and Rhea.

11. Rhea will be travelling to India, strictly on temporary basis on her current Indian visitor visa. Due to the new Government of India regulations, subsequently to the American terrorist Headley's case, a visitor to India on tourist visa cannot re-enter India for a minimum period of 2 months and so between now and July last week, Rhea cannot travel to India.

12. Dorothy will file for a ReEntry Permit/Advance Parole with the US Citizenship and Immigration Services to ensure that her 5-6 month stay for the Chennai experiment does not throw her Green-Card into any disarray. Dorothy should make sure this information of the re-entry-permit is shared with me as well.

13. Rex will try his best to visit Dorothy and Rhea in December 2010, as he usually visits India for Christmas.

14. Dorothy will bring Rhea back to the US in January 2011 for at least a minimum of 2 weeks. This way, Rhea will get to visit her friends, her former school-teachers, neighbours and will also be able to spend some quality time in her own great country, the United States, for which she needs nobody's permission! In other words, Rhea's citizenship and her inalienable rights should be respected by Dorothy and everybody.

15. Besides, it is during this January 2011, that Dorothy should make up her mind as to whether her Chennai experiment worked or failed. If it failed, she will come back to the US permanently, discarding this temporary experiment in Chennai.

17. Assuming that Dorothy wants to continue the experiment, she will again take Rhea back to India to continue with her experiment with the Re-entry permit she already had and it is around this time in January or February 2011, that Rhea will be having her P10 Card for the first time.

20. On or around April-June 2011, I will try to visit India on a temporary basis to see if both Dorothy and Rex can continue to rear Rhea in India.

21. As part of the mediation brokered, it comes at a tremendous cost to me personally because it totally does not consider my career concerns and ambitions with me having a very good position in the evolving areas of Smart Grid and Smart Meters in the Energy and Power Industry. Yet, I am ready to throw everything and do what is the right thing for my poor 3 year old daughter Rhea's sake, whose birthday happens to be today! So, I am ready to come as a pauper, throwing everything that I had painfully earned in this great country -US - only because I feel it is very cruel to subject Rhea to a divorce and bitter custody fight. I will continue to do everything in my capacity to ensure that Rhea has a

smooth childhood. When she grows as a big girl, I want her to know that her Dad tried EVERYTHING just for HER SAKE - gave up everything he painfully assembled, just to spare her of any ordeal.

22. Any conflict at this stage should be resolved through negotiations/mediation and if that should fail, then take legal recourse with the Court of jurisdiction being the US Courts, especially the one with the natural jurisdiction, which will continue to be the Superior Court of Cobb County of the State of Georgia, US because this is where our marriage was solemnized and registered and this is the county that we all (Rhea, Dorothy and I) are residents and Rhea being a US Citizen and potentially around this time-frame. I could be a US citizen as well.

24. Dorothy should resist all attempts to avoid International Parental Child Abduction. This involves, not taking Rhea to a 3rd country from India. As such, she should entrust Rhea's passport with Prabhu Uncle-Sheela Akka, while in India. Likewise, up until late July 2010/early August 2011, Dorothy should entrust Rhea's passport with Rex or any other mutually agreeable 3rd party because Dorothy will continue to have Rhea by her side and it is only fair that Rhea's passport not be with her as well.

26. If at any time, Dorothy refuses to bring back Rhea to her country of citizenship (US) after repeated requests from Rex in the US, then Rex will move the Courts in the US for ex parte custody orders to properly file a complaint with the US State Department for International Parental Child Abduction thereby making Dorothy come to the US to fight in the US Courts to decide on the terms of divorce and custody of Rhea in a fair and legal manner."

68. As stated earlier, the plaintiff was in India from 12.5.2010 to 22.5.2010 when the above mail was sent by the defendant. She returned to US on 22.5.2010 and all the arrangements such as (i) sale of the house (ii) sale of the car (iii) withdrawal of the child from the school (iv) admission of the child in a school in Chennai (v) hiring an apartment in Chennai etc., had taken place only thereafter, partly when she was in US and partly after she came to India by the end of July 2010. If the plaintiff had arrived in India on 26.7.2010, with any respect for the above settlement, she should not have filed a second petition for divorce, within 20 days of her arrival in India, on 16.8.2010, through her counsel. The filing of the petition for divorce on 16.8.2010, shows that all the conditions subject to which the defendant agreed for a settlement, by his mail dated 18.5.2010, were thrown to the winds by the plaintiff. Therefore, the contention of the defendant that his consent was for a temporary relocation, subject to certain conditions, on an experimental basis, appears to be acceptable. This is clear also from another mail dated 26.7.2010 filed as defendant's document No. 16. In para 2 of the said mail, the defendant made it clear, even before the plaintiff left US that he agreed to her going to India only temporarily. In the penultimate paragraph of the same mail, he again reiterated that she could go only temporarily. When the defendant perceived the relocation only as temporary at all points of time and that too subject to certain conditions, his presentation of the case before the foreign Court, on the same perception, cannot by any stretch of imagination be termed as fraudulent or misleading. In any case, the filing of the petition for divorce on 16.8.2010, by the plaintiff, was not the product of any consent. Therefore, the defendant, who was consistent in his understanding and communication, of the nature of the plaintiff's

visit to India along with the child, did not either mislead or play fraud upon the foreign Court. Even in cases where a finding of fact is rendered on the basis of evidence, but such fact is actually not true, the case will not fall under the category of fraud. In *T. Sundaram Pillai v. Kandasamy Pillai* AIR 1941 Mad. 387, KING, J., held that "merely because a plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true, he cannot be stated to have obtained that decree by fraud. The learned Judge further pointed out that there must be fraud connected with the procedure in the suit itself to bring the matter within Clause (e) of Section 13".

69. In order to establish that by consent of parties, she shifted to India permanently, the plaintiff has brought out the following facts in her pleadings viz.:

- (i) The sale of their house in Atlanta.
- (ii) The sale of the plaintiff's Car in Atlanta.
- (iii) The farewell to the child in her school in Atlanta.
- (iv) The vetting of 1-131 Form by defendant.
- (v) The defendant vetting the lease agreement for the house at Chennai.
- (vi) The contribution of the defendant's parents for the furniture.
- (vii) The purchase of the tickets by the defendant for the plaintiff as well as the child.
- (viii) The enrolment of the child in a school at Chennai.
- (ix) Withdrawal of the child's medical records from the U.S. Hospital and the shipment of child's personal facts to India.

70. Though the plaintiff has filed a bill of sale as plaintiff document No. 8 signed by the defendant, in evidence of the sale of the car with the consent of the defendant, all other things pleaded in the preceding paragraph, do not appear to have had the consent of the defendant. This is seen from the following:

- (i) The letter dated 8.6.2010 addressed to the Shreiner Academy for cancellation of the admission of the child, filed as plaintiff document No. 9, contains only the signature of the plaintiff. Though the letter is described as emanating from both the defendant and the plaintiff, it is signed only by the plaintiff.
- (ii) Similarly, the Authorisation to Release Health Information, filed on 6.11.2010 (plaint document No. 10) shows that the said form was also signed only by the plaintiff and not by the defendant.
- (iii) The mail dated 28.5.2010, filed as plaintiff document No. 11, signed by the plaintiff to the defendant, shows that the information regarding withdrawal of the child from the school in U.S., and the registration of the child for admission to a school in Chennai, were passed on by the plaintiff to the defendant just by way of information.
- (iv) Form 1-131 is only an application for travel document, which appears to have been obtained with the consent of the defendant. But the necessity for obtaining the said document was to facilitate re-entry of the plaintiff into the U.S., as seen from the document itself, filed as plaintiff document No. 14. Therefore, this has nothing to do with the idea of permanent relocation.
- (v) The emails filed as plaintiff document No. 15 relate to air ticket reservations. The payment for the air tickets were made out of the bank account of the defendant. But the air tickets were admittedly round trip tickets and hence they only disclose the belief that the defendant had that the plaintiff would return to U.S.

- (vi) The mails dated 21.6.2010, 1.7.2010, 2.7.2010, filed as plaintiff document No. 16, by which the plaintiff informed the defendant of the factum of taking an apartment on rent, are only one sided communications. These communications do not disclose a consensus ad idem between the parties on the issue of permanent relocation.
- (vii) The only mails that emanated from the defendant, are dated 18.5.2010, 26.7.2010 and 12.8.2010. They are filed as defendant's document Nos.12 and 16 and plaintiff document No. 20 respectively. They show (a) the conditions subject to which the defendant agreed to send the child to India and (b) the defendant's belief that the plaintiff and the child would come back to U.S., on 23.11.2010, the date for which the return journey ticket had been reserved.

71. Therefore, even the documents filed before me by the plaintiff disclose (i) that what was agreed was only a temporary relocation in the first instance (ii) that it was conditional (iii) that within 20 days of her arrival in India, the plaintiff committed a breach of those conditions and moved the foreign Court for divorce. If on the basis of the documents filed on both sides, I myself cannot come to a conclusion that the defendant consented unconditionally to the plaintiff's permanent relocation in India, it is impossible for me to think that the defendant misled the Foreign Court about this issue and obtained an order by fraud or misrepresentation. If there had been a permanent relocation to India, by mutual consent, in July, where was the necessity for the plaintiff to file a petition for divorce and for primary custody of the child, on 16th August, within about 20 days of her arrival in India?

72. Assuming for a moment that the defendant misrepresented to the Court of Cobb County certain facts, it was not as though the plaintiff did not have any opportunity to expose the falsity of his claim. The plaintiff is an Attorney who was represented by a local Attorney in the case. The plaintiff was aware of the claim made by the defendant about the circumstances under which she moved to India. Therefore, she owed a duty to the Court, if there was actually a misrepresentation on the part of the defendant, to bring it to the notice of the very Court whose jurisdiction was actually invoked by her and not by the defendant. The transcript of the proceedings (page-4) shows that Mr. Manely, the Attorney engaged by the plaintiff was present at the time when the case was called. After informing the Court of the plaintiff's decision to withdraw her petition, the counsel left. This fact has been recorded by the learned Judge in pages 4 and 5 of the transcript.

73. As an Attorney by profession and as a person who had engaged a local Attorney to represent her, the plaintiff owed a duty to the Court of Cobb County, at least as a matter of professional commitment, to inform the Court, if there was any attempt by the defendant to mislead the Court. The stand taken by the defendant, which is alleged now to be a misrepresentation, was laid bare in the Motion for Emergency Hearing filed by the defendant on 24.8.2010 itself. Therefore, it is not as though the plaintiff was not aware of the representations that the defendant was making before the foreign Court. Despite being aware, sufficiently in advance, of the very foundation upon which the defendant proposed to proceed with his counter claim, the plaintiff withdrew her appearance from Court. Therefore, the plaintiff has lost the moral authority to contend that the Court

was misled by the defendant through his misrepresentations. Hence, the attack to the judgment of the Foreign Court on the ground that it was vitiated by fraud, cannot be sustained.

74. Moreover, it is to be noted that the plaintiff is not attacking the foreign judgment in entirety. The foreign judgment contains several decretal parts, one of which is the dissolution of the marriage of the plaintiff with the defendant. The plaintiff has conveniently chosen to accept this part of the foreign decree and challenges only the portion relating to custody. If the allegation of fraud is sustained, it would bring down the entire edifice built upon a foundation made of fraud. Fraud vitiates all solemn acts and the plaintiff cannot seek to retain one portion which is beneficial to her. Her selective challenge makes her ground of attack extremely weak. Therefore, I do not accept it.

#### *Welfare considerations*

75. Though the case on hand is a civil suit seeking a declaratory relief that the foreign judgment is null and void and unenforceable, Mr. J. Sivanandaraj, learned counsel for the plaintiff contended that since it relates to the custody of a minor child, even if the foreign judgment is taken to be valid, it would at the most serve as a piece of evidence or one of the factors for consideration, in a case of this nature and that the Court may still hold an enquiry into the issue of interest and welfare of the child. According to the learned counsel for the plaintiff, all other principles of law would yield to the principle of interest and welfare of the child and that while performing its role of *loco parentis*, the Court is not fettered by other technicalities of law.

76. At the outset, it must be remembered that I am neither dealing with a *Habeas corpus* petition under Article 226 nor with a petition under the Guardians and Wards Act, 1890. I am dealing with a suit praying for a declaration that a portion of a foreign judgment, unpalatable to the plaintiff, is null and void. In other words, the case on hand does not arise directly under the jurisdiction vested either under Clause 17 of the Letters Patent or under Section 7 of the Guardians and Wards Act, 1890. Within the precincts of this heritage structure, every Judge exercises different jurisdictions, some under the , some on the civil appellate side, some on the ordinary original civil side and so on and so forth. While exercising jurisdiction on one side, it is not open to a Judge to exercise jurisdiction on another side, merely because the High Court is one. My jurisdiction in this case arises out of some of the provisions of the Letters Patent, the rules on the original side of this Court and the . Therefore, I cannot now convert this into a proceeding under the . Yet, I shall consider this issue also, in view of the fact that the ultimate decision I may render, would affect a minor child directly. I can do so, by treating the issue of interest and welfare of the child as part and parcel of the issue of *prima facie* case, while considering the prayer for injunction.

77. The extent to which the judgment of a foreign Court is to be recognised and/or enforced, has been the subject matter of debate not only in our Courts, but also in several jurisdictions for centuries. In England, the need to recognise and enforce foreign decrees was originally conceived from the 17th century onwards on the basis of the theory of comity of nations. Dicey and Morris point out that English Judges feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad. But, this theory was superseded

by what is called the Doctrine of Obligation, which was stated by PARKE, B., in *Russell v. Smyth* (1842) 9 M & W 810 and approved by BLACKBURN, J., in *Godard v. Grey* (*supra*). Apart from these doctrines, Dicey in England also propounded the theory of vested rights, but even according to the authors of Dicey and Morris, it went out of fashion after his demise.

78. Insofar as U.S.A., is concerned, 3 theories were advanced to explain what happens when the Courts of one jurisdiction recognise or give effect to the laws of another jurisdiction. They are (i) the Comity theory of Professor Story (ii) the vested rights theory of Professor Beale (similar to the one propounded by Dicey of England) and (iii) the local law theory of Professor Cook.

79. The theory of comity is based on the premise that since a state cannot, by its laws, directly affect or bind property out of its own territory or bind persons not resident therein, the foreign law operates in the forum only at the will or comity of the Courts of the forum. Though Justice CARDOZA has contended that use of the word 'comity' has created problems in that it suggests a discretion unregulated by general principles, Story wrote in his Conflict of Laws as follows:

"It would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all and none for itself; and that all might establish rules, which none were bound to obey. The absurd result of such a state of things need not be dwelt upon"

80. The theory of vested or acquired rights postulates that it is not the foreign law but the rights created by the foreign law that are enforced. This theory can be said to be similar to, though not exactly the same as, the doctrine of obligations. But, this theory came in for heavy criticism and it was pointed out in 65 Yale L.J., 1087 (1956) that "the theory of vested rights has been brutally murdered by Cook, Lorenzen and others, though it still flits ghostlike through many decisions." The third theory namely the local law theory is based on the premise that whatever effect the law of one state or country may have in another state or country, depends upon the law of the latter; both the right and the remedy are created by the law of the forum.

81. Whatever be the name given to the principle adopted for recognition and enforcement of foreign decrees, they remain mere symbols. The statement made by Katzenbach in Conflict on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law 65 Yale L.J. 1087 (1956) is of significance in this regard:

"When a Court applies the rules and principles found in the statutes or judicial decisions of another sovereign, it can be said that the Court is either enforcing foreign law, enforcing a right created by foreign law or enforcing a right created by its own law which is as nearly homologous as possible to that arising under the foreign law. All we are doing is using different symbols to describe similar judicial behaviour. Unhappily, however, the symbols come freighted with a host of philosophical assumptions, supplementing the inherent tyranny of words"

Therefore, there is no single theory which can be said to have gained universal recognition for all time to come. As DENOVAN, L.J., said in *Formosa v. Formosa* (1962) 3 All ER 419 "Rules of Private International Law are made for men and women-not the other way round-and a nice tidy logical perfection can never be achieved".

82. Keeping the above theoretical forms in mind, if we come to the Indian scenario, especially with regard to cases that arose out of child custody disputes, it is seen that one of the earliest cases to come up before the Supreme Court, was in *Sathya v. Teja Singh* (*supra*). Quoting from CHESHIRE'S PRIVATE INTERNATIONAL LAW, the Court pointed out in that case that Private International Law is not the same in all countries and that there is no system of Private International Law which can claim universal recognition. The Court also quoted the celebrated writer Graveson to the effect that "almost every country in the modern world has not only its own system of Municipal law, differing materially from those of its neighbours, but also its own system of conflict of laws". After indicating that we (Indian Courts) cannot adopt mechanically, the rules of Private International Law evolved by other countries, the Supreme Court observed that these principles vary greatly and are moulded by the distinctive social, political and economic conditions obtaining in these countries.

83. Speaking of the peculiar problems of conflict of laws arising in the United States of America, due to the co-existence of 50 States, each with its own autonomous legal system, the Supreme Court pointed out in *Sathya v. Teja Singh* (*supra*), that under Article IV, Section 1 of the American Constitution, full faith and credit is required to be given in each State, to the public Acts, Records and Judicial Proceedings in every other State. Consequently, the validity of a divorce decree granted by a State Court in the United States, is tested in the other States as if it were a decree granted by a foreign Court. Though the acceptance of the validity of a decree granted by one Court, by other Courts, is on the principle of "comity", the Supreme Court pointed out, relying upon the American author Livermore that comity is a matter for sovereigns and not for Judges and that in deciding whether a decree will be recognised in another jurisdiction, public policy and good morals have to be considered. No country is bound by comity to give effect in its Courts to the laws of another country which are repugnant to its own laws and public policy. To come to the said conclusion, the Supreme Court relied upon the fact that American Courts themselves found it abhorring to accept collusive mail-order divorces granted by Mexican Courts to all and sundry, of whatsoever nationality and domicile. A foreign decree of divorce is denied recognition in American Courts (i) if the judgment is without jurisdiction or (ii) if it is procured by fraud or (iii) if treating it as valid would offend public policy. It appears from this decision that the shift from the "theory of comity of nations" to the "doctrine of obligations" that took place in England even in nineteenth century, was not noted in this or any of the subsequent cases.

84. After quoting CARDOZA, J., "we are not so provincial as to say that every solution of a problem is wrong, because we deal with it otherwise at home", the Supreme Court held that "we shall not brush aside foreign judicial processes unless (not) doing so would

violate some fundamental principles of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal".

85. After *Sathya v. Teja Singh* (*supra*), came *Surinder Kaur Sandhu v. Bax Singh Sandhu* (*supra*). That case concerned a Sikh couple married in India and shifted to England, where a child was born. The husband was convicted of an offence and was released on probation. After the expiry of the probation, the husband removed the child and brought it to India. The wife obtained an order for the custody of the child, from a Court in England and came to India and approached the High Court for securing the custody of the child. The High Court dismissed the petition, forcing her to file an appeal before the Supreme Court. While allowing the appeal, the Supreme Court pointed out that the modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. The Court pointed out that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. The Court went on to add that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern for the well-being of the spouses and the welfare of the offsprings of marriage.

86. In the next decision, *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw* (*supra*), the issue of custody of a minor child, born of an Indian father and an American mother, came up for consideration. The child was an American citizen and the marriage between the spouses was dissolved by a decree granted by a competent Court in U.S.A. The Court also granted permanent custody to the mother and visitation rights to the father. The father brought the child to India without intimating the mother as well as the Court. When the mother moved the Michigan Circuit Court, a warrant of arrest was issued against the father for unlawfully taking the minor out of the country. Unable to trace the child in her matrimonial home at Pune, the mother moved a *Habeas Corpus* Petition. While allowing the said petition, the Supreme Court pointed out that whenever a question arises before a Court pertaining to the custody of a minor, the matter is to be decided, not on considerations of the legal rights on the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. On the ground that the child is an American citizen and that excepting for a few months after being brought to India by a process of illegal abduction by the father, he had spent the rest of his life in U.S.A., the Court allowed the petition. The Court also noted that the child had not taken root in this country and that he is still accustomed and acclimatised to the conditions and environment obtaining in the place of his origin in U.S.A. Relying upon the decision of WILLMER, L.J., *In Re.H (infants)* 1966 1 All ER 886, the Supreme Court pointed out that it is the duty of all Courts in all countries to do all they can to ensure that the wrong doer (the person who removes a child unauthorisedly from one country to another) does not gain any advantage by his wrong doing.

87. Interestingly, the Supreme Court took note of the fact (in *Mrs.Elizabeth Dinshaw v. Arvind M. Dinshaw* (*supra*)) that on

account of violation of the order of the Circuit Court, the Court had cancelled the visitation rights granted to the father and had also held him guilty of contempt of Court. Therefore, the Supreme Court directed the father to tender unconditional apology to the same Court, and recorded a hope that the Circuit Court (in U.S.) would take a lenient view, in the best interest of the minor which required the avoidance of complete alienation of the child from the father. The Supreme Court also expressed the hope that the mother of the child would render all assistance to the father, for the withdrawal of the warrants of arrest from the competent Court.

88. In *Dhanwanti Joshi v. Madhav Unde (supra)*, the question that fell for consideration was as to whether the removal of the child from U.S.A., to India, contrary to an order of the U.S. Court, disqualified the mother from having the custody of the child. While dealing with the same, the Supreme Court first took note of the decision of the Privy Council in *McKee v. McKee (1951)* 1 All ER 942, where LORD SIMONDS held that in proceedings relating to custody, the welfare and happiness of the infant was of paramount consideration and that the order of a foreign Court in U.S.A., though to be given due weight, was only one of the facts which must be taken into consideration. The Privy Council also pointed out that the order of the foreign Court would yield to the welfare of the child and that comity of Courts demanded not its enforcement, but its grave consideration.

89. After considering the decision of the Privy Council in *McKee v. McKee (supra)*, the Supreme Court (in *Dhanwanti Joshi v. Madhav Unde (supra)*) also took note of the apparent contradiction between the view of the Privy Council in *McKee* and the view taken in *Re.H (infants) (supra)*, which was relied upon by the Supreme Court in *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw (supra)*. But the Supreme Court pointed out that this conflict between *McKee v. McKee (supra)* and *In Re.H (infants) (supra)*, was resolved by the Court of Appeal in *Re.L (minors) 1974 (1)* All ER 913, by ultimately holding that *McKee v. McKee (supra)* was still the correct law and that the latter decisions revolved around the limited question whether the Court in the country to which the child was removed, could conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody. After elaborating on the question as to when summary jurisdiction is to be invoked and when an elaborate inquiry is to be conducted, the Supreme Court also took note of the decision in *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw (supra)* and held that the general principles laid down in *McKee v. McKee (supra)* and the distinction between summary and elaborate inquiries as stated in *Re.L. (infants)* hold good in our country also.

90. Referring to the Hague Convention on Civil Aspects of International Child Abduction 1980, to which India is not a signatory, the Court pointed out that under Article 12 of the Convention, the child is required to be sent back, even if a period of more than one year had lapsed from the date of the removal to the date of commencement of the proceedings, unless it is demonstrated that the child is settled in its new environment. Article 16 of the Convention prohibited the Court of the country to which the child is removed, from going into the merits of the welfare of the child. But Article 12 is made subject to Article 13 and hence, the request for return of the child could be refused, if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position. Insofar as non

Convention countries are concerned, the law to be followed was summarised by the Supreme Court in para 33 of its decision in *Dhanwanti Joshi v. Madhav Unde (supra)*, to the following effect:

“33. So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration as stated in *McKee v. McKee* unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in L. Re. As recently as 1996-1997, it has been held in P (A minor) (Child Abduction : Non-Convention Country), Re : by WARD, L.J. (1996 Current Law Year Book, pp. 165-166) that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence - which was not a party to the Hague Convention, 1980 - the Courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established. See also A (A minor) (Abduction: Non-Convention Country) (Re, The Times 3-7-97 by Ward, L.J. (CA) (quoted in Current Law, August 1997, p.13). This answers the contention relating to removal of the child from USA.”

91. In *Sarita Sharma v. Sushil Sharma (supra)*, the Court was concerned with a case where in violation of an interim order of the District Court of Tarrant County, Texas, U.S.A., the mother of the child came back to India, along with the children. The father sought a writ of *habeas corpus* before the Delhi High Court and the same was allowed on the ground that the mother committed a wrong in violating an order of a competent Court in U.S.A. While allowing the appeal, the Supreme Court held that it would not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from U.S.A., despite the order of the Court of that country and that the decree passed by the American Court, though a relevant factor, cannot override the considerations of welfare of the minor children.

92. In *Shilpa Aggarwal v. Aviral Mittal (supra)*, the father of the child, who was a permanent resident of U.K., initiated proceedings before the High Court of Justice, Family Division, U.K., on 25.11.2008 for a direction to the mother to return the minor child to the jurisdiction of that Court. Even before the initiation of those proceedings in the English Court, the mother and the child had returned to India on 12.9.2008. The father also came to India on 10.10.2008 but returned to U.K., on 14.10.2008. The English Court passed an order on 26.11.2009, directing the mother to return the minor child to the jurisdiction of that Court. Immediately thereafter, the father filed a writ of *habeas corpus* before the Delhi High Court for the production of the child and for handing over its custody to him. The Delhi High Court allowed the writ petition and granted 14 days time to the mother to return the child to England. On appeal by the mother, the Supreme Court considered the previous decisions in *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw (supra)*, *Dhanwanti Joshi v. Madhav Unde (supra)* and *Surinder Kaur Sandhu v. Bax Singh Sandhu (supra)*

and upheld the view taken by the High Court, which placed greater reliance upon the theory of Comity of Nations and Comity of Judgments of the Courts of different countries. Taking note of the fact that both parents had worked for gain in U.K., and had also acquired permanent resident status in U.K., the Supreme Court found that the High Court had balanced the principle of Comity of Courts and the principle of interest and welfare of the child.

93. *V. Ravichandran (Dr)(2) v. Union of India (supra)*, is a unique case where the Court literally launched a woman (child) hunt by directing the Central Bureau of Investigation to trace a small child. A few facts, which actually resulted in the extraordinary situation, of the child being directed to be kept under the custody of the C.B.I., authorities for 2 days, before its production before the Court, are relevant to be noted. The couple in that case got married at Tirupathi and left for United States of America. The child was born in U.S. Within a year of the birth of the child, the marriage broke. Initially, a consent order governing the issues of custody and guardianship was passed by the New York State Supreme Court on 18.4.2005, granting joint custody. The same was modified by an order of the Family Court of the State of New York, on 18.6.2007, by consent of parties. But, the mother of the child brought the child to India on 28.6.2007. Thereafter, the father obtained an order from the Family Court of the State of New York, directing the mother to return the child to America. The Family Court also issued child abuse non bailable warrants against the mother. Thereafter, the father filed a writ petition before the Supreme Court of India in September 2007, for the issue of a writ of habeas corpus. Since the mother and the child could not be traced, by the local police of the States of U.P., Chandigarh, Tamil Nadu and Karnataka, the Supreme Court directed the C.B.I., to trace the minor child.

94. After the child was traced and produced before the Court, the Supreme Court considered the matter in great detail, with reference to the law laid down by the English Courts and the Supreme Court in the various decisions cited *supra*. Thereafter, in paragraphs 29 and 30, the Court indicated the duty of the Court while dealing with such cases, on the following lines:

“29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the Court where the parties had set up their matrimonial home, the Court in the country to which the child has been removed must first consider the question whether the Court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child’s welfare be investigated in a Court in his own country. Should the Court take a view that an elaborate enquiry is necessary, obviously the Court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the child’s character, personality and talents. While doing so, the order of a foreign Court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case. 30. However, in a case where the Court decides to exercise its jurisdiction summarily to return the child to his own

country, keeping in view the jurisdiction of the Court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the Court may leave the aspects relating to the welfare of the child to be investigated by the Court in his own native country as that could be in the best interests of the child. The indication given in *McKee v. McKee (supra)* that there may be cases in which it is proper for a Court in one jurisdiction to make an order, directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in *L (Minors), In re* and the said view has been approved by this Court in *Dhanwanti Joshi v. Madhav Unde (supra)*. Similar view taken by the Court of Appeal in *H. (Infants), In re* has been approved by this Court in *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw (supra)*.”

95. After pointing out the choices available to the Court, either to make a summary inquiry or to make an elaborate inquiry, the Supreme Court considered the facts of that case and held that the custody issue did not deserve to be gone into by the Courts in India and that the child should be returned to U.S.A., where the mother would be free to seek a modification of the order passed by the Court in U.S.A. This was despite the fact that by the time the order was passed by the Supreme Court, the child was already in India for 2 years. But while ordering so, the Court directed the father to request the concerned authorities to drop the warrants of arrest issued against the mother. The Court also directed the father not to file or pursue any criminal charges for the violation of the consent order passed in U.S.A.

96. In the latest decision, in *Ruchi Majoo v. Sanjeev Majoo (supra)*, three questions were taken up for consideration by the Supreme Court. The second question was as to whether the Court in India, can decline to exercise jurisdiction on the principle of comity of Courts. This question arose on account of the fact that the father obtained an order for the custody of the child from the Superior Court of California. But, the mother obtained an order from the District Court at Delhi under the , 1890. But, the same was over turned by the High Court of Delhi under Article 227 of the Constitution, forcing the mother to file an appeal before the Supreme Court.

97. After pointing out that the recognition of decrees and orders passed by foreign Courts remains an eternal dilemma, the Court held that the validity of such decrees are to be determined in the light of the provisions of Section 13 CPC. The Court also pointed out that simply because a foreign Court has taken a particular view, on any aspect concerning the welfare of the minor, it is not enough for the Courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender, the Court held, should be the mantra in such cases.

98. After referring to the 5 previous decisions *viz.*, (i) *Sathya v. Teja Singh (supra)* (ii) *Dhanwanti Joshi v. Madhav Unde (iii)* *Sarita Sharma v. Sushil Sharma (iv)* *V. Ravichandran v. Union of India* and (v) *Shilpa Aggarwal v. Aviral Mittal*, the Supreme Court drew a distinction (in *Ruchi Majoo v. Sanjeev Majoo (supra)*) between cases which arose out of habeas corpus proceedings and cases which arose out of proceedings under the . It was held by the Court that while the writ Court’s jurisdiction arises in cases

where the alleged detainee is within its territorial jurisdiction, the jurisdiction of the Court under the , is determined by the place where the minor ordinarily resides. Therefore, the Court held that unless the Court in India before which a proceeding is brought, had the jurisdiction to entertain it, it cannot even order the return of the child to the country from where the child was removed.

99. After pointing out the above distinction, the Supreme Court gave 4 reasons for reversing the decision of the Delhi High Court, by which the mother was directed to return the child to U.S.A.

One of the reasons is as follows:

“What needs to be examined is whether the High Court was right in relying upon the principle of comity of Courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that ‘comity of Courts’ principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the Courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent Court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Decisions of this Court in *Dhanwanti Joshi v. Madhav Unde (supra)* and *Sarita Sharma v. Sushil Sharma (supra)* clearly support that proposition.”

100. Despite holding as above, the Supreme Court did not (in *Ruchi Majoo v. Sanjeev Majoo (supra)*) overturn the law laid down in the previous decisions to the effect (i) that by balancing delicately, the principle of comity of nations and the principle of interest and welfare of the child, the Court must first decide, whether the case warrants a summary inquiry or an elaborate inquiry and (ii) that the Court could also apply the test of closest contact as evolved in *Surinder Kaur Sandhu v. Bax Singh Sandhu (supra)*. Apart from reiterating the same principles, the Court also made it clear that the Court exercising powers under the , can choose to hold a summary inquiry and pass appropriate orders, provided it is otherwise competent to entertain the petition.

101 In *Ruchi Majoo v. Sanjeev Majoo (supra)*, the Supreme Court found (i) that the minor was not removed from the jurisdiction of the American Court in contravention of any orders passed by any American Court, but the father approached the American Court only after the child came to India (ii) that the child was already living in India and pursuing his studies for 3 years in a reputed school in India and (iii) that the child which was aged 11 years, did not evince any interest in returning to U.S., when interviewed. Therefore, on question No. 2, the Supreme Court held that the order of the Delhi High Court for the repatriation of the minor to the United States, on the principle of comity of Courts, did not appear to be an acceptable option, worthy of being exercised at that stage.

102. After referring to all the 7 decisions of the Apex Court starting from *Surinder Kaur Sandhu v. Bax Singh Sandhu (supra)*, a Division Bench of this Court, in its decision rendered on 11.4.2011, in H.C.P. No. 2367 of 2010, held that in that case, it was not proper to exercise a summary jurisdiction to return the child to USA, in view of the fact that the child in question was a female child just aged 3 years and also in view of the fact that the Home

Study conducted by the U.S. Consulate in Chennai, found the child to be in a good environment.

103 Therefore, in view of the fact that a note of dissent was not recorded in *Ruchi Majoo v. Sanjeev Majoo (supra)*, on the fundamental principles laid down in *Dhanwanti Joshi v. Madhav Unde (supra)*, which was also approved by a 3 Member Bench of the Apex Court in *V. Ravichandran (Dr)(2) v. Union of India (supra)*, the following principles emerge:

- (i) This Court should first consider whether an elaborate inquiry on the question of custody is permissible or whether the Court should summarily order the return of the child to the country from where it was removed, leaving it to the Court in that country to investigate all aspects relating to the child’s welfare.
- (ii) The question as to whether this Court could summarily order the return of the child to the country from where it was removed, depends upon several factors. One of those factors would be as to whether a competent Court in that other country, was already seized of the dispute between the parties, when the child was removed from that country and whether any order had already been passed by a Court of competent jurisdiction in that other country. If one of the parties to the dispute had deliberately removed himself/herself along with the child, out of the territorial jurisdiction of the foreign Court before which a dispute was pending, in order to escape the consequences of an order that had already been passed or was likely to be lawfully passed by that Court of competent jurisdiction, this Court would normally resort to a summary inquiry, since no Court would extend a helping hand to a person, who tries to escape from the jurisdiction of a competent Court.
- (iii) Again the question whether a person removed himself/herself, out of the jurisdiction of the foreign Court, deliberately and with a view to escape the consequences of any order that may be passed, is a question that cannot be considered in isolation from the social context. The Court cannot lose sight of the fact that the law and Courts, in a few countries (mostly perceived as developed countries) exhibit a cold gender neutrality. Immigrant women from countries like ours, find it very hard to deal with such cold neutrality, especially in an alien soil. In a country like ours, where dependence on someone, right from the time of birth, has been the hallmark of the life of a woman, they do not learn so easily to stand alone independently and fight a legal battle and also eke out a livelihood especially in a foreign land. In their home land, they are better placed to fight a legal battle, for two reasons viz., (i) that at least for some time, they gather the support of their family members and (ii) that the system here is perceived, at least by men, (whether true or not), to be sympathetic rather than maintaining crude neutrality. Even the Convention on the Elimination of All Forms of Discrimination against Women, ratified by India, recognises under Article 4.1 that the adoption by States Parties, of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the Convention. However, those special measures are required to be discontinued, when the objectives of equality of opportunity and treatment have been achieved. Therefore, there is at least a perception, whether it is real or not, that the home turf is safer. But in a foreign country, where litigation

is prohibitively costly, it is impossible for an Indian woman to sustain herself and also fight a litigation. Moreover, the normal tendency on the part of an immigrant woman, is to return to India, once the marriage is broken. If she has a child by the time the marriage is broken, she would be left with the hobson's choice of either coming back to India with the child or to leave the child there and come back alone. The choice of continuing her stay in an alien land, just for the purpose of fighting a child custody case there, appears to be the most horrendous one. This is why the Supreme Court held in *Surinder Kaur Sandhu v. Bax Singh Sandhu* (*supra*) that it is the duty of the Court to protect the wife against the burden of litigating in an inconvenient forum.

**104.** Therefore, in my considered view, apart from the 2 tests already laid down by Courts, *viz.*, (i) the test for determining whether to hold a summary inquiry or an elaborate inquiry and (ii) the test of closest contact with the child, evolved by the Supreme Court in the various decisions cited *supra*, the Court should also apply one more test. It is that the Court should look into the status of the woman involved in the case. If the woman involved in the case is incapable of sustaining herself independently in a foreign country and also fighting a child custody case, the Court should be slow to order the return of the child summarily.

**105.** There is one strong reason for my above conclusion. The various decisions of the Apex Court cited *supra*, rested their conclusions mostly upon (i) International Conventions and (ii) the Principles of Private International Law as applicable to the Indian context. Every International Convention that touches upon the rights and welfare of the child, automatically touches upon the welfare of its mother also. Article 4 of the Declaration of the Rights of the Child, adopted by the United Nation General Assembly in 1959, not only states that the child shall be entitled to grow and develop in health, but also states that special care and protection should be provided both to him and to his mother.

Article 6 states that a child of tender years shall not, save in exceptional circumstances, be separated from his mother.

**106.** Following the Declaration of the Rights of the Child of 1959, the General Assembly also adopted the Convention on the Rights of the Child in 1989, which entered into force in 1990. Article 9.1 of the Convention stipulated that States Parties shall ensure that a child is not separated from his or her parents against their will, except under certain circumstances. Article 10.2 contains a significant mandate which reads as follows:

“A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention.”

**107.** After recognising, under Article 10.2, the right of the child and his or her parents to leave any country, including their own and to enter their own country, the Convention on the Rights of the Child also stipulated under Article 11 (i) that the States Parties shall take measures to combat the illicit transfer and non-return of children abroad and (ii) that to this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

**108.** With the above prelude if we take a critical look at all the 7 cases decided by the Apex Court, the picture that emerges is quite interesting:

Case reference	Nature of the proceedings	Special Features	Ultimate result
<i>Surinder Kaur Sandhu v. Bax Singh Sandhu</i> ( <i>supra</i> ) case (1984) 3 SCC 698	Writ petition	1. Original petition filed by mother of the minor child under Section 97 Cr.P.C., was dismissed by Magistrate. 2. She went to England, obtained an order by which the child became the ward of the Court in England. 3. There after she came back to India and filed a writ petition. It was dismissed by High Court and she went to Supreme Court	Held: (i) that the spouses had made England their home and the boy was born there, and so the father cannot deprive English Court's jurisdiction and (ii) that the matrimonial home of spouses was in England and hence there are sufficient ties or contacts with that State, which make it reasonable for English Court to assume jurisdiction. Note: Court also held that it is their duty to protect the wife against the burden of litigating in an inconvenient forum. Therefore, father was directed to hand over custody to mother
<i>Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw</i> case AIR 1987 SC 3	Writ of Habeas Corpus	1. Marriage in U.S. Mother was American, father Indian. Child born in U.S. 2. A Court order dissolving the marriage and dealing with the issue of custody of child, was passed by U.S., Court 3. There after the father abducted the child to India and the mother filed habeas corpus	Held: (i) child is an American citizen (ii) child has not taken root in this country (iii) His welfare demands handing over custody to mother (iv) Child's presence in India is an illegal act which cannot be taken advantage of by father. Therefore, child was directed to be handed over to mother, to be taken to U.S

Dhanwanti Joshi v. Mahav Unde (supra) case (1998) 1 SCC 112	Petition under before Family Court	1. Marriage took place in U.S., on 11.6.1982, child born in U.S. On 15.3.1983 and the couple separated on 20.4.1983. U.S., Court granted divorce on 23.9.1983, but the mother and the child came to India on 20.2.1984. 3. Father then obtained visitation rights on 11.4.1984, temporary custody on 30.4.1984 and permanent custody on 28.4.1986. 4. Father came to India and filed Habeas corpus, which was dismissed on 15.4.1986, only after which the U.S., Court granted permanent custody to him. 5. Mother obtained a permanent custody order ex parte from Family Court. Thereafter, after father filed another before the Family Court and obtained an order. The appeal filed by mother was dismissed for default by Bombay High Court and she approached the Apex Court.	Permanent custody granted to mother and visitation rights to father. He was refused temporary custody as it might result in the child not being returned to India.
Sarita Sharma v. Sushil Sharma (supra) case (2000) 3 SCC 14	Habeas Corpus	1. Proceedings were first initiated in U.S. and interim orders for the care and custody of the children passed from time-to-time. 2. While exercising visitation rights, mother brought the children to India. 3. Father obtained divorce, Permanent custody of children and also arrest warrants. 4. Thereafter, he came to Delhi and filed a habeas corpus. High Court allowed the writ and Supreme Court reversed it.	Held: (i) Decree of U.S., Court is a relevant factor but it cannot override the consideration of welfare of children. (ii) The interest and welfare of the children require a full and thorough inquiry. (iii) The father is an alcoholic.
Shilpa Aggarwal v. Aviral Mittal (supra) case 2010 (1) CTC 359	Habeas Corpus	1. Matrimonial home set up in Scotland and then moved to England. Child born in U.K., and holds British passport. 2. Mother and child came to India in September 2008 with return tickets, but they did not return. 3. So the father obtained an order for the return of the child to the jurisdiction of High Court of Justice, Family Division, U.K., in November 2008. 4. Thereafter, the father initiated habeas corpus before Delhi High Court.	Held: (i) that the High Court was right in balancing the issue of comity of Courts and the issue of interest and welfare of the child by directing the child to be returned to U.K. (ii) having regard to the nationality of the child and parents' employment in U.K., the English Court had the most intimate.
V. Ravichandran (Dr) (2) v. Union of India (2010) 1 SCC 174	Habeas Corpus	1. Married at Tirupathi, child born in U.S. 2. Mother filed divorce petition in US Court and a consent order passed governing the issues of custody and guardianship. Marriage was also dissolved later. 3. Consent order for custody was later modified by Family Court of New York on 18.6.2007. 4. Mother came to India thereafter, breaking those orders, forcing the father to obtain non-bailable warrants in U.S., and then filing habeas corpus in Supreme Court.	Keeping in view the fact (i) that the child is an American (ii) that the parties had already obtained consent orders for custody from the U.S. Court (iii) that the child had not developed roots in this country and (iv) that there was nothing on record to suggest that the return of the child was harmful to it, the Court ordered the mother to return the child to U.S. However, the Court also ordered (i) that the travel expenses and arrangements for stay of the mother be taken care of by father (ii) that the father shall arrange to have the warrants of arrest dropped and (iii) that he shall not pursue the criminal complaints against her in U.S.
Ruchi Majoo v. Sanjeev Majoo (supra) case	Proceedings under	1. Child was a citizen of America. 2. Father obtained a custody order from a U.S., Court and a red corner notice was issued on allegations of abduction against the mother. 3. Mother obtained an order for interim custody from the District Court, Delhi in a petition under the Guardians Act, but the same was set aside by the High Court in a revision under Article 227. Mother filed an appeal to Supreme Court.	Taking into account the wishes of the child and the fact that the child is settled in India for 3 years, the Supreme Court held, without overruling the earlier decisions, that the foreign judgment is only one of the several inputs and that the interest and welfare of the child are of paramount consideration. Therefore, the Court allowed the District Court to proceed with the hearing of the main petition under the Guardians Act.

109. A critical analysis of all the above 7 decisions of the Supreme Court would show the following:

- (i) In the first two cases *viz.*, *Surinder Kaur Sandhu v. Bax Singh Sandhu (supra)* and *Ms. Elizabeth Dinshaw v. Arvind M. Dinshaw (supra)*, the fathers abducted the children to India and the Supreme Court granted reliefs to the mothers permitting them to take the children to England and U.S., respectively, invoking the principal of Judicial Comity and applying the test of most intimate contact.
- (ii) In the next two cases *viz.*, *Dhanwanti Joshi v. Madhav Unde (supra)* and *Sarita Sharma v. Sushil Sharma (supra)*, the mothers brought the children to India and the fathers approached the Courts for relief. But the Supreme Court invoked the test of interest and welfare of the children and allowed the mothers to retain the children in India.
- (iii) In *Shilpa Aggarwal v. Aviral Mittal (supra)* and *V.Ravichandran (Dr)(2) v. Union of India (supra)*, the mothers brought the children to India, but the Supreme Court directed them to return the children to the countries from where the children were removed, invoking the principles of Judicial Comity and the test of intimate contact.
- (iv) In the last case *viz.*, *Ruchi Majoo v. Sanjeev Majoo (supra)*, the mother brought the child to India and the father was denied relief by the Supreme Court, holding that the interest and welfare of the child would override other considerations.

110. What is important to note from the above discussion, is the fact that there was unanimity of opinion in all the above 7 decisions, about the principles of law to be followed in such cases. Yet, the application of those principles produced different results, unlike in laboratory experiments, since law is all about humanities and not a science. Of all the above decisions, the decision in *V.Ravichandran (Dr)(2) v. Union of India (supra)*, was by a 3 Member Bench and the others are by 2 Member Benches.

111. Therefore, in the light of the principles laid down in all the above 7 decisions, let me get into the facts of the case, to find out, where lies the interest and welfare of the child, assuming that it still exists, despite all these disputes.

112. At the outset, it is noted from the pleadings that the plaintiff has not pleaded anywhere that the defendant is disqualified from having the custody of the child. On the contrary, many of the mails exchanged between the parties reflect that the respondent has been a very affectionate and caring father for the child. Though the plaintiff has today projected the defendant as a very bad husband, she had praised him at the earliest point of time when the parting shot was fired by her by a mail dated 22.4.2010. It may be recalled that the plaintiff and the defendant got married on 26.9.2005. The first signs of cracks developing in the relationship, was reflected in the mail dated 22.4.2010 sent by the plaintiff to the defendant. This mail is filed as defendant's document No. 10. The relevant portions of this mail, are as follows:

'I want to tell you that these 4 years that I have lived with you has been very meaningful and what we have shared and given into this relationship is something only we both know. You have been a very good husband, a good father and a good head to our family which you have run in the last 4 years. I hope you would also acknowledge that I have never failed in my responsibilities in running this family and ensuring relationships are strongly held.

I thank you for every happy moment you have brought into my life in these 4 years. Having said that, in the recent past 5 to 6 months, I was just realizing that I was growing out of this relationship and growing out of you. I initially thought this is a temporary feeling and that I could curb without realizing that this feeling was only getting stronger.

The most important aspect I would like to add here is you have been a great dad to Rhea and you might not have her in your daily life. It is painful now but it will be the reality that has to be faced. But I more than accept the fact that your right over Rhea is equal to mine in every sense and hence you will have all the freedom to spend enough and more time with your daughter. From my end I will ensure Rhea always knows how much you love her and she will come with open arms and receive you at any stage of her life and that's a promise. You have the right to blast and curse me and I will keep quiet and take it as I probably have no response. I wanted to send you this email so that you have the time after you finish work today to read and digest this heavy truth. We will speak when you are here tomorrow in more detail just that I won't have any answers to most of your questions.

I do have one request - I plead that you please make this as amicable as possible because I want to take back those 4 years of good memories as against the few moments of bitterness. I would want to part ways with some energy to start this new life ahead. Please do this for me and for Rhea. And the only word I would like to conclude this mail with is - I AM SORRY.'

113. The above mail discloses that from the date of marriage *viz.*, 26.9.2005 till the date of issue of the mail *viz.*, 22.4.2010, the plaintiff perceived the defendant as a good husband and a good father. The only reason stated by her for stepping out of the matrimony was 'that she was growing out of the relationship and growing out of the defendant'. No one can find fault with a person, for growing out of a relationship, especially in these days, when career and ambition tends to overtake family ties and family values. But at the same time, it may not be fair to invent reasons *post facto*, to justify one's action in walking out of matrimony.

114. After sending the mail dated 22.4.2010, the next step that the plaintiff took was to file a petition for divorce on 7.5.2010. A copy of the said petition is filed as plaintiff's document No. 3 and defendant's document No. 11. In that petition, the plaintiff claimed that they were in a state of separation from 1.5.2010. Interestingly, the petition for divorce filed by the plaintiff on 7.5.2010, contains a Disclosure Statement, Summons and the Form of Order and *Rule Nisi* annexed to it. They form part and parcel of the bunch of papers that go with the divorce petition. Unfortunately, the plaintiff has not filed these papers along with her document No. 3. But, the defendant has filed them. What makes the filing of these documents crucial are (i) that in the column dealing with 'Family Violence', the plaintiff has clearly indicated that there was no request for relief from alleged family violence and (ii) that the Form relating to 'Order and *Rule Nisi*' contains a mandate that each party is enjoined and restrained from causing or permitting the minor children of the parties to be removed from the jurisdiction of the Court. This Form relating to Order and *Rule Nisi*, which contains a prohibition from removing the child out of the jurisdiction of the U.S., Court, was also signed by the Judge on 7.5.2010, upon presentation of the petition for divorce.

115. After filing the petition on 7.5.2010, the petitioner came to India with the child on 11/12.5.2010 and returned to U.S., on

22.5.2010. As seen from the amended Order and *Rule Nisi*, the Court fixed the date for hearing of the petition for divorce filed by the plaintiff, as 24.5.2010. But, the summons was served on the defendant only on 1.6.2010, till which point of time, the defendant was kept in the dark, despite the fact that both of them were living under the same roof. But after service of summons on the defendant on 1.6.2010, the plaintiff withdrew her petition for divorce on 3.6.2010.

116. When the plaintiff was in India during the period from 12.5.2010 to 22.5.2010, the defendant sent a mail on 18.5.2010 to the sister and brother-in-law of the plaintiff. A copy of this mail is filed as plaint document No. 12. A perusal of this mail shows that when the relationship got strained by the end of April 2010, the plaintiff threatened to return to India with the child. This mail also discloses that attempts were made by the plaintiff's sister and brother-in-law to arrive at a mediated settlement. The points that the defendant wanted to be part of any amicable settlement, were indicated by him in the said mail. Portions of this mail have already been extracted in a previous paragraph. Of particular importance is paragraph 21 of the mail dated 18.5.2010. Here, the defendant states that

"21. As part of the mediation brokered, it comes at a tremendous cost to me personally because it totally does not consider my career concerns and ambitions with me having a very good position in the evolving areas of Smart Grid and Smart Meters in the Energy and Power Industry. Yet, I am ready to throw everything and do what is the right thing for my poor 3 year old daughter Rhea's sake, whose birthday happens to be today! So, I am ready to come as a pauper, throwing everything that I had painfully earned in this great country -US - only because I feel it is very cruel to subject Rhea to a divorce and bitter custody fight. I will continue to do everything in my capacity to ensure that Rhea has a smooth childhood. When she grows as a big girl, I want her to know that her Dad tried EVERYTHING just for HER SAKE - gave up everything he painfully assembled, just to spare her of any ordeal."

117. Therefore, it is clear that the defendant was ready to do any sacrifice and travel an extra mile for the sake of the child. In contrast to the reason indicated by the plaintiff in her mail dated 22.4.2010, for walking out of the matrimony, the defendant's mail dated 18.5.2010 showed his anxiety to save the marriage for the sake of the child. Therefore, the concern of the defendant for the interest and welfare of the child, appears to be more than that of the plaintiff.

118. In any event, the fact that the defendant is a good father to the child, is not at all in dispute. When the dice is evenly cast, between the plaintiff and the defendant, on the issue of interest and welfare of the child, the only parameter on which the case on hand could be tested, would be the principles of Private International Law, be it on the theory of comity, on the theory of vested rights or on the theory of local laws. If so done, it will be clear that the child should be returned to the jurisdiction that the plaintiff herself invoked, not once but twice, knowing well the consequences, as an Attorney at Law.

119. Relying upon the Report of the U.S. Consulate, dated 19.4.2011, which portrayed the child to be appearing as healthy, happy, energetic and well cared for, it was contended by Mr. J. Sivanandaraj, learned counsel for the plaintiff that it would not be in the interest and welfare of the child to remove it again from the present conditions. According to the learned counsel, from

26.7.2010 when the child arrived in India, the child is happily settled here at Chennai for the past one year and hence the child should not be uprooted.

120. It is true that the staff of the U.S. Consulate made a home visit on 19.11.2010 and found the neighbourhood in which she lived, to be clean and well kept. They also found the apartment to be well furnished and the school to be one where many American children were studying. But, it does not mean that the alteration of the status quo would mean disaster. The child which was born in US in May 2007, lived there for 3 years till July 2010, before she was brought to India. The plaintiff brought the child to India upon certain conditions, reflected in the mail dated 18.5.2010, which I have extracted elsewhere. After arriving in India, the plaintiff filed the petition for divorce in the Superior Court of Cobb County, Georgia, through her counsel there. She also sought for primary custody of the child. It is only after the defendant filed a counter claim and insisted upon the plaintiff returning to U.S., with the child that she withdrew her petition on 18.10.2010. Despite coming to know of the fate of the counter claim within a couple of days, the plaintiff waited till January 2011 to initiate the present original proceedings before this Court. But, the defendant has been continuously taking steps without any let up, both before the American Court and before this Court. Therefore, the plaintiff (i) who waited from 17.8.2010 (date of filing of her petition for divorce) till 18.10.2010 to withdraw her petition and (ii) who delayed the initiation of the action before this Court till January 2011, cannot now take advantage of the passage of one year and appeal to the sympathy of this Court on the ground that the child is settled here for the past one year.

121. As pointed out earlier, even according to the plaintiff, the defendant had been a good and caring father for the child. Therefore, in an ideal situation, assuming that there is one, the child should grow up with both of them under one roof. But, it is not possible hereafter, since the marriage is already dissolved and the plaintiff has happily accepted that portion of the final order of the American Court. Therefore, it is unavoidable that henceforth one of the parents would have an order of residence (custody) and the other would have an order of contact (visitation) with the child. In the parenting schedule that a Court would now be forced to draw, the Court has to test which of the two parents is better suited to have a residence order.

122. To find an answer to the above question, the plaintiff and the defendant are to be placed in a scale, on certain parameters. If so done, the defendant may have an edge over the plaintiff for one strong reason. As seen from the mails dated 22.4.2010 and 18.5.2010, the decision to walk out of the marriage was that of the plaintiff. The reason to walk out, as stated by her was that she had grown out of the marriage. Though the defendant has made an allegation that the plaintiff has become friendly with another person by name Arun Kumar and that the same was the reason for her walking out of the marriage, I do not wish to get into that question. But, the fact remains that in the earliest of the mails dated 22.4.2010, the plaintiff claimed to have grown out of the marriage and requested the defendant to accept the reality. In the later mails, she cited her career prospects as the reason for shifting to India. But, after the declaration of war between them, she started accusing the defendant of being a bad husband (not a bad father). Even in the temporary truce that was brought forth through mediation, the plaintiff was not prepared to sacrifice her career prospects. But, during the period of temporary truce, the defendant expressed his willingness to make any kind of sacrifice and come down to India, for the sake of the child. Therefore, it is

impossible to think that it will not be in the interest and welfare of the child to return the child to U.S., especially at the request of the father who has not only been a good father but also been a person willing to make any sacrifices for the interest and welfare of the child. Hence, even on considerations of interest and welfare of the child, I am unable to sustain the plea of the plaintiff for continuing the order of injunction.

*Balance of Convenience:*

123. In an emotional appeal, Mr. J. Sivanandaraj, learned counsel for the plaintiff, submitted that if the interim order of injunction is vacated, two consequences would follow, viz., (i) that the suit will become infructuous and (ii) that in order to retain the child, the plaintiff will necessarily have to travel to U.S., at the risk of being arrested and detained for violating the orders of the American Court. Once the second consequence follows, the plaintiff would be in prison in U.S., and the defendant would have the permanent custody of the child. This will not be in the interest of the child or the mother. Therefore, the learned counsel appealed that the interim order should not be vacated, in view of the peculiar circumstances of the case.

124. I have pondered over these consequences. But, I have two reasons for not being swayed by the emotional appeal. One is that this is something that the plaintiff has invited upon herself. As pointed out by the learned counsel for the defendant, the plaintiff is no ordinary person. She is an Attorney at Law, specialising in Corporate Law and advising a leading firm of Lawyers. She got into matrimony with the defendant at Atlanta, USA, set up her matrimonial home at Georgia, gave birth to the child at Georgia and also ran the office of the Solicitor's firm at Georgia. She herself invoked the jurisdiction of the American Court, first in May 2010 and next in July 2010. She gave an impression (i) to her lawyers (ii) to the defendant's lawyers and (iii) to the Court till 18.10.2010 that she would return to U.S., for attending the hearing on 18.10.2010. She went back on her assurances and allowed her petition to be dismissed on 18.10.2010. After things started getting heated up, she approached this Court, for the purpose of setting aside one portion of the judgment of the American Court, even while retaining the other portion. Therefore, however much I wish to, I cannot sympathise with the plaintiff. The reliance placed by the counsel for the defendant in this regard, in the decision of the Supreme Court in *Gujarat Bottling Co. Ltd v. Coca Cola Ltd*. AIR 1995 SC 2372, is well placed. It was held therein that for the grant of an order under Order 39, Rule 1, C.P.C, the party invoking the jurisdiction of the Court should show that he was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. Therefore, the plaintiff cannot invoke the sympathy of this Court, on the basis of the consequences that would befall upon her, when they were actually invited by her.

125. The second reason is that this is not the first time that a Court is confronted with such a situation. At least in two cases viz., (i) *Shilpa Aggarwal v. Aviral Mittal (supra)* and (ii) *V. Ravichandran (Dr)(2) v. Union of India (supra)*, the Supreme Court had to deal with similar circumstances, when the mothers of the minor children were facing the threat of arrest, upon landing in the foreign country, for having violated custody orders. But by issuing certain directions, the Apex Court ensured that disastrous consequences did not fall upon those mothers. Therefore, similar directions could be issued even in this case. As a matter of fact, the learned counsel for the defendant submitted

that the defendant would not press the contempt petition and that he would cooperate with the plaintiff in having the contempt petition closed without any damage to the plaintiff, if she returned to U.S., with the child and seek appropriate remedies before the Court whose jurisdiction she invoked.

126. Therefore, the application O.A. No. 191 of 2011 is disposed of to the following effect:

- (i) The prayer for interim injunction is rejected.
- (ii) Within a week of receipt of a copy of this order, the plaintiff is directed to move the Superior Court of Cobb County which passed the final order dated 1.11.2010, praying for a variation/modification of the said order and also praying for recalling the order passed in the contempt petition. Since the procedure of the Superior Court of Cobb County appears to permit the filing of petitions through counsel, even when the parties are abroad, the petitioner shall move the said Court even from here. In the application so filed, the plaintiff shall tender unconditional apology to the said Court for violating its orders and shall also give an unequivocal undertaking to appear before that Court along with the child, provided the defendant purchases tickets for the plaintiff and the child and also takes care of the expenses for the stay of the plaintiff and the child in U.S., till the proceedings before that Court are concluded.
- (iii) The defendant shall also move the same Court, either simultaneously or at least within a week of the plaintiff filing an application as per the preceding clause, expressing his willingness not to press the contempt petition against the plaintiff and also undertaking to purchase the air tickets and take care of the expenses of the plaintiff and the child.
- (iv) Since the defendant is in U.S., he may get a date fixed by the Court, for the hearing of the application filed by the plaintiff as per the preceding clauses. Once a date is fixed by the Court, for the hearing of the above application, the defendant shall purchase the tickets for the plaintiff and the child to travel to U.S. Once they land up in U.S., the defendant shall provide for their food and shelter and also take care of the expenses for the litigation.
- (v) To enable the plaintiff to move the Superior Court of Cobb County, Georgia, as per these directions, the defendant is directed not to take any precipitative action. In other words, the defendant shall not remove the child forcibly from the plaintiff's custody, by taking advantage of the rejection of the plaintiff's prayer for interim injunction. If in compliance with the directions issued hereunder, the plaintiff files an application before the Superior Court of Cobb County, Georgia, within a week of receipt of a copy of this order, the defendant shall not make any attempt to take away the child from the plaintiff forcibly, till the date fixed by that Court for the hearing of such an application.
- (vi) In the event of the plaintiff not filing any application before the American Court, within a week of receipt of a copy of this order, it will be open to the defendant to enforce the final order dated 1.11.2010 passed by the American Court in a manner known to law. Similarly, if after filing a petition as aforesaid, the plaintiff fails to appear before the American Court, on the date fixed by that Court, despite the defendant providing the air tickets, it will be open to the defendant to enforce the final order dated 1.11.2010 passed by the American Court.
- (vii) There will be no order as to costs.

*Order accordingly.*

# Judgment

by Judge Agnieszka Klonowiecka-Milart.

Panel Forum: "A Comparative Approach in Judicial Decision Making"

Day 2: 11.30am

## Decision On Nuon Chea's Appeal Against The Trial Chamber's Decision On Rule 35 Applications For Summary Action

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of an immediate appeal filed on 11 June 2012 ("Appeal") by the Co-Lawyers for the Accused NUON Chea ("the Defence") against the Trial Chamber's "Decision on Rule 35 Applications for Summary Action" of 11 May 2012 ("Impugned Decision").

### I. PROCEDURAL HISTORY

1. On 10 January 2012, the Defence orally requested the Trial Chamber, first, to officially condemn statements attributed in the press to Prime Minister Hun Sen and second, to ask him to refrain from similar remarks in the future ("First Oral Application"). These statements characterised Nuon Chea as a "killer" and "perpetrator of genocide". Recalling the presumption of innocence guaranteed in the Constitution of the Kingdom of Cambodia ("Constitution"), the Trial Chamber orally confirmed in its "decision" of 2 February 2012 that it would not consider any public comment on the guilt of the accused in reaching its final verdict ("Oral Decision").
2. During trial proceedings on 8 February 2012, the Defence attempted to argue that the Oral Decision was not an actual decision on the First Oral Application. The President of the Trial Chamber stated that the matter had already been addressed. In refusing further submissions, the President observed that the Defence was at liberty to appeal the Oral Decision should it be unsatisfied with the ruling. The Defence lamented that the Oral Decision could only be challenged on final appeal against the judgment which the Trial Chamber did not deny.
3. On 22 February 2012, the Defence filed a written motion before the Trial Chamber explicitly referring to Rule 35 and based on the same factual circumstances originally giving rise to the Oral Application ("Written Application"). The Defence requested the Trial Chamber to recognise the violation of the Accused's right to be presumed innocent until proven guilty. By way of sanction, the Defence requested the Trial Chamber to publicly condemn Prime Minister Hun Sen's remarks and to issue a warning against further statements of a similar nature.
4. The Trial Chamber delivered the Impugned Decision on 11 May 2012 "with a view to [sic] clarifying its oral decision of 2 February 2011 [sic] elaborating] on the reasons for its original ruling". In the same decision, the Trial Chamber also disposed of an additional Rule 35 request advanced by the Defence during trial proceedings on 12 March 2012

and based on distinct but related facts ("Second Oral Application").

5. On 11 June 2012, the Defence filed the Appeal against the Impugned Decision. On 25 June 2012, the Co-Prosecutors filed their Response which was notified on 26 June 2012. The Defence did not reply to the Response. Given that the case file was received from the Trial Chamber on 14 June 2012, the deadline for the Supreme Court Chamber's decision (or summary of the reasons) falls on 14 September 2012.

### II. FACTUAL BACKGROUND

6. The Written Application, which largely mirrors the First Oral Application, concerns statements reported by the Vietnamese press on 5 January 2012. These statements, attributed to Prime Minister Hun Sen, were made in Vietnam at the inauguration of a monument celebrating the establishment of Unit 125, a group of combatants involved in the early resistance movement against the Pol Pot regime. The interview focused upon the relationship between Vietnam and Cambodia and, in particular, whether the Vietnamese forces were to be seen as invaders or liberators in the events surrounding the defeat of the Khmer Rouge. The Defence's allegations of interference with the administration of justice are based on the following remarks by Prime Minister Hun Sen:

**Quan Doi Nhan Dan Newspaper:** Recently at the court trial of the Khmer Rouge, Nuon Chea said something that went against history, made false accusations against Vietnamese volunteer forces. What is your opinion?

**Prime Minister:** I have heard of the statement of Nuon Chea, a person of important position in the Pol Pot regime who has been tried in the past weeks. He did not admit to his wrongdoings but gave lies about the Vietnamese volunteer forces. I consider those statements lies from a murderer.

There are always excuses the bad guys resort to so as to dodge their wrongdoings. He said so to lessen his sin so we should not respond but let the court judge. The reality happened in contrary to what Nuon Chea said. The truth is that Vietnamese volunteer forces helped free the Cambodian people from the genocidal Pol Pot regime.

**VnExpress:** You once showed anger when someone said that Vietnamese volunteer forces invaded Cambodia. Why was that?

**Prime Minister:** I have reacted strongly to that kind of statement because the activities of the Vietnamese volunteer forces in Cambodia stem from the request of the Cambodian people. Which countries in the world have helped Cambodian people, especially in freeing them from the genocidal Pol Pot regime and prevent their comeback? The answer is the people and military of Vietnam.

7. Based upon these remarks, the Defence made its First Oral Application. Following the First Oral Application and the Oral Decision, the Prime Minister reportedly “urged government lawyers to respond to charges made by one of the lawyers defending Nuon Chea”. It was also reported that:

[...] Hun Sen asserted at a flood forum Friday that his comments while visiting Vietnam had no influence over the trial. “I want to make a public announcement about Brother Number Two Nuon Chea’s lawyer who wants to sue me”, he said, calling for a response from Cabinet Minister Sok An.

“I was asked in Vietnam about Pol Pot’s crimes in the Khmer Rouge regime, but Nuon Chea’s lawyer accuses me of interfering in the Khmer Rouge trial. My speeches over Pol Pot, Nuon Chea, Khieu Samphan and Ieng Sary didn’t influence the current court. The court can do whatever it wants but I had the right to condemn Khmer Rouge leaders.”

These statements underlie the Second Oral Application.

### III THE IMPUGNED DECISION

8. The President of the Trial Chamber pronounced the Oral Decision on 2 February 2012:

This is the Trial Chambers decisions [sic] on the objection raised by the international defence counsel of Nuon Chea in regards to the public comments on the existence of guilt of his client. The Chamber has noted the objection by defence counsel that public comments have been made via media indicating his client, Nuon Chea, is guilty of offences for which he’s currently being tried.

The Chamber emphasizes that Article 38 of the Constitution of the Kingdom of Cambodia, which states [sic]: “The accused shall be considered innocent until the court has judged finally on the case.” Thus, the determination of guilt or innocence is the sole responsibility of the Trial Chamber, which will consider all relevant facts, evidence, submissions, and law applicable at the ECCC. Therefore, the Court will not take account of any public comment concerning the guilt or innocence of any Accused in reaching its verdict.

9. As mentioned above, the Impugned Decision “elaborated” upon the reasoning of the Oral Decision, set out the applicable law concerning the presumption of innocence, and detailed the ECCC legal framework concerning interferences with the administration of justice. The Trial Chamber observed that the right for an accused to be presumed innocent until proven guilty is a fundamental principle of criminal procedure guaranteed under the Constitution and enshrined in a number of international human rights treaties. Relying on international human rights jurisprudence, especially the case-law of the European Court of Human Rights (“ECtHR”), the Trial Chamber held that “any declaration of an accused person’s guilt by a

public official prior to a verdict being delivered by a court is incompatible with the presumption of innocence”.

10. With respect to the applicable ECCC legal framework, the Trial Chamber recalled the discretionary nature of the Court’s power to deal with instances of interference under Rule 35. The Chamber also noted that, while a minimal “reason to believe standard” is required for the matter to be considered, an allegation of criminal liability demands a higher threshold to be satisfied in order to trigger judicial intervention. The reasonable belief threshold under Rule 35(2) is satisfied where there is a material basis showing that the allegation is not merely speculative, therefore “giv[ing] rise merely to further inquiry.” It does not trigger a duty to proceed with a detailed examination of, or a criminal inquiry on, the alleged facts. Where criminal culpability is alleged under Rule 35(1), the Trial Chamber recalled that Rule 87(1) and relevant international jurisprudence require that (i) specific intent to interfere with justice must be established and (ii) criminal sanctions may only follow from an assessment that the crime was committed beyond reasonable doubt.
11. The Trial Chamber found that the Prime Minister’s remarks concerning the culpability of Nuon Chea, if accurately reported, were incompatible with the Accused’s right to be presumed innocent until proven guilty. Nevertheless, it was reiterated that these alleged remarks - as well as any public comments on the guilt or innocence of an accused - would not influence the judges of the bench, who are legally qualified and presumed able to act independently.
12. The Trial Chamber affirmed that improperly influencing judges, or “acting in a way that could be perceived as an attempt to do so”, falls within the scope of Rule 35. The Chamber determined that that the reported comments, regardless of the intent with which they were uttered, satisfied the lower reasonable belief standard for intervention under Rule 35(2). Whereas the Trial Chamber declined to initiate a criminal inquiry on the ground that the evidence put forth by the Defence was insufficient, it ostensibly decided to deal with the matter summarily pursuant to Rule 35(2)(a). Hence, the Trial Chamber “reaffirmed for the benefit of all actors the principles of the independence of the judiciary and the presumption of innocence” and “issued an unambiguous public reminder of the right of the Accused to be presumed innocent and of the need for officials to avoid comments incompatible with this presumption”.
13. The Written Application, characterised as “a repetitious filing or a disguised appeal”, was ruled inadmissible. As for the Second Oral Request, the Trial Chamber rejected it on the merits for lack of evidence and failure to meet the reasonable belief burden of proof.

### IV SUBMISSIONS

#### The Accused’s Appeal

14. The Defence submits, as a general matter, that the Impugned Decision failed to clearly delineate the Chamber’s duty to conduct an investigation pursuant to Rule 35(2). Whilst the Trial Chamber held, without further explanation, that the reasonable belief that interference with justice

may have occurred “gives rise merely to further inquiry”, it refused to conduct an investigation on the Defence’s allegations. The Defence is unsatisfied that, absent an investigation, the Trial Chamber limited its action to a general reminder deemed to be “at best, an unsustainable platitude”. Additionally, the Defence maintains that the Impugned Decision unnecessarily focused on issues of criminal liability and its requisite level of proof although this was not the subject of the Written Application. The Written Application was confined, rather, to alleging a human-rights violation and establishing the lower *prima facie* threshold in order to trigger further inquiry under Rule 35.

15. Under its first ground of appeal, the Defence submits that the Trial Chamber committed an error of law invalidating the decision by failing to provide an appropriate remedy after finding that the Accused’s rights were violated. The second ground of appeal alleges a discernible error in the exercise of the Trial Chamber’s discretion. In this respect, the Defence contends that the public reminder issued by the Trial Chamber is an “extremely limited action”, hence insufficient to deter future violations. The Defence argues that the Trial Chamber should have, instead, directly condemned the Prime Minister, warned him against further statements of a similar nature and conducted an inquiry to reveal his intent. As a third ground of appeal, the Defence submits that the Impugned Decision erred in declaring the Written Application inadmissible. In this respect, it concedes nevertheless that “such error was a harmless one in so far as the Trial Chamber actually addressed the merits of the *entire* [Written Application]- 16. Consequently, the Defence requests the Supreme Court Chamber to admit the Appeal, hold a public hearing, invalidate the Impugned Decision, and exercise its discretion to grant an appropriate remedy and take action pursuant to Rule 35.

#### The Co-Prosecutors’ Response

17. The Co-Prosecutors argue that, first, the Appeal, insofar as it addresses matters raised in the Written Application, is inadmissible, in part, as untimely filed. Given that the Oral Decision definitively, albeit summarily, disposed of the First Oral Application, and the Written Application is substantially identical to the First Oral Application, the Co-Prosecutors contend that the 30-day time limit to lodge an immediate appeal pursuant to Rule 107(1) started running on 2 February 2012, that is, the date of issuance of the Oral Decision. Therefore, according to the Co-Prosecutors, the Defence ought to have lodged the Appeal by 2 March 2012, sought an extension of time, or sought an exception for the late filing. Having failed to do so, despite the President of the Trial Chamber’s statement that the Oral Decision was open to appeal, the Co-Prosecutors submit that the Defence did not comply with relevant provisions on time limits.
18. In the alternative, the Co-Prosecutors maintain that the entirety of the Appeal should be rejected because it fails to satisfy the applicable standard of appellate review. First, the Impugned Decision is consistent with Rule 35(2) and the jurisprudence of human rights’ courts in considering a declaratory remedy alone sufficient redress for the established violation of the presumption of innocence. Thus, the Trial Chamber did not commit an error of law

invalidating the decision. Second, the Co-Prosecutors submit that the Defence fails to establish an error of law with respect to the Trial Chamber’s declaration of the Written Application inadmissible as a repetitious filing because the factual record clearly reveals the dispositive nature of the Oral Decision. Even if the Trial Chamber erred in law in this respect, such error does not invalidate the decision because, as the Defence concedes, it was harmless error in light of the Trial Chamber’s decision to nevertheless address the Written Request on the merits and issue a more fully reasoned decision. Third, the Impugned Decision does not demonstrate a discernible error in the exercise of the Trial Chamber’s discretion such as to make it “so unreasonable or plainly unjust”, given that courts of first instance are entrusted with a broad margin of discretion in fashioning appropriate measures to safeguard their independence and integrity. For these reasons, the Co-Prosecutors conclude that the Appeal, including the request for a public hearing contained therein, should be dismissed.

#### V. STANDARD OF REVIEW

19. Pursuant to Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:
  - An error on a question of law invalidating the decision;
  - An error of fact which has occasioned a miscarriage of justice; and
  - A discernible error in the exercise of the Trial Chamber’s discretion, which resulted in prejudice to the appellant.
20. As this Chamber previously clarified, these three grounds of appeal “are to be read as disjunctive”, meaning that for the first two grounds to be satisfied, an appellant is not required to demonstrate that the alleged error also resulted in prejudice to his or her rights.

#### VI. DISCUSSION

##### Admissibility

##### *The Trial Chamber’s treatment of the First Oral Application*

21. Concerning the Appeal’s admissibility, the procedural history preceding the Impugned Decision is particularly instructive. Before the Oral Decision was issued, and then again until the issuance of the Impugned Decision, the Defence repeatedly raised the matter underlying the First Oral Application. The Trial Chamber later considered this behaviour, in conjunction with other allegations, to constitute evidence of a “consistent pattern of professional misconduct” and referred this misconduct to the competent Bar Associations. Upon review of the relevant Khmer and English transcripts, however, the Supreme Court Chamber is of the view that this persistence was justified given the Trial Chamber’s lack of clarity relating to the Defence’s applications.
22. Indeed, on 10 January, following the First Oral Application, the Trial Chamber provided no comment or acknowledgement and merely proceeded with the next scheduled item. On 19 January, the Defence sought to follow-up on the First Oral Application. In response, the President affirmed that the Chamber “ha[d] noted the remarks made by the defence counsel”, “preferred] not to make any comment to react to what [counsel] ha[d] stated”, and “remind[ed]” the Defence that it was not allowed to

raise this same matter again. On 23 January, the Defence attempted once more to obtain an unambiguous indication as to the treatment, if any, that the First Oral Application would receive. In particular, the Defence queried whether there would be a decision thereupon. In response, the Trial Chamber stated that “[t]he matter will be taken into consideration in due course”, while emphasising yet again that counsel should refrain from raising the matter any further.

23. The Supreme Court Chamber accepts that, by “noting” the First Oral Application on 19 January and assuring the Defence on 23 January that “the matter will be taken into consideration in due course,” the President of the Trial Chamber possibly implied that the Chamber would revert to this issue at some point. However, assuming the procedural history as recounted is accurate and complete, the First Oral Application was handled ambiguously. The Chamber’s pronouncements were neither definite nor specific and did not elucidate the intended course of action. Interpreted in light of the Trial Chamber’s repeated reprimands of the Defence, reiterated instructions to not raise the matter again, and the potentially sensitive nature of the issue, these ambiguous pronouncements could have reasonably been interpreted as a sign that the Chamber had set the matter aside. It follows that the Defence’s efforts to clarify the status of the First Oral Application do not appear to be reprehensible.

#### *The legal nature of the Oral Decision and Written Application*

24. The Defence was unsatisfied with the Oral Decision, claiming that it was “in fact not a decision to [their] request”. For this reason, the Defence lodged the Written Application, apparently convinced that the Oral Decision was not open to immediate appeal. The Trial Chamber, finding that the Written Application “merely expanded” on earlier oral requests already addressed by the Oral Decision, declared it inadmissible in the Impugned Decision as “a repetitious filing or a disguised appeal”. The Co-Prosecutors therefore maintain that the Appeal against this decision as it relates to the issues raised in the Written Application should be dismissed as belated because the time limit for filing the Appeal started running upon issuance of the Oral Decision, of which the Impugned Decision simply represents an “elaboration”.
25. The Supreme Court Chamber observes that, in the first place, a court’s decision must display *indicia* of an authoritative judicial act. In this respect, it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner. As such, a judicial decision should contain an operative part (“enacting clause” or “disposition”) which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties. Moreover, it is established ECCC practice for decisions open to appeal to be released in written form. This practice, although not required by law, serves legal certainty and transparency of proceedings as required by Rule 21 and enables an effective review process. Further, as held by the Trial Chamber on a different occasion, all judicial decisions - whether oral or written - must comply with a court’s obligation to provide adequate reasons as a corollary of the accused’s fundamental fair trial rights. Indeed, the right to receive a reasoned decision forms

part of the right to be heard. In conclusion, the fact that a court rendered a decision should be unambiguously borne out of both the form and the content of the act, rather than derived from “the most reasonable construction of the trial record” as to its implicit import, as advanced by the Co-Prosecutors. The Supreme Court Chamber finds that the Trial Chamber’s responses to the Defence’s applications, including the Oral Decision, were not consistent with this established practice and these underlying principles and may have been confusing as to their legal nature and consequences.

26. Pursuant to Rule 35, the body seized of a request must examine the allegations; assess whether there is, at a minimum, reason to believe that any of the acts encompassed by Rule 35(1) may have been committed; and decide the appropriate action, if any, to be taken pursuant to Rule 35(2). The Supreme Court Chamber notes that the First Oral Application was not explicitly characterised as a request pursuant to Rule 35. For that matter, the Oral Decision also failed to mention the legal basis upon which it was made. Most importantly, though, the Oral Decision did not explain whether the Defence’s allegations fell within Rule 35(1), which standard of proof was employed and, ultimately, whether the First Oral Application was granted or denied. Accordingly, the Oral Decision does not appear to be a judicial act disposing of a substantive or procedural issue within the Trial Chamber’s cognisance. Rather, the Oral Decision is a non-authoritative declaration, devoid of reasoning. Based on the available records, it is not readily apparent to the Supreme Court Chamber whether, prior to the filing of the Written Application, the legal framework provided in Rule 35 was considered with respect to the Prime Minister’s speech. Notably, the Trial Chamber was silent in the face of the Defence’s statement that the Oral Decision was not subject to immediate appeal, fostering uncertainty as to the Oral Decision’s legal characterisation. Therefore, even if the Trial Chamber intended to act pursuant to Rule 35 when announcing its Oral Decision, such intention did not manifest itself as a matter of course.
27. In addition to departure from the written form, the Supreme Court Chamber finds that the Oral Decision, considered alone, did not entirely comport with the Accused’s right to a reasoned decision. Only when taken in conjunction with the Impugned Decision can it be considered complete. Consequently, the Impugned Decision remedied this breach and, as conceded by the Defence, no prejudice was suffered by the Accused concerning access to a reasoned decision. Still, the unannounced and seemingly unjustified separation of the decision-making process into two phases could potentially confuse the parties.
28. The Supreme Court Chamber further finds that the Written Application should not have been considered inadmissible in the Impugned Decision. Regardless of its repetitive nature, the Written Application was occasioned by the Trial Chamber’s prior ambiguity concerning the First Oral Application. The Trial Chamber also failed to substantiate its qualification of the Written Application as a “disguised appeal”. In the event the Trial Chamber had reason to so believe, then the Written Application warranted treatment as such: the Trial Chamber should have forwarded the Written Application to the Supreme Court Chamber for consideration. Finally, the Supreme Court Chamber

observes that the Impugned Decision is not a mere “elaboration” of the Oral Decision, but also includes new findings not contained in the latter.

29. In conclusion, the Supreme Court finds that the Defence’s third ground correctly identifies an error of law in the Impugned Decision in so far as it found the Written Application inadmissible on *res judicata* grounds whereas the decision-making process was not complete. This error invalidates the decision as it unduly bars the Defence’s access to the appellate process.
30. Only a reasoned decision renders an accused’s right of appeal meaningful. Given that the only properly reasoned decision on the First Oral Application was the Impugned Decision, the Supreme Court Chamber finds that the time limit for lodging an appeal started to run from the date of the Impugned Decision. The Co-Prosecutors’ argument that the Appeal was filed out of time is accordingly without merit. The Supreme Court Chamber therefore concludes that the Appeal is admissible under Rules 35(6) and 104(4)(d) as timely filed.

#### Scope and Applicability of Rule 35

31. Given the ambiguity which accompanied the issuance of the Impugned Decision, this Chamber must first address the *prima facie* scope and applicability of Rule 35 before disposing of the merits of the Appeal. Rule 35 provides in relevant part:

#### **Rule 35. Interference with the Administration of Justice** (Amended on 6 March 2009)

1. The ECCC may sanction or *refer to the* appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:
  - a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
  - b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers;
  - c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;
  - d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;
  - e) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or the Chambers;
  - f) knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC; or
  - g) incites or attempts to commit any of the acts set out above.
2. When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may:
  - a. deal with the matter summarily;
  - b. conduct further investigations to ascertain whether

- there are sufficient grounds for instigating proceedings; or
- c. refer the matter to the appropriate authorities of the Kingdom of Cambodia

32. At the outset, we note that conduct falling within the scope of Rule 35(1) may, but need not amount to a criminal act. Further, unlike in international tribunals which operate outside the institutional framework of a state and have to construe their authority to punish contempt of court based on inherent powers, in the hybrid and civil law context of the ECCC, Rule 35 is not an autonomous source of criminalization. Nor does Rule 35 usurp the authority to primarily define criminal conduct on an *ad hoc* basis when seized of an issue of interference with the administration of justice. Therefore, whilst Rule 35 resembles the provisions dealing with contempt of court punishable at other international criminal tribunals in terms of the proscribed conduct, it is substantively distinct and does not constitute a *sui generis* basis for penal responsibility and sanction. Indeed, Rule 35(4) explicitly foresees the application of Cambodian law with respect to sanctioning acts set out in sub-Rule 35(1). Accordingly, where certain acts outlined under Rule 35 rise to the level of criminal behaviour, the applicable law with respect to proscribed acts and persons liable is Cambodian law. It follows that Cambodian criminal law remains controlling for issues such as modes of responsibility and elements of a crime.

33. Based on these observations, the Supreme Court Chamber must determine the normative import of Rule 35(1). As previously noted at the ECCC, this sub-rule articulates, by way of illustration, an array of conduct which may qualify as an interference with the administration of justice. It does not purport to define proscribed conduct exhaustively, nor is it limited in scope by reference to the Cambodian Criminal Code. Such open-ended construction demonstrates that the notion of interference under Rule 35 is broad, and acts falling thereunder may or may not be criminal in nature. The Supreme Court Chamber notes with approval the Pre-Trial Chamber’s articulation of the functional connection between Rules 21 and 35. This Chamber nonetheless emphasises that Rule 21 - which, as already clarified, expresses a general principle of interpretation - cannot be employed in expanding the realm of criminal liability and thereby infringing the principle of *nullum crimen sine lege*. Rather, Rule 35, in conjunction with Rule 21, contemplates procedures addressing both crimes against the administration of justice (as defined in the criminal statutes of Cambodia) and non-criminal offences against the administration of justice. Absent relevant Cambodian law, it ultimately falls on the ECCC Judges and Chambers to determine those non-criminal offenses that fall within the scope of Rule 35.

#### *Actus Reus*

34. Each of the specific prohibitions set out in Rule 35(l)(a) through (g) entails an effort to frustrate the mandate and functioning of the Court. Sub-paragraphs (a), (b) and (e) concern noncompliance with an order of the Court. Sub-paragraphs (c) and (d) address interference with evidence to be given in proceedings before the Court. Sub-paragraph (f) governs assistance to an accused person for purposes

of evading the jurisdiction of the Court. In accordance with the *ejusdem generis* rule of statutory construction, only conduct analogous to these enumerated grounds should be considered to be within the scope of Rule 35.

35. The Supreme Court Chamber further observes that the significance of a particular act's interference with the administration of justice under Rule 35(1) is measured by its abstract as well as by its concrete impact. Actual interference with the course of proceedings is not necessary where the conduct undermines the Court's legitimacy with the parties and the general public.
36. Specifically, this Chamber held that an erroneous judicial holding is not, by itself, legally sufficient to satisfy the Rule 35 standard. This Chamber further held that, notwithstanding the existence of specific rules dealing with disqualification and discipline, a judge or counsel are, at least in principle, within the ambit of Rule 35, provided that the alleged conduct rises to the level of interference with the administration of justice within the meaning of the Rule. Moreover, the Trial Chamber found in the Impugned Decision that conduct proscribed by Rule 35 includes "improperly influencing the judges in charge of a case" or even "acting in a way that could be perceived as an attempt to do so". Similarly, the Pre-Trial Chamber stated that "Rule 21(1) requires Rule 35(1) to cover the act of external pressure on a judge of the ECCC, including the acts of incitement and attempt". The Supreme Court Chamber concurs that actions undermining the independence and impartiality of ECCC judges, such as exerting pressure, constitute interference prohibited under Rule 35(1). Other prohibited conduct may include causing disorder in the courtroom, harassing Court officials and staff, undermining the logistical functioning of the Court, and otherwise bringing about circumstances that damage the Court's appearance of independence or impartiality. Notably, damaging the Court's appearance of independence and impartiality is interference as such, not merely an "appearance of interference".

#### *Mens Rea*

37. Under Rule 35(1), proscribed conduct must be "knowing and wilful". Strict liability is not foreseen. In other words, there is no liability under Rule 35 on the basis of an objective fact itself and irrespective of whether the conduct in question stems from direct intent, indifference or the lack of realisation of the nature and/or consequences of the conduct. Indeed, the procedural options available to the Court pursuant to Rule 35(2) refer to "a person [who] may have committed any of the acts set out in sub-rule 1". Rule 35(4), likewise, speaks of "sanctions imposed on a person found to have committed any act set out in sub-rule 1". Thus, pursuant to the plain language of Rule 35, the whole regime is designed to provide a punitive response, that is, sanction or referral to appropriate authorities of a person attributed with intent to interfere with the administration of justice.
38. Cambodian law is dispositive for criminal forms of interference. Therefore, the requisite *mens rea* does not have autonomous meaning under Rule 35(1). Conversely, to the extent Rule 35 applies to non-criminal acts, the intent element remains to be defined so as to encompass culpability as is appropriate to effecting the protection that the proscription seeks to establish. In this regard, we

consider that the requirement of specific intent construed by ICTY Trial Chambers for criminal contempt of court is too strict for administrative offences. Rather, it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental. However, acts that *prima facie* lack the requisite intent are excluded from the ambit of Rule 35 barring the initiation of proceedings or application of sanctions. For these reasons, the Trial Chamber's finding that "regardless of the intent with which [the Prime Minister's] remarks were made [...] the Chamber may therefore take any of the measures listed in Rule 35(2), irrespective of whether or not criminal responsibility arises from these remarks" goes beyond the plain meaning of Rule 35.

#### *Procedural avenues under Rule 35*

39. Rule 35(2) delineates procedural avenues open to a Chamber where there are reasons to believe that a person committed interference with the administration of justice. Actions under Rule 35 are discretionary. Considering its limited time and notoriously limited resources, the ECCC itself is unlikely to engage in a finding of criminal liability and mete out criminal punishment. Rather, the likely course of action in the event of alleged criminal interference with the administration of justice would be a referral of the matter to the Cambodian authorities. Indeed, having reason to believe that a prohibited interference occurred, Judges or Chambers may decide not to investigate and/or sanction for the sake of efficiency. It is inappropriate, however, for a Chamber to find an interference, especially a criminal interference, based on little or no substantiation in order to justify the failure to apply a sanction, in a sort of "guilty by suspicion" determination. The Supreme Court Chamber agrees in this respect with the Pre-Trial Chamber and the Co-Prosecutors, as recently expressed in another Rule 35 case, that any determination of a person's culpability under Rule 35 would require a standard of proof higher than "reasons to believe". The Supreme Court considers that the burden of proof for non-criminal offenses may vary from a balance of probabilities to beyond a reasonable doubt based on the measure or sanction available.
40. In the Impugned Decision, the Trial Chamber found reason to believe that an interference occurred, but refused further inquiry on the basis that the evidence was insufficient. We consider this approach logically flawed.
41. The Supreme Court Chamber considers, in particular, that dealing with a matter summarily under Rule 35(2) denotes a simplified procedure for making a determination. It does not authorize unfettered determinations based upon a low level of proof. Theoretically, a summary procedure does not exclude establishing facts under a beyond reasonable doubt standard. For example, acts appropriately dealt with summarily include those notorious because of their public nature, recorded on the Court's video, committed through authenticated documents, or admitted.
42. Rule 35 discloses little detail regarding the procedures pursuant to sub-Rule 35(2). The Supreme Court considers that the procedure for establishing liability, whether for a criminal or administrative offence, should comport with the fundamental requirement of fairness. The appropriate standard of proof is one aspect of this requirement. In

addition, as noted by the ICTY Appeals Chamber under the procedure laid down by its Rule 77(F), “it is for a Chamber, *proprio motu*, to initiate the proceedings whereby a person is called upon to answer the allegations against him when the Chamber has reason to believe he may be in contempt.” “[A] Chamber being both the prosecutor and the judge in relation to a charge of contempt” represents a danger and in such a case, the ordinary procedures and protections for the parties might be overlooked. Therefore, it is “essential that, where a Chamber initiates proceedings for contempt itself, it formulates at an early stage the nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved. It is only in this way that the alleged contemnor can be afforded a fair trial.”

#### *Sanctions and referrals under Rule 35*

43. Rule 35 does not contemplate measures to counter or punish proscribed conduct other than sanctions under Cambodian law or referral to the appropriate authorities. The Impugned Decision contains a “public reminder of the right of the Accused to be presumed innocent and of the need for officials to avoid comments incompatible with this presumption”. The Trial Chamber failed to identify any legal basis for this measure. Further, the Trial Chamber’s discussion of the standard of proof relating to these procedural avenues does not elucidate the issue.
44. Sanctions available under Rule 35 must be tailored to the ECCC context. To this end, other than criminal acts covered by Cambodian law, the framework of Rule 35 encompasses the power to “take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice”. This power accrues to any court by virtue of its judicial role and “is necessary to ensure that the Tribunal’s exercise of jurisdiction is not frustrated and its basic judicial functions are safeguarded”. As such, it is reasonable to interpret Rule 35 as applicable to a wider set of corrective responses that are administrative in nature. These responses include, for example, an admonition; notice to self-regulatory bodies, the superior or contracting authority of the culprit; publication of the outcome of proceedings in the media; or a limited administrative fine. These administrative sanctions still must comport with the basic principles of necessity and proportionality.
45. Rule 35 is primarily designed for the application of punitive measures with the objective of deterrence. The Supreme Court Chamber considers, however, that Rule 35 also serves the overarching goal of ensuring an effective and fair trial. In this respect, the duty of the court is not just to punish the interference with the administration of justice, but also to stop on-going interference and prevent its potential occurrence. These duties are particularly valid in the face of interference that endangers a fundamental right, such as the right to a fair trial. It is therefore reasonable to construe, *a majori ad minus*, that the ECCC may resort to the procedures under Rule 35 to apply not only the *sensu stricto* punitive measures (sanctions) but also undertake other corrective responses that are non-punitive in nature and do not require the finding of culpability (intent), in order to safeguard the right to a fair trial. The Supreme Court believes that this holding also articulates the position implicitly adopted in the Impugned Decision.

46. The Supreme Court will now assess the merits of the case in accordance with the above principles.

#### Merits

##### *The issue of criminal liability does not arise*

47. This Chamber agrees with the Trial Chamber that the issue of criminal liability does not arise in this case, but wishes to provide different reasoning. Pursuant to Article 522 of the Criminal Code of Cambodia, criminal responsibility for the “publication of comments intended to unlawfully influence judicial authorities” requires a specific intent “to influence judicial decision”. In this Chamber’s opinion, the content of the impugned statement as well as its context, as reported, do not *give prima facie* grounds for the attribution of such intent and instigation of proceedings.
48. Whereas the Prime Minister’s reported statements are doubtlessly forthright in declaring the guilt of the Accused, they nonetheless do make reference to the fact that a trial is in progress and that one “should not respond but let the court judge”. The same was emphasised again on a later occasion by the Prime Minister acknowledging that “the court may do what it wants”. Moreover, the impugned utterances were expressed in Vietnam, in the context of an interview regarding the ongoing historical debate on the role of Vietnam in the fall of the Khmer Rouge regime, namely, whether it invaded or helped liberate Cambodia. The Prime Minister’s statement supported the latter view. He was responding to a leading question about whether he disagreed with the position of the Accused on the function of Vietnamese forces in the overthrow of Democratic Kampuchea. The Prime Minister reportedly declared that Nuon Chea’s statements are “lies from a murderer” who “did not admit to his wrongdoings but gave lies about the Vietnamese volunteer forces” in order “to lessen his sin”. These quotations attributed to the Prime Minister appear to be aimed at discrediting the statement of the Accused with regards to the aforementioned historical debate. This reinforces the Prime Minister’s opinion that “[t]he reality happened in contrary to what Nuon Chea said”. This context demonstrates a purpose to appease the intended audience of the publication.
49. Therefore, the external manifestations of the speaker’s intent are 1) acting abroad 2) in the course of a discussion not primarily related to the question of the criminal responsibility of the Accused and 3) using words aimed at a specific audience and for a specific purpose, as described above. The Supreme Court Chamber is not satisfied that the Prime Minister could be attributed with the specific intent to interfere with the administration of justice. This Chamber further considers that it is highly unlikely that evidence of such specific intent, such as an admission, will be adduced through the initiation of criminal proceedings. Taken in combination with the issue of immunity, there is no basis to launch an investigation under Rule 35.
50. Rather than purporting to improperly influence the judges of the ECCC or to encourage the Cambodian public to believe the Accused guilty, the impugned statements appear to be an unfortunate result of circumstance and personal opinion, coupled with a conviction that “[f]he court can do whatever it wants but I had the right to condemn Khmer

Rouge leaders". Assuming that the latter refers to the right to freedom of expression, the Supreme Court agrees that the freedom of expression is relevant to this case and generally a valid concern in the context of Cambodia. In this instance, however, the right has been misconstrued: in accordance with the international standards embraced by the Cambodian Constitution and included in the Constitution itself, the freedom of expression is subject to limitations necessary to protect the "rights of others". The right to a fair trial, including the right to be presumed innocent, is one of the rights that justifies limiting free speech, particularly in the case of public officials.

*The Trial Chamber did not err in its choice of remedy for the violation of the Accused's right to be presumed innocent until proven guilty*

51. Below, the Supreme Court Chamber addresses first whether there was a violation of the Accused's right to a fair trial. Second, the Supreme Court Chamber addresses the scope of a criminal court's duty to preserve the integrity of the proceedings. Finally, the Supreme Court Chamber considers whether such duty has been properly discharged by the Trial Chamber under the circumstances.
52. Even though the fair trial violation seems to be uncontested in this case, the Supreme Court Chamber still deems it necessary to address the issue, even if only as a matter of general significance. The international human rights standards on the presumption of innocence are applicable to the ECCC pursuant to Articles 12(2) and 13(1) of the Agreement, and Articles 33(new) and 35(new) of the ECCC Law, which make direct reference to Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR"). Given the lack of pertinent Cambodian jurisprudence or practice, guidance was sought on the international level. State interference with a pending criminal case through the public speech of a government official in the course of their official duties is a violation of the presumption of innocence in the jurisprudence of both human rights bodies and national systems.
53. The Human Rights Committee ("HRC") acknowledged that the presumption of innocence, as enshrined in Article 14(2) of the ICCPR, entails "a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused". In determining whether a state violated the presumption of innocence the HRC considers (i) the extent of media coverage of prejudicial statements; (ii) the choice of words used by the public officials; (iii) whether prejudicial statements were repeatedly issued; and (iv) the status of the declarant. Violation of the right to be presumed innocent is punishable regardless of a government official's station.
54. In *Gridin v. Russian Federation*, the head of the police announced that he "was sure that the [defendant] was the murderer". Additionally, the investigator pronounced the defendant guilty in public meetings before the court hearing. These statements were given widespread media coverage, triggering a highly adverse public perception on the guilt of the accused, which was reflected in the tense atmosphere inside the courtroom. The HRC found a violation of the presumption of innocence in that a high-ranking law enforcement official failed "to exercise the restraint that

article 14, paragraph 2, requires of them". Moreover, although the defendant appealed his sentence on the basis that this right was violated, the Supreme Court of the Russian Federation failed to specifically deal with the matter.

55. Similarly, the HRC found a violation of the presumption of innocence in *Larranaga v. Philippines* where the defendant alleged that powerful social groups, one of which called for the execution of the defendant, influenced both the Trial Court and the Supreme Court. There were also many negative media reports before the verdict influencing the judges. Neither the trial court nor the Supreme Court adequately addressed these issues.
56. In cases not involving statements by public officials, a hostile pre-trial media campaign which implicates State sponsorship or control may also give rise to State responsibility for the violation of fair trial rights where no corrective action was taken. In *Marinich v. Belarus*, the respondent State was found to have violated an accused's right to be presumed innocent when the State-controlled television network aired episodes of the accused's interrogations accompanied with comments suggestive of the accused's guilt. In *Engo v. Cameroon*, the Cameroonian state media carried out a propaganda campaign against the accused in newspaper articles, repeatedly portraying him as guilty before trial. Although the complainant wrote letters to the prosecutor, the Minister of Justice and the managing director of Cameroon Radio Television requesting them to stop the publication of such information, these letters were met with no response. Other cases similarly demonstrate that when "extensive and adverse" material broadcast by state-directed national media called the accused "criminals" and "mutineers", the right to be presumed innocent is breached.
57. Pursuant to the European Convention on Human Rights, in accordance with Article 10 which guarantees freedom of expression, public officials are not barred from imparting information to the public concerning the proceedings or encouraging a public debate on a matter of general interest, provided that they do so with such discretion in full respect for the presumption of innocence. The ECtHR likewise held that public officials must refrain from making statements regarding an accused's guilt before the accused is convicted according to law. In balancing these two countervailing interests, the ECtHR progressively specified a wide range of elements to determine whether a declaration by a public official influenced the judges to the extent that the court's appearance of impartiality and the presumption of innocence are called into question. These factors include (i) the choice of words used by public officials in their statements, including whether the statements are allegations of suspicion or declarations of guilt; (ii) the context in which the statements were made; (iii) the status of the declarant; (iv) the public interest underlying the criminal case; (v) the timing of the statement in relation to the court proceedings; and (vi) whether the trial is being held before a jury or a professional judge.
58. The Inter-American Court of Human Rights ("IACtHR") relied on these ECtHR-established principles in determining that a State party violated the presumption of innocence set out in Article 8(2) of the American Convention on Human Rights ("ACHR") by "exhibit[ing]" the accused before the media as

the perpetrator before she was convicted of the charged crime. In the same case, the IACtHR specified that the right at hand “requires that the State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion” prior to a final finding of criminal responsibility according to law. A similar violation was found where state officials “paraded” a defendant before the media dressed in “defamatory clothing” as the perpetrator of treason. Similarly, the African Commission on Human and Peoples’ Rights found violations of the presumption of innocence in connection with public declarations of guilt by “highly placed government officers” and State-organised “intense pre-trial publicity”.

59. The Supreme Court Chamber notes that the Co-Prosecutors previously drew attention to the United States Supreme Court case *Tenney v. Brandhove* to illustrate the significance of free speech in political issues. The Supreme Court Chamber acknowledges that, in U.S. jurisprudence, the government speech doctrine stands for the principle that a government entity is entitled to say what it wishes. The government is also entitled to “speak for itself” and to select the views it wants to express. Nevertheless, cases more directly on point reveal that these free speech principles do not trump an accused’s right to a fair and impartial trial. Indeed, the presumption of innocence prohibits government entities and officials from speaking out against suspects in pending criminal trials. In *Sheppard v. Maxwell*, a case involving extensive media publicity and prejudicial statements by government employees regarding the defendant’s guilt, the U.S. Supreme Court held that while “freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court”.
60. Finally, we note that secondary sources considered that public characterizations by former President George Bush and former Secretary of Defence Donald Rumsfeld of the Guantanamo Bay detainees as “bad people”, “killers”, and “hard-core, well-trained terrorists” “resemble comments that have constituted a violation of the presumption of innocence in other contexts”. “It is difficult to see how the presumption of innocence can be maintained when the very individuals who established the commission system, appointed the commission personnel, and who will play a role in the review process have made such statements”.
61. In light of the jurisprudence discussed above, statements by public officials that pronounce on the guilt of an accused are incompatible with the presumption of innocence.
62. To remedy this violation the Defence requested monetary compensation or sentence reduction, whereas the Co-Prosecutors argue that the Trial Chamber’s “declaratory relief was sufficient. Both based their submissions on remedies provided at the various human rights bodies. The Supreme Court Chamber reiterates that while “[t]he case law of regional human rights bodies on victims’ remedies may serve as persuasive authority with regard to the content of the right to reparation for harm suffered by individuals”, due to their different mandate, “proceedings before regional human rights bodies differ, in terms of policy, technical legal framework, and rules of interpretation from criminal trials”.

In considering remedies available for infringements upon the accused’s presumption of innocence, human rights bodies have the mandate to engage States in disputes concerning the conduct of public authorities as a whole, and in turn, can recommend measures to be implemented by the state apparatus as a whole. The criminal court, however, is a public authority itself. It responds to the conduct of other public authorities in a manner necessary to hold a fair trial. Measures available to a criminal court are subordinate to this narrower goal. Moreover, due to their *modus operandi* which may require exhaustion of available domestic remedies and compliance with complex supra-national procedures, the human rights bodies are removed in time and distance from a violation. Remedies granted by these bodies may therefore be of a different nature than those available to domestic criminal courts. Thus it is the remedial measures taken by the domestic criminal courts and *reviewed* by the human rights courts, not the remedies *provided* by the human rights courts themselves that are relevant here.

63. Accordingly, the immediate duty of the criminal court in the pending case is to ensure that the trial is untarnished by any prejudice caused by adverse publicity. The “simple failure” of the court to counter the possible effect of prejudice can be sufficient to trigger responsibility under the European Convention of Human Rights. Similarly, in *Gridin v. Russian Federation* and *Larranaga v. Philippines*, the HRC found violations of the presumption of innocence when the domestic appellate courts failed to specifically deal with the issue of public officials uttering statements portraying the applicant as guilty. Conversely, if a domestic appellate body examines and analyses the impact of adverse publicity on a trial, the ECtHR is unlikely to find a breach of the accused’s Article 6 protections.
64. Indeed, it is the judiciary’s role to prevent the abuse of process by exercising its discretion to intervene when inaction would result in prejudice. Other cases confirm that court intervention can in itself be sufficient to preserve a fair trial against external influence, so long as the defect is not so egregious as to render a fair trial impossible. Regarding the effects of adverse publicity provoked by a media campaign in a jury proceeding, the ECtHR upheld the domestic courts’ reasoning that a judge’s direction to the jury to disregard external comments was sufficient to protect the presumption of innocence. In *Adolf v. Austria*, the ECtHR found no breach of the fair trial rights, including the presumption of innocence, as the domestic Supreme Court corrected the lower court’s defective reasoning. In all such cases, the fairness of the proceedings was evaluated as a whole.
65. Contempt sanctions and admonishments are used against justice system officials violating the presumption of innocence. In a recent case concerning the conduct of the Prosecutor of the International Criminal Court (“ICC”), the ICC Appeals Chamber held that his “clearly inappropriate [behaviour] in light of the presumption of innocence” may require, among other things, the taking of “various remedial measures to address any damage done by [his] statements”, including a formal reminder of his obligations or judicial reprimand. In *United States v. Koubriti*, the Attorney General violated a court order aimed at prohibiting the parties from publicly disclosing any information that had a reasonable likelihood of interfering with a fair trial. In deciding the proper

course of action, the Court observed that even though the high-ranking position of the declarant would make criminal contempt proceedings “considerably more complex” due to constitutional concerns about separation of powers, “the court’s duties and inquiries remain the same, and necessarily cannot vary with the station of the individual involved”. Far from being deliberate or intended, the violation was found to be “inadvertent”, considering the high official’s apology to the court and counsel, the statements themselves and the surrounding circumstances. Notably, it appeared that the Attorney General’s statements were legitimately aimed at keeping the public informed about the “latest developments in the war on terror” and were neither blatantly inflammatory nor designed to attract attention. Considering that the “potential for prejudice” was “undeniable under the circumstances” the court “formally and publicly admonished” the Attorney General for his conduct.

66. The most radical remedies available for a violation of the presumption of innocence are a stay of proceedings or the remand of a case for re-trial. The Supreme Court notes that such measures are exceptionally applied in trials involving a jury. In the United Kingdom, although “unremitting, extensive, sensational, inaccurate and misleading” publicity may render a guilty verdict “unsafe” in a jury trial, the Privy Council determined that in making such determination all circumstances must first be considered including the timing and circulation of the publicity; the “public interest that justice should be done and should be seen to be done”; and the safeguards of the trial process itself. Ultimately, “it is the effect of the publication [...] on the mind of the notional juror at the time of the trial that has to be considered.” “[T]he focusing effect of listening over a prolonged period to evidence in a case” and adequate warnings and directions given by an experienced and impartial trial judge ensure that a jury, except in the most exceptional cases, will “disabuse itself of information that it is not entitled to consider”. Such confidence that juries properly instructed and “in accordance with their oath” will deliver a “true verdict”, certainly attaches to an even greater degree to a trial court composed of professional judges. Thus, as determined by the ECtHR, professional judges are usually presumed unsusceptible to adverse publicity, especially absent any indication of such influence in the overall evaluation of the fairness of the proceedings.

67. Lastly, the Supreme Court notes that in *United States v. Bakker*, the Fourth Circuit Court of Appeals considered the source of pre-trial publicity. The defendant, a television evangelist indicted for fraud, appealed the trial court’s denial of his motions to change venue, alleging that these denials violated his right to an impartial jury given the “venomous”, “recent, pervasive and widespread” coverage of his legal proceedings. The Fourth Circuit found that the accused was the source of much of the publicity, having “engaged in a calculated media campaign,” both before and after

his indictment to support his claim of innocence and to raise publicity for his restructured television ministry. The court determined that an accused should not be allowed to manipulate the criminal justice system by generating publicity which is then used to support a claim that the publicity should give rise to a presumption of prejudice.

68. This Chamber observes that the declarant holds one of the most influential positions in the country and his statements were concomitant with the proceedings. It follows that the conduct had the *potential* to prejudice the Accused’s fair trial rights and compromise the Court’s appearance of independence. Statements of this kind should be avoided altogether. That being said, contrary to what the Defence seems to purport, the gist of the corrective action by the ECCC is not to sanction or otherwise embarrass the Prime Minister but to ascertain that no prejudice is caused to the trial proceedings. The trial is being conducted before professional judges only, who are less likely than jurors and lay assessors to be influenced. The evidentiary proceedings are also on-going leaving open the possibility to prove or disprove relevant facts. Furthermore, regarding the source of the publicity, the Supreme Court Chamber observes that the first statement attributed to the Prime Minister was made to the Vietnamese press. It was neither blatantly inflammatory nor designed to attract attention. The subsequent publicity was not a virulent press campaign aimed at hampering the fairness of the trial. Rather, the subsequent widespread coverage and reaction in Cambodia are mainly attributable to the Defence’s efforts to give prominence to their grievance.

69. For the foregoing reasons, this Chamber finds appropriate the public affirmation of the presumption of innocence and confirmation that the Trial Chamber will not take into account any public comments concerning the guilt or innocence of any Accused. By refusing (implicitly) to apply the measure requested by the Defence, that is, an admonition, the Trial Chamber did not err in law such as to invalidate the decision nor did it err in the exercise of its discretion resulting in prejudice to the Appellant. Considering that the passage contained in paragraph 31 of the Impugned Decision was not announced in a public hearing, the Supreme Court emphasises the right of the Accused to be presumed innocent. Public officials must avoid comments incompatible with this presumption, as such comments, if repeated, could undermine the Accused’s right to a fair trial.

## DISPOSITION

For The Foregoing Reasons, The Supreme Court Chamber:

**DECLARES** the Appeal admissible;

**DISMISSES** the Appeal on the merits.

# Conference Paper

by Ms Susila Sithamparam

Panel Forum: “A Comparative Approach in Judicial Decision Making”

Day 2: 11.30am

## A Comparative Approach In Judicial Decision-Making

### Introduction

The focus of this paper is on the growth of industrial law in Malaysia. There are historical reasons for a comparative approach in judicial decision-making in Malaysia. The labour, employment and industrial legislation are a legacy of the British colonial government<sup>1</sup>. The earliest decisions of the courts followed the common law tradition. This trend has continued and decisions from the courts in the Commonwealth are of persuasive authority.

The decisions on industrial law emanate from the Industrial Court<sup>2</sup> which has the jurisdiction to decide on trade disputes<sup>3</sup>. The Industrial Court has quasi-judicial powers and is subject to the supervisory jurisdiction of the High Court<sup>4</sup>.

The powers of the Industrial Court were highlighted by the Federal Court<sup>5</sup> as follows:

“At the outset, it is we think, necessary to reflect on the extraordinary powers conferred upon the Industrial Court in resolving industrial disputes. They are all encompassing. This is s.30(5) of the Industrial Relations Act 1967 (the Act) which stipulates :

‘The Court shall act according to equity good conscience and the substantial merits of the case without regard to technicalities and legal form.’

It has been said, quite rightly, that industrial jurisprudence and industrial justice have a prior obligation and adherence to social justice as distinguished from legal justice and therefore have far wider powers than ordinary civil courts in the prescription, recognition and creation of rights, duties and obligations so as to achieve industrial harmony thereby enhancing the economic well-being of the nation: (see *Insaf Vol. XXI no.3 - The philosophy and concept. of industrial relations in Malaysia* - by Abu Hashim bin Hj. Abu Bakar, Chairman, Industrial Court.) In applying the powers under s. 30(5) above, the Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the *raison d’etre* of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing

harmony between capital and labour and fostering good relationship.”

### Legislative history

The beginnings of industrial law is a legacy of the British colonial government<sup>6</sup>. The growth of industrial law has been in tandem with the economic growth and the industrialisation of the country<sup>7</sup>.

The first legislation were the Industrial Courts Enactment 1940 by the Federated Malay States, Industrial Courts Ordinance 1940 for the Straits Settlement and the Industrial Courts Enactment 1360 of Kedah. When the Federation of Malaya was formed in 1948, these laws were repealed and the Industrial Courts Ordinance 1948 was enacted. The Industrial Courts Ordinance 1948 provided for the settlement of trade disputes by a permanent Industrial Court and *ad hoc* Boards of arbitration and inquiry. It provided for a voluntary system of arbitration of trade disputes.

The Essential (Arbitration in the Essential Services ) Regulations 1965 and the Essential (Prohibition of Strikes and Proscribed Industrial Action) Regulations 1965 provided special provisions for certain industries during a period of emergency. They were later repealed by the Essential (Trade Disputes in the Essential Services) Regulations 1965.

The present Industrial Court was established under the Industrial Relations Act 1967. The Industrial Courts Ordinance 1948 and the Essential (Trade Disputes in the Essential Services) Regulations 1965 were repealed by the Act. The present legislation provides for the compulsory arbitration of trade disputes if a trade dispute is referred to the Industrial Court by the Honourable Minister of Human Resources.

The Industrial Court also has the jurisdiction to decide on the unjust dismissal of an individual workman irrespective of whether or not he is a member of a trade union of workmen if the matter is referred to the Industrial Court by the Honourable Minister of Human Resources.

### The precedents by the Privy Council

The decisions of the Federal Court were subject to appeal to the Privy Council until the abolition of the final appeal to the Judicial Committee of the Privy Council on 1 January 1985. The review by the Privy Council of the decisions which emanate from the Industrial Court are essentially on the supervisory jurisdiction of the High Court in respect of the decisions of inferior courts.

In *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others*<sup>8</sup>, the Privy Council interpreted the ouster clause in section 29(3)(a), Industrial Relations Act 1967. The Privy Council held as follows:

“.....there is no doubt that the dispute between the company and the respondents was a trade dispute within the definition in section 2 of the Industrial Relations Act 1967. It was therefore a dispute which the Minister had power to remit to the Industrial Court under section 23(2). The Industrial Court applied its mind to the proper question for the purpose of making its award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that section 29(3) (a) effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings. Accordingly their Lordships agree with the decision, though not with the reasoning, of the Federal Court and they will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed.”

The decision of the Federal Court<sup>9</sup> in the same case highlights the inheritance of the common law on the supervisory jurisdiction of the High Court. Raja Azlan Shah, Federal Judge (as he then was) held as follows:

“The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence.”

Subsequently, the Federal Court in *R Rama Chandran v Industrial Court of Malaysia and Another*<sup>10</sup> took a more liberal view of the supervisory jurisdiction of the High Court. Eusoff Chin, Chief Justice held as follows:

“Section 33B(1)(previously s.29(3)(a) of the Industrial Relations Act provides that an award of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question

in any Court of law. Yet, our High Courts and Federal Court intervene to quash the awards of the Industrial Court in appropriate cases, all for the cause of justice. Therefore, even when the statute declares an award is final, the Courts can still intervene. (See *Sungai Wangi Estate v. Uni* [1975] 1 MLJ 136). Similarly, in *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 MLJ 24, where the Minister has refused to refer a trade dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act, the Supreme Court when upholding the decision of the High Court granting certiorari to quash the decision of the Minister, did not order the Minister to reconsider the matter *de novo* but instead arrogated itself the powers of the Minister and granted the relief to the workman by directing the Minister to refer the trade dispute to the Industrial Court.

It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in certiorari proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

...

I am, therefore, of the view that based on the facts on record, this is a fit and proper case where the jurisdiction of the Court should not end with the quashing of the award.

The High Court jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by the Courts in England. Of course if the application for certiorari is dismissed, that ends the matter. But if the application is allowed, the Court has surely to mould the order. If we were to merely grant certiorari to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.

...

I would suggest that the intensity of the Court's review of administrative action may vary according to the nature of the case. The Courts in the United Kingdom have identified particular classes of cases where the exercise of power will be subject to rigorous examination. To illustrate, the interference with human rights should be subject to close scrutiny. (See, *R. v. Secretary of State for the Home Department, ex parte, Brind* [1991] 1 AC 696, 757).

Similarly when the result of an impugned decision may put life or liberty at risk, the duty which rests on the Court will be especially onerous. In this context, I would refer to *Bugdaycay v. Secretary of State for the Home Department London Borough Council* [1987] 1 All ER 940 (HL) where Lord Bridge stated that Courts are entitled within limits :

“To submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under

challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

And Lord Templeman said this :

'Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the Court in the examination of the decision-making process.'

And, 'life' in Article 5(1) of the Constitution, as Sri Ram JCA has said in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 AMR 1617, 1654, is wide enough to encompass the right to be engaged in lawful and gainful employment.

The categories of such cases are, of course, not closed.

I would say that in reviewing the award of the Industrial Court for *substance* and not just *process*, we were amply supported by the reasoning and the authorities cited above and, that therefore, there was a *legal basis* for us to have done so."

### The persuasive value of decisions from the courts in the Commonwealth

The industrial jurisprudence of Malaysia has been enriched by the citation of cases from the Commonwealth countries.

In *Re Application By Dunlop Estates Bhd v All Malayan Estates Staff Union*<sup>11</sup>, Mohamed Azmi J, High Court Judge (as he then was) followed the decision of the Federal Court in *Non-Metallic Mineral Products Manufacturing Employees Union and others v South East Asia Fire Bricks Sdn Bhd*<sup>12</sup> and cited the decision of the Indian Supreme Court in *M/S Hindustan Hosiery Industries v F.H. Lala and another*<sup>13</sup> where it was held that the Indian Industrial Disputes Act 1947 was intended to be a self-contained one which seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration.

Abdul Hamid Mohamad, Court of Appeal Judge (as he then was) referred to decisions of the courts in the Commonwealth in *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair and another*<sup>14</sup> in deciding that the standard of proof which an employer had to prove that an employee had committed a misconduct was on a balance of probabilities and that the degree of probability required should be proportionate to the nature and gravity of the issue. The Court of Appeal overruled the decision of the High Court<sup>15</sup> which had applied the burden of proof in a criminal case of beyond reasonable doubt. The Court of Appeal also reviewed the statutory provisions in particular section 30(5), Industrial Relations Act 1967 and local decisions and held that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure which are applied in a court of law.

The Court of Appeal had considered the decisions of the English Court of Appeal in *Monie v Coral Racing Ltd*<sup>16</sup>, Indian Supreme Court in *Management of Balipara Tea Estate v Its Workmen*<sup>17</sup> and the Court of Appeal of New Zealand in *Airline Stewards and Hostesses of New Industrial Union of Workers v Air New Zealand Ltd*<sup>18</sup> and *Honda New Zealand Ltd v New Zealand Boilmakers' etc Union*<sup>19</sup>.

The Court of Appeal held from pages 137 to 140 as follows:

"Since no court in this country higher than the High Court has made a pronouncement on this issue, perhaps we should also look at other jurisdictions.

In *Monie v. Coral Racing Ltd* (1981) ICR 109, the Court of Appeal in England had to decide an appeal by an employee who had been dismissed for dishonesty. Money was stolen from the employers' safe in circumstances such that only the employee or an assistant manager could have taken it. The employers did not know who was responsible and dismissed them both for dishonesty. The Court of Appeal, dismissing the appeal by the employee held, *inter alia* :

'Held, dismissing the appeal, (1) that whether a dismissal based on mere suspicion of an employee's theft was fair depended in whether in all the circumstances of the case the employer had acted reasonably in treating their suspicion as a sufficient reason for dismissing the employee: that such reason was in the circumstances a 'reason related to the conduct of the employee'; and that the industrial tribunal, having asked themselves whether there were solid and sensible grounds on which the employers could reasonably suspect dishonesty, were entitled to find that the employers had discharged the onus of proof under para 6(8) of Sch 1 to the Act (post, pp 121Dm 122G-123E, 124C-G, 126G-127A, D-R, G-128B).'

In *Employee's Misconduct As Cause for Discipline and Dismissal in India and the Commonwealth* by Alfred Avins, (1968 Ed), the learned author, citing numerous authorities says:

#### 'Section 284 - Proof

The British Columbia Supreme Court has ruled that an employer need not prove the guilt of an employee beyond a reasonable doubt to impose disciplinary sanctions, and hence acquittal of theft by a criminal court is no bar to dismissal by the employer. A fortiori, an employer need not reinstate an employee dismissed for theft because the conviction has been set aside on appeal. As the Hyderabad High Court has remarked: 'It is for ... (the employer) to see how far the services of such a suspicious character can be safely continued taking into view ... the value of the property with which ... (he) had to deal.

The standard of proof must be sufficient to measure up to a preponderance of the evidence, taking all reasonable inferences into account.'

The Supreme Court of India in *Management of Balipara Tea Estate v. Its Workmen* AIR 1960 Supreme Court 191, says :

'In making an award in an industrial dispute referred to it, the tribunal has not to decide for itself whether the charge framed against the workman concerned (in this case falsification of accounts and misappropriation of fund) has been established to its satisfaction; it has only to be satisfied that the management of a business

concern was justified in coming to the conclusion that the charge against its workman was well founded. If there is finding by the tribunal that the management has been actuated by any sinister motives, or has indulged in unfair labour practice, or that the workman has been victimised for any activities of his in connection with the trade unions, it may have reasons to be critical of the enquiry held by the management.

The tribunal misdirects itself in so far as it insists upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well settled that a tribunal has to find only whether there is justification for the management to dismiss an employee and whether a case of misconduct has been made out at the inquiry held by it.'

Normally, one would expect the Indian Court to be very technical in its approach and insist of the higher burden, but this judgment shows otherwise.

Two judgments of the Court of Appeal, Wellington, New Zealand will also throw some light on the approach of the court on the issue. In *Airline Stewards & Hostesses of New Industrial Union of Workers v. Air New Zealand Ltd* (1990) 3 NZLR 549, four Air New Zealand Ltd cabin crew members were believed by United States Customs to have attempted to import into Hawaii alcohol removed from the bonded stock in the aircraft. Air New Zealand was fined US\$500 for violation of United State Customs Regulations. Air New Zealand, after making extensive inquiries into the matter, dismissed them for serious misconduct. Air New Zealand did not allege that the employees had committed theft, but did allege that they caused the company grave embarrassment by being found attempting to bring on shore bonded stock from the aircraft. The Court of Appeal, held, *inter alia*:

- (2) The employer is required to prove, however, on the balance of probabilities that on the facts available to him after reasonable inquiry made by him the dismissal has been shown to be justifiable (see p 554 line 39).
- (3) The test is whether the employer has shown that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision. He must show that he had reasonable grounds to believe and did honestly believe that there had been misconduct by the employee of sufficient gravity to warrant dismissal (see p 555 line 51).'

It is interesting to note that MP Jain, the learned author of *Administrative Law of Malaysia and Singapore*, as meticulous as he is, does not deem it fit to discuss the question of standard of proof under a specific heading or subheading. However, at p 327 of the 3rd Ed of the book, the learned author says:

'What is needed to sustain findings of fact by an adjudicatory body is some evidence of probative value. A finding based on evidence of no probative value is no good.'

HWR Wade and CF Forsyth, in the 7th Ed of *Administrative Law* discussed the 'Standard and Burden of Proof' under a sub-heading. On the standard of proof, the learned authors have this to say:

'Nearly all the cases which concern administrative law are civil, as opposed to criminal, proceedings. The standard of proof of facts, accordingly, is the civil standard, based on the balance of probabilities, as contrasted with the criminal standard which requires proof beyond reasonable doubt. Even where, as sometimes in disciplinary proceedings, the language of the Act or regulations has a criminal flavour, speaking of 'offences', 'charges' and 'punishments', the standard of proof remains the civil standard.

But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the court will require a high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude.'

It should be remembered that the question of standard of proof is closely connected with the question of finding of facts."

In applying the decisions of court from outside the jurisdiction, the courts are mindful that there are different laws prevailing and the local statutes must be adhered to. In *Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor*<sup>20</sup>, Edgar Joseph Jr, High Court Judge (as he then was) held as follows:

"A final point must be made. It was argued by way of alternative, by counsel for the union that if, contrary to his primary submission, there was no legal basis in employment law or under the collective agreement, for the Industrial Court to have made the award concerned, it was still open to the Industrial Court to create rights and obligations which it considers essential for keeping industrial peace. The following passage in the judgment of Mukherjee J in *Bharat Bank Ltd Delhi v. Employees of the Bharat Bank Ltd Delhi* cited with approval by Chang Min Tat FJ in *Dr. A Dutt v. Asunta Hospital* at page 312 was quoted :

'In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.'

In reply, counsel for the company submitted that Chang Min Tatt FJ's approval of the passage in Mukherjee J's

judgment was only obiter and that the learned judge had loosely adopted the reasoning in certain Indian decisions. As for the Indian decisions, counsel argued that an uncritical adoption of them could be misplaced because industrial jurisprudence in India is very much influenced by the Indian Constitution and the statement of state policy therein, known as the Directive Principles of State Policy contained in Part IV of the Indian Constitution, art 36 et seq. (See *Basu's Commentary* (6th, Ed, 1981 (Vol E) at p 79). To illustrate the role played by the Directive Principles in decision making in a labour dispute, counsel also cited the cases of *State of Mysore v. Workers at p 928* and *Workman Shift In Charge v. Presiding Officer Industrial Tribunal Delhi*. He then drew attention to the case of *Phang Chin Hock v. PP* where Suffian LP in making a comparison between the Indian and Malaysian Constitutions listed the Directive Principles as one of the distinguishing features between the two documents.

Having said that counsel acknowledged that the Directive Principles may carry laudable concepts, but the question was whether it should not be left to Parliament to decide whether these principles should infuse our labour legislation rather than for the courts to import them vicariously by the adoption of Indian decisions without qualification.

...

Secondly, the dicta to be found in the judgments in the Indian cases on the functions and powers of Industrial Tribunals referred to by the Federal Court in *Dr. Dutt's* case, are based not on art 38 of the Indian Constitution and its Directive Principles of State Policy, as argued by counsel for the company, but on the following statement by Ludwig Teller in his book, entitled *Labour Disputes and Collective Bargaining* (Vol 1) at p 536 :

'Industrial arbitration may involve the extension of an existing agreement, or the making of a new one or in general the creation of new obligations or the modifications itself with interpretation of existing obligations and disputes relating to existing agreements.'

On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (6) of s.30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily."

The Industrial Court has established principles on job security. Prior to the Minimum Retirement Age Act 2012 which came into force on 1 July 2013, the Industrial Court held that in the absence of a retirement clause in the contract of employment, an employer could impose a retirement age for its employees which was reasonable. In *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong*<sup>21</sup>, Lim Heng Seng, Chairman of the Industrial Court held at pages 854 to 855 as follows:

"In a s.20 reference a workman's complaint consists of two elements; firstly, that he has been dismissed and secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief to wit an order for reinstatement which may be granted or nor at the discretion of the court.

As to the first element, industrial jurisprudence as developed in the course of industrial adjudication readily recognises that any act which has the effect of bringing a contract employment to an end is a dismissal within the meaning of s.20 of the Act. The terminology used and the means resorted to by an employer is of little significance; thus contractual terminations, constructive dismissals, non-renewals of employment contracts, forced resignations and retrenchments are all species of the same genus which is dismissals. Retirement likewise is also a dismissal for the purpose of industrial adjudication under s.20 of the Act.

In this context, the term 'dismissal' carries no implication of fault or breach of discipline, but purely a neutral meaning indicative of the termination of an employment relationship at the instance or behest of the employer. This is in contrast with its common usage of the term in association with some justificatory reason for the employee's termination, e.g. misconduct, poor performance or breach of conduct.

When an employee's services have been terminated on the grounds that he had attained his retirement age, the just cause or excuse advanced by an employer when the termination is challenged will invariably be a justification based on a contractual provision. An employer will point to the agreement signed between the parties or to a usage or custom in a particular trade to establish his just cause. Or, where an employer is in the position to do so, he might rely on an implied term. The parties to that agreement have agreed, expressly or impliedly, that unless the employee miscondacted himself or failed to perform his work satisfactorily, he shall be engaged in the service of the employer until the former attains the stipulated retirement age. Like an employee in a genuine fixed term contract of employment who leaves at the expiration of his fixed term, the retired employee has completed his engagement with his employer for a definite term on which event he gracefully retires. that is just cause enough for an employer to formally bring an end to their employment relationship.

In this case, however, the company is unable to rely upon a contractual provision stipulating that the claimant ought to retire at 55. When retired one year and three months after he attained that age the claimant complains that he had been dismissed without just cause or excuse. He claims that employees in his category normally retire at 60. The court is of the opinion that the claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the court will now address.

The non-existence of a retirement clause in an employment contract cannot mean that no employer can ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would tantamount to dismissal without just cause or excuse. The court has to constantly remind itself - and the parties before it - that in reference under s.20, the true question posed to the court for adjudication is not whether a termination of an employee's services services is lawful in that it was pursuant to a contractual provision or otherwise, but whether the same was for just cause or excuse. A justification based on

contractual grounds might be a relevant factor; however, it will certainly not be conclusive of the matter.

A fundamental aspect of industrial adjudication is the proposition that the function of the court is not confined to interpreting and giving effect to the contractual rights and duties or obligations of the parties. The court must have the authority to recognise and even create rights which exists independently of the contract whenever the justice of the matter requires were the court to meaningfully perform the statutory function entrusted to it in the realm of industrial relations, in particular in the resolution of the claims arising out of the conflicting demands, interests and aspirations of the disputing parties.”

The Court of Appeal<sup>22</sup> upheld the decision of the Industrial Court in that case. Gopal Sri Ram, Court of Appeal Judge (as he then was) held at page 16 as follows:

“This, in my view, is a perfectly correct direction. It has the support of the decision of the House of Lords in *Waite v. Government Communications Headquarters* [1983] ICR 653, an authority referred to be the learned Chairman in his award. In *Waite* (ibid), Lord Fraser summed up the principle applicable to a case as the present as follows (at p. 662):

‘I therefore reject the view that the contractual retiring age conclusively fixes the normal retiring age. I accept that where is a contractual retiring age, applicable to all, or nearly all, the employees holding the position which the appellant employee held, there is a presumption that the contractual retiring age is the normal retiring age for the group. But it is a presumption which, in my opinion, can be rebutted by evidence that there is in practice some higher age at which employees holding the position are regularly retired, and which they have reasonably come to regard as their normal retiring age. Having regard to the social policy which seems to underlie the Act - namely the policy of securing fair treatment, as regards compulsory retirement, as between different employees holding the same position - the expression ‘normal retiring age’ conveys the idea of an age at which employees in the group can reasonably expect to be compelled to retire, unless there is some special reason in a particular case for a different age to apply. ‘Normal’ in his context is not a mere synonym for ‘usual’. The word ‘usual’ suggests a purely statistical approach by ascertaining the age at which the majority of employees actually retire, without regard to whether some of them may have been retained in office until a higher age for special reasons such as a temporary shortage of employees with a particular skill, or a temporary glut of work, or personal consideration for an employee who has not sufficient reckonable service to qualify for a full pension. The proper test is in my view not merely statistical. It is to ascertain what would be the reasonable expectation or understanding of the employees holding that position at the relevant time. The contractual retiring age will *prima facie* be the normal, but it may be displaced by evidence that it is regularly departed from in practice.”

### The future

The nature of work and employment relationships is constantly evolving. Where the nature of work and employment relationships is transnational, issues on the jurisdiction of the

Industrial Court have arisen<sup>23</sup>. The use of technology has also changed the landscape of work and employment relationships. It is anticipated that new issues on the jurisdiction of the Industrial Court will arise. There could be an overlapping of jurisdictions in such cases.

These trends provide further impetus for a comparative approach in judicial decision-making in Malaysia.

Dated : 2 August 2013.

### Notes

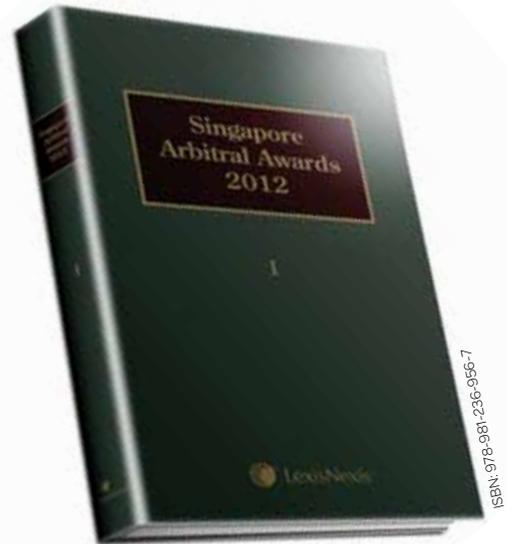
- 1 The Federation of Malaya became independent on 31 August 1957. Malaysia was formed when the states of Malaya, Sabah, Sarawak and Singapore joined as a federation on 16 September 1963. Singapore ceded on 9 August 1965.
- 2 There are twenty-six divisions of the Industrial Court in Malaysia.
- 3 The jurisdiction of the Industrial Court is by way of references by the Honourable Minister of Human Resources in respect of trade disputes pursuant to 26(2) or a complaint by a trade union of workmen pursuant to section 8(2A) or a dismissal of an individual workmen irrespective of whether or not he is a member of a trade union of workmen pursuant to section 20(3), Industrial Relations Act 1967.
- 4 There are two High Courts which are the High Court of Malaya and the High Court of Sabah and Sarawak.
- 5 *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* [2004] 3 ILR i at pages xiv and xv.
- 6 “The Industrial Relations Law of Malaysia” by Wu Min Aun .
- 7 “Human Capital Transformation: 55 Years of Malaysian Experience” by the Institute of Labour Market Information and Analysis, Ministry of Human Resources.
- 8 [1980] 3 W.L.R. 318.
- 9 *Non-Metallic Mineral Products Manufacturing Employees Union & Others v South East Asia Fire Bricks Sdn Bhd* [1976] 2 M.L.J. 67 per Raja Azlan Shah FJ at page 68.
- 10 [1997] 1 CLJ 147 per Eusoff Chin CJ at pages 167, 169 and 176.
- 11 [1980] 1 M.L.J 243
- 12 [1976] 2 M.L.J 67
- 13 [1974] 1 L.L.J 340
- 14 [2002] 3 CLJ 314
- 15 [1996] 1 MLJ 481
- 16 (1981) ICR 109
- 17 AIR 1960 Supreme Court 191
- 18 [1990] 3 NZLR 549.
- 19 [1991] 1 NZLR 392.
- 20 [1991] 2 MLJ 115 per Edgar Joseph Jr J at pages 121 and 122.
- 21 [1998] 3 ILR 843
- 22 *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 3 CLJ 9
- 23 *Kathiravelu Ganesan and another v Kojasa Holdings Bhd* [1997] 2 M.L.J 685 (Supreme Court). The highest court has been renamed as the Federal Court; *Nacap Asia Pacific Bhd v Jeffrey Ronald Pearce and another* [2011] 5 CLJ 791 (High Court).

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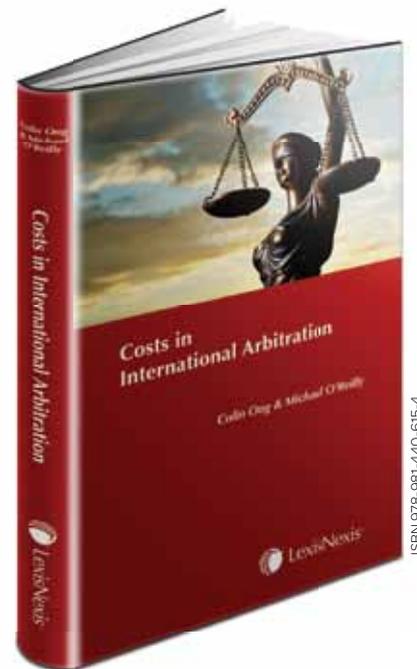
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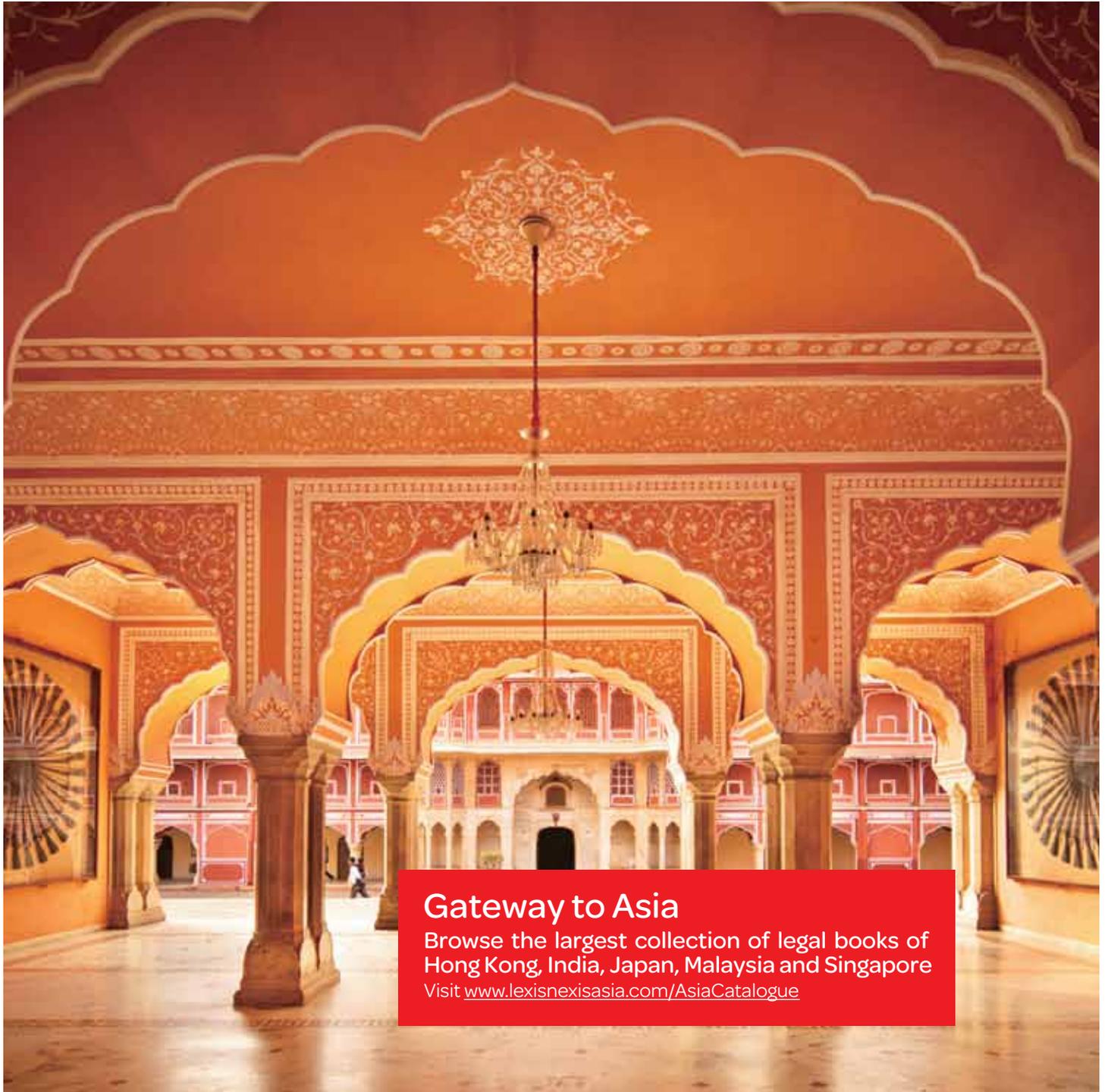
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