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# Resolving the Conundrum of Jurisdiction in Conflict of Laws: A Private International Law Approach

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## ABSTRACT

*The purpose of this article is to study the modern concept of jurisdiction in conflict of law. With the advent of globalization and commercial transactions, the issue of jurisdiction takes a strategic position for the forums who decide disputes of such nature. With the increasing e-commerce and cross border transactions, emerge the unique issue of ascertainment of jurisdiction in disputes at hand. There are various theories that support diverging approaches to tackle the conflict in jurisdiction. However, private international law has answers to this particular issue. This study analyses the development of this concept in common law countries. Its relevance in the present can be appreciated through the eyes of judges and various scholars of conflict of law espousing this issue. The modern concept of jurisdiction is unable to establish a nexus between the root of the problem and its solution. The concept of jurisdiction under private international law is not crystallized. The primary objectives of research are to come out with a comprehensive idea of jurisdiction under private international law. Further, to study various theories which cull out jurisdiction in conflict of law cases.*

**Keywords:** *jurisdiction, conflict of law, inter partes, actions, suit, territory*

## I. INTRODUCTION

“Jurisdiction” concerns the power of courts to adjudicate with respect to a person or thing. If a court has jurisdiction over a person, for example, it can exercise power over her, and adjust her legal relations with others. A court, for example, might order that a defendant pay money to a plaintiff for a breach of contract; the court must have personal jurisdiction for that order to be valid. In contrast, a court might exercise jurisdiction over a piece of property (real or personal), adjudicating the rights of the whole world in it (in rem jurisdiction), or adjudicating the rights in it of certain named individuals only (quasi-in rem jurisdiction). Examples of the former include Torrens land registration systems and decrees of probate and admiralty courts; quasi-in rem jurisdiction is typified by a suit to quiet title or an attachment action by a creditor against

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a piece of a debtor's property. To exercise jurisdiction properly, a court must have enough connection with a problem to satisfy both constitutional and statutory requirements. There must be a sufficient nexus between the defendant or the res on the one hand and the state on the other to justify the exercise of power. This does not mean that the defendant, for example, necessarily must be present in the jurisdiction; it may be that her activities (such as selling goods in the state) will make it reasonable for the state to exercise jurisdiction over her even though she is not within the state's territory. When that happens, the state's "long-arm" jurisdiction can bring the defendant before the court.

This research paper on jurisdiction examines the development of modern jurisdictional concepts, problems involving specific types of jurisdiction, and conceptual difficulties with modern doctrine, particularly with regard to new developments in electronic communication and commerce.

## **II. POSITION OF JURISDICTION IN ENGLAND AND INDIA**

Physical presence in a state is always a basis for personal jurisdiction. The exercise of jurisdiction is permitted over people and property within the territorial borders. In such a case, physical presence in a forum state is a basis for personal jurisdiction, even when an out-of-state individual enters the forum state for a brief time. Physical presence in the forum state satisfies the requirement of constitutional due process.

The English conflict rules have more or less adhered to the rule of territoriality as the basis of an adjudicative jurisdiction. In England, "there are now two quite different sets of rules as to jurisdiction of the English courts. In many cases, jurisdiction is still governed by what may be called the 'traditional rules', though in a growing proportion of cases, they are replaced by the 'Convention rules',"<sup>2</sup>

### **THE TRADITIONAL RULES**

The traditional rules permit an English court to exercise jurisdiction when (1) the defendant is present within England and the writ is served upon him; (2) he submits to the jurisdiction of the court; or (3) he is served, at the discretion of the court, with the writ, in accordance with the Rules of the Supreme Court outside England. This was a shift from

the earlier position where English courts founded jurisdiction based on the location of the assets or nationality or presence of the defendant. In other words, if the defendant is informed or is put

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<sup>2</sup> Collier, J. G. (2001) "Introduction," in *Conflict of Laws*. 3rd edn. Cambridge: Cambridge University Press, pp. 3-7. doi: 10.1017/CBO9781139164627.002.

on notice of an action, an English court would exercise jurisdiction over him. Mere physical presence of a person, for howsoever short a period, within the territorial limits of England makes him liable to the service of the writ, and consequently, makes him amenable to jurisdiction. In certain cases, the court may also permit substituted service.

The principle of *lex fori* is applicable with full force in all matters of procedure. No rule of procedure of foreign law is recognised. It was held in *Ramanathan Chettier v Soma Sunderam Chettier* that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure. In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code). The Code does not lay any separate set of rules for jurisdiction in case of international private disputes. It incorporates specific provisions for meeting the requirements of serving the procedure beyond territorial limits. In matter of jurisdiction what is treated differently is the question of subject-matter competence and not of territorial competence, i.e. the question of territorial jurisdiction arises in the same way in an international private dispute as in a domestic dispute. The Code provides general provisions regarding jurisdiction on the basis of pecuniary limit, subject matter and territory. Sections 16 to 20 of the Code regulate the issue of territorial jurisdiction for institution of suits.<sup>3</sup>

#### **RULES AS TO THE NATURE OF SUIT**

Based on the subject-matter suits are divided into three classes: (1) suits in respect of immovable property; (2) suits for torts to persons or movable property; and (3) suits of any other kind. Suits of immovable property must be filed within the local limits of whose jurisdiction the property situated. The Code therefore incorporates the principle of *lex situs* and therefore the property in this section may refer to only property “situated in India”. Suits for wrongs to persons and movable property may be instituted in the courts within whose local limits the wrong is done or the defendant resides or carries on business or personally works of gain. Suits of any other kind are dealt with under s.20 of the Code which is the “default rule” providing for all others cases not covered by any of the foregoing rules. Under s.20, a court can exercise jurisdiction in actions involving persons where: (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for work; or (b) any of the defendants, where there are more than one, at the time of commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case with the leave of the court has

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<sup>3</sup> The Code of Civil Procedure, 1908.

been obtained or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of section wholly or partly arises.

### **JURISDICTION OF COURTS**

In its broadest sense jurisdiction connotes constitutional, legislative, executive and judicial jurisdiction. Jurisdiction is one of those areas where constitutional law, public international law and private international law converge. The legislative and executive aspects of jurisdiction fall more appropriately in the realm of private international law, as these relate to limitations on the territorial jurisdiction of states. The territorial jurisdiction of states and the jurisdictional limits of the municipal courts are still based on the territorial theory. According to this theory every state has jurisdiction.

According to this theory every state has jurisdiction over everything situated within and over every state has jurisdiction over everything situated within and over every person present within the territories: *quid quid est in territorio as estian de territoria*.<sup>4</sup> To the rule that the municipal courts have jurisdiction over every person and everything present within the jurisdiction, one exception is recognized, viz. foreign sovereigns, personnel of the diplomatic missions and international organizations and their personnel, enjoy jurisdictional immunity.

Sometimes, states purport to give extra-territorial effect to their laws and orders. To what extent effect can be given to them in public or private international law is difficult to say.<sup>5</sup> It is certain, as we have seen, the penal and revenue laws of foreign states having extra-territorial effect are not given effect to. Another manifestation of the territorial theory is found in the principle of allegiance. This principle means that all citizens owe allegiance to their state and it is their duty to obey its laws and orders wherever they might be. This principle also means that all those persons who are present within the jurisdiction owe allegiance to the state.

Nationality is a basis of jurisdiction in most of the countries of civil law system. Domicile has been the basis of jurisdiction in this common law system. Domicile has been the basis of jurisdiction in the common law system. The modern tendency is to substitute ordinary residence or habitual residence as basis of jurisdiction for domicile and nationality. In modern international conventions, habitual residence is being accepted as an alternative basis of jurisdiction.

The question of jurisdiction in private international law is different from the question of jurisdiction

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<sup>4</sup> *Sagoon Jayade Dhond v Sociedade Civile e Particular da Tavis de Volvvi*, 1966 Goa 38; *Bachanan v Rucker*, (1800) 9 East 192.

<sup>5</sup> The United Kingdom's Continental Shelf Act, 1964.

in public international law. In private international law jurisdiction means competence of the domestic courts to hear actions and to render decisions in matters in which they are called upon to do so. In private international law most of the countries consider the question of jurisdiction as pertaining to procedural law. In an entirely internal suit the question of jurisdiction arises in a different manner. Ordinarily, a suit is to be filed in that court within whose jurisdiction the cause of action arose. This is the place element of jurisdiction. Another question that arises is as to which court, among the hierarchy of valuation element of jurisdiction. For instance, for a claim amounting to Rs 50,000 for a breach of contract committed in Chandigarh, the suit is to be filed in a Chandigarh court and in a court which has jurisdiction to entertain suit of that valuation- this is the district court. On the other hand if the suit has some foreign element, then another preliminary question arises: has the Indian Court jurisdiction to try the suit? If jurisdiction will arise the same way as they arise in an internal suit. The question of jurisdiction in any action, much more in a case pertaining to conflict of laws, is a primary question, without the determination of which the court cannot proceed further.

Two sets of question arise. First, against whom an action can be filed, and who can file an action. Secondly, what types of actions may be filed. The actions may be filed in a court of law may be broadly, divided under three heads: (a) actions *inter partes* or personal actions, (b) actions relating to property, and (c) actions relating to status. In the last category of actions are included suits and petitions in matrimonial causes, guardianship, custody, adoption and legitimacy.

#### **AGAINST WHOM ACTIONS MAY BE FILED**

##### ***ACTIONS INTER PARTES***

A personal action or an action *in personam* or an action *inter partes* (the latter, it is submitted, is the most suitable term in respect of international actions of this type) is one by which the rights of parties between themselves are adjudicated. The suit, in such actions may relate to obligations, such as payment of damages for breach of contract, or for a tort, or an action for recovery of debt. It also includes proceedings in equity.<sup>6</sup> The outstanding feature of an action *inter partes* is that it is binding on the parties to the action alone.

Under English law the courts have jurisdiction in an action *inter partes* if the defendant is served with process, irrespective of the fact that he is a foreigner or was casually present in England, such as a tourist or a person who is in transit. Once the process is served on the defendant the court has a jurisdiction to try the suit, even if the subject-matter of the suit is in no way connected with England. On the other hand, if the process cannot be served on the defendant or the defendant

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<sup>6</sup> *Taylor v Judges of the Court of Registration*, (1900), 175 Mass 171.

evades it, then howsoever closely connected the subject-matter of the suit may be with England, English court cannot try the suit.

In respect of actions *inter partes* the court may have jurisdiction in the following situations:

1. When the defendant is present within the jurisdiction.
2. When the court assumes jurisdiction against an absentee defendant.
3. When the defendant submits to the jurisdiction.

In India rules relating to jurisdiction in action *inter partes* are laid down in Sections 19 and 20 of the Civil Procedure Code. Section 19<sup>7</sup> is confined to suit for compensation for wrongs to person or movables.

This section is confined to torts committed in India and to defendants residing in India. It does not include within its ambit the suits in respect of foreign torts.<sup>8</sup> Such cases are covered by Section 20 which overlaps this section. Section 20 deals with all other *inter partes* suits. That section runs:

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:

- (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of commencement of suit, actually and voluntarily resides, or carries, or carries on business, or personally work for gain, provided that in such case either the leave of the court is given, or the defendant who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such situation; or
- (c) the cause of action, wholly or in part, arises.

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

Under Section 20, the Indian courts can exercise jurisdiction in *inter partes* actions in the following four circumstances:

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<sup>7</sup> Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally work for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts.

<sup>8</sup> *Govindan Nair v Achutha Menon*, (1916) 39 Mad. 433.

1. When the permanent or temporary residence of the defendant is within the jurisdiction,
2. If the defendant is engaged in some business within the jurisdiction,
3. If the defendant is working for gain within the jurisdiction,
4. If the cause of action, wholly or in part, arises within the jurisdiction.<sup>9</sup>

It is submitted that the Indian court should not construe strictly the requirement of residence in private international law cases, nor should it exercise jurisdiction over persons on whom process has not been served just because cause of action arises within jurisdiction. It may be interesting to note that rules of Indian Private International Law are almost identical with the rules of English Private International Law.

In 1894 the Privy Council was the first to seize the opportunity to expound the rules of Indian Private International Law with respect to jurisdiction in *inter partes actions*.<sup>10</sup> Their Lordships of the Privy Council said that jurisdiction, “being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within territory, does not follow a foreigner, after his withdrawal thence, and living in another state. Nor to the courts of state in which the cause of action has arisen, nor in cases of contract to those of the locus solutionis, should resort be had by the plaintiff, but to the courts of the state in which the defendant resides, *the courts of the latter state having jurisdiction in all personal actions*. The case related to recognition of foreign judgment against a defendant who was neither resident of the state the court of which rendered the judgment nor did he submit to jurisdiction of the court. From very beginning the Indian courts have adhered to the doctrine of territoriality. Time and again they have said that the power to determine the place at which a particular class of action should be tried vests exclusively in the legislature.

But the question is whether presence of the defendant within the jurisdiction will be enough to confer jurisdiction?

In 1899, in *Kasinath v Anant*<sup>11</sup> the question came before the Bombay High Court. Under a contract and usage the plaintiff and the defendant were entitled to share the income of the property situated outside the jurisdiction. The defendant was collecting the income of the property. On defendant's refusal to give the share, the plaintiff filed a suit for the recovery of the same. The defendant was not residing within the jurisdiction, though he was present there during the time of the suit. The Hon'ble High Court held that though under the provisions of the Civil Procedure Code, the court

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<sup>9</sup> *Md. Abdulla v P.M. Abdul Rahim*, 1985 Mad. 375.

<sup>10</sup> *Gurdial Singh v Raja of Faridkot*, (1894) 22 Cal. 222.

<sup>11</sup> *Kasinath v Anant* (1899) Bom. 407.

has no jurisdiction, but since Indian courts in such matters follow the English law and since English courts have jurisdiction in such a case, Indian courts too have jurisdiction. This rule of English private international law was again followed in *Fernandes v Ray*.<sup>12</sup> The question in this case was, would five days stay of defendant in Bombay, confer jurisdiction on the Court? Tyabji J. said that 'residence' may be used in a very wide sense or in a very narrow sense, depending upon the intention of the legislature. As far as court's jurisdiction is concerned it is well settled law that if a person has no settled abode or residence, then he is deemed to be resident at the place where he is. The court observed that the defendant had left his Kolhapur residence and not established residence anywhere else. At the time of the suit he was in Bombay, therefore he would be deemed to be a resident of Bombay for the purpose of court's jurisdiction.

In *T.H.P. De Silva v S. Soosai Pillai Morais*<sup>13</sup> the defendant had gone to Trivandrum voluntarily for the purpose of business and proposed to stay there for three months. A suit was filed and service got affected on him when he was also staying there. The court held that it had jurisdiction to try the suit. In another case court observed that when the jurisdiction of the court is invoked against a subject of foreign state on the ground that by coming within the physical boundaries of jurisdiction of the court, he is liable to be sued as if he were a subject, a duty is cast upon the court to be zealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty.<sup>14</sup>

#### **DEFENDANT ENGAGED IN SOME BUSINESS HIMSELF OR THROUGH AN AGENT:**

This has been persistent view of the Indian courts that if the defendant is carrying on business personally or through his agent, then the Indian courts have jurisdiction, irrespective of the fact whether the cause of action did not arise within the jurisdiction or that the defendant was not present within the jurisdiction.<sup>15</sup> The actual presence of the person who had come on business within the jurisdiction of a court is enough to invest the court with the jurisdiction. The right of resorting to a court of one country for the enforcement of the cause of action arising in another country depends upon municipal law of the country where the suit is brought in.<sup>16</sup>

Sections 15 to 20 of the Civil Procedure Code regulate the forum for the institution of suits in his country. In *Haveli Shah v Khan Sahib Sheikh Painsa Khan*<sup>17</sup>, where the cause of action against the defendant residing in Punjab arose in Persia but the defendant carried out business in Quetta (Then in India), the Privy Council held that the defendant could be sued in Quetta. This case was followed

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<sup>12</sup> *Fernandes v Ray* 21 Bom. 373.

<sup>13</sup> *T.H.P. De Silva v S. Soosai Pillai Morais* 1954 T.C. 141.

<sup>14</sup> *John Baptist D'Souza v Lizzie Jane Lobo*, 1940 Mad. 584.

<sup>15</sup> *Srinivas v Venkata Varda Ayyangar* (1906) 29 mad. 239.

<sup>16</sup> *Chunnial Kasturchand v Dundappa Danappa* 1951 Bom. 190.

<sup>17</sup> *Haveli Shah v Khan Sahib Sheikh Painsa Khan* 1926 P.C. 88.

by the Punjab High Court in *Frontier Bank Ltd. v Shrimati Prakashwati Bahl*<sup>18</sup>, where the plaintiff deposited a sum of money with the Frontier Bank at Dera Ismail Khan, a limited company with its head quarters at Dera Ismail Khan. When, at the wake of partition in India, communal disturbances broke out in 1947, she asked the bank to transfer her account to New Delhi. The Bank failed to comply with her request, and in 1950 she filed a suit for recovery of money in India. The court rejected the stand of defendant that the court had no jurisdiction, the court said that the case was covered by Section 20 of the Civil Procedure Code. A full bench of the Andhra Pradesh High Court also took this view.<sup>19</sup> It has also been held that if the defendant is carrying on business through an agent within the jurisdiction then the court has jurisdiction to entertain the suit.<sup>20</sup>

The Privy Council in *Gurudayal Singh v Raja of Faridkot*<sup>21</sup> said that the action lies in the court within whose jurisdiction the defendant resides and if the defendant has left the jurisdiction the court cannot try the suit even if the cause of action arose within the jurisdiction. The High courts in India have distinguished this case and have held that if cause of action arises within the jurisdiction the courts have jurisdiction to entertain the suit. The Patna High Court rightly observed that according to the principle of private international law a court has no jurisdiction to entertain a suit against a foreigner who had not submitted to its jurisdiction. But, the court added, if the legislature confers jurisdiction upon the court situated in a particular territory to entertain suit against foreigners, where cause of action, wholly or partly arises, within its jurisdiction, then such a court has jurisdiction.<sup>22</sup> It is a different matter that the foreign courts may refuse to enforce the judgments passed in such actions.<sup>23</sup>

### III. SUBMISSION TO JURISDICTION

#### ENGLISH LAW

A person may submit to the jurisdiction of the court either under express agreement or by conduct. If a person who is outside the jurisdiction of the court submits to the jurisdiction then the court gets the jurisdiction to try the action and the decree or order passed in such an action will be valid internationally. To constitute submission to the jurisdiction, it is not necessary that the defendant be personally present before the court.

However, the rule that submission confers jurisdiction applies to legal actions only and then submission to jurisdiction will meet only those objections to jurisdiction which are of personal

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<sup>18</sup>Frontier Bank Ltd. v Shrimati Prakashwati Bahl I.L.R. (1950) Punjab. 635.

<sup>19</sup> *H. Ahmed & Co. v Kohinoor Glass Factory Ltd.* 1961 A.P. 470 (F.B.)

<sup>20</sup> *Girdhar Damodar v Kassigar Hiragar*, (1893) 17 Bom. 662.

<sup>21</sup> *Gurudayal Singh v Raja of Faridkot* (1894) 22 Cal. 222.

<sup>22</sup> *Suresh Narayan Sinha v Akhauri Balbhadra Prasad*, 1957 Pat. 256.

<sup>23</sup> *Brajmohan Bose v Kishori Lal Kishan Lal*, 1958 M.B. 1.

nature, such as the objection that the summons were not served on the defendant. The submission to jurisdiction cannot bring those cases within the jurisdiction which are otherwise outside the jurisdiction. For instance, no amount of submission would confer jurisdiction to entertain a suit for divorce if the court to which submission is made not a court of domicile of parties. Similarly, the court would have no jurisdiction to entertain an action in respect of immovable property situated outside the jurisdiction, even though the defendant has submitted to the jurisdiction. Ordinarily, a court does not assume jurisdiction if it is convinced that the order or decree passed by it would not be effective. For example, the court may decline to assume jurisdiction despite defendant's submission in a suit in respect of a tort committed on land situated outside the jurisdiction.

### INDIAN LAW

The Indian law of submission closely follows English law. If a person is outside the jurisdiction, the court will have jurisdiction on him only if he submits to the jurisdiction of the court. In case the defendant does not submit to the jurisdiction of the court, then the judgment delivered in his absence would be null and void. It has been held time and again by Madras High Court that if a foreign defendant submits to the jurisdiction of the court by pleading the merits of the case, the court has jurisdiction. That is to say that if a defendant puts up appearance in the court, then the appearance to amount to submission, must be unconditional; he must unequivocally submit to the jurisdiction of the court. Only full participation by the defendant in the proceedings amounts to submission to jurisdiction. The waiver of objection to the jurisdiction of the court also amounts to submission to jurisdiction. The waiver of submission to jurisdiction of the court also amounts to submission to jurisdiction.<sup>24</sup>

The Supreme Court has opined in *Hira Lal v Kali Nath*<sup>25</sup> that an objection as to the local jurisdiction of a court can be waived...having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself to the right to question the authority of the court to refer the matter to arbitration, to render the award. It is clear therefore, that the defendant is stopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally stopped from challenging the authority of the arbitrator to render the award. Also, long and continued participation by the defendant in the proceedings without any protest may, in an appropriate case, amount to waiver of objection of jurisdiction.<sup>26</sup>

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<sup>24</sup> *United Arab Republic v Mirza Ali Akbar Kashmi*, 1962 Cal. 387.

<sup>25</sup> 1962 SC 199.

<sup>26</sup> *Bahrein Petroleum Co. Ltd. v P.J. Pappu* 1966 SC 634.

#### IV. JURISDICTIONAL IMMUNITY

Although as a general rule an action can be filed against any person who is present within the jurisdiction, there are certain persons who enjoy jurisdictional immunity and therefore suits cannot be filed against them. The following enjoy jurisdictional immunity:

1. foreign state, its head and its departments;
2. persons entitled to diplomatic immunity; and
3. officials of international organizations including United Nations and its organs.

Since no action can be brought against the above categories of persons, no action ordinarily lies against their property.

The rule of immunity of foreign state and its head has been derived from English law maxim *par in parem non habet imperium* and from the rules of public international law. The House of Lords observed, “the principle of sovereign immunity is not founded on any technical rules of law; it is founded on broad considerations of public policy, international law and comity.”<sup>27</sup>

##### POSITION OF INDIAN LAW:

Indian law of jurisdictional immunity is primarily based on English law, though in some minor details it makes some departure from it. Sections 84 to 87A of the Civil Procedure Code deal with this matter. Section 87A(1)(a) defines foreign state as any state outside India which has been recognized by the Central Government. Clause (b) of s. 87A(1) defines “Ruler” in relation to a foreign state as the ‘the person who is for the time being recognized by the Central Government to be the Head of that State.’ Then sub-section (2) of s. 87A lays down:

Every court shall take judicial notice of the fact:

- (a) that a state has or has not been recognized by the Central Government;
- (b) that a person has or has or has not been recognized by the Central Government to be the head of the state.

The recognition *de facto* or *de jure*, has the same effect.<sup>28</sup> In international law of the Head of a State represents the State as such and not as an individual representing his own rights. In that capacity he enjoys certain extra-territorial privileges in other states which are friendly, and in peace are known as the receiving states, with the state he represents. These are ceremonial honours for himself, the members of his family, and his retinue; special protection to his person and exemption from

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<sup>27</sup> *Rahimtoola v Nizam of Hyderabad*, (1958) A.C. 397 at p. 499.

<sup>28</sup> *German Democratic Republic v Dynamic Industrial Undertaking Ltd.*, 1972 Bom. 27.

criminal jurisdiction; the grant of extra-territoriality, on that basis that one sovereign does not have any power over the other, such as filing of suits against him, except where he is himself a plaintiff, and from other legal process; exemption from taxation, rating and other fiscal enactments and the inviolability of immovable property in which he or the representatives of the state accorded diplomatic immunity resides<sup>29</sup>. The jurisdictional immunity of the foreign sovereign exists not merely in respect of his person but also in regard to his property. In this respect no distinction is made between public property or private property of the sovereign.<sup>30</sup>

The Indian law has been codified. Section 86, Civil Procedure Code confers jurisdictional immunity to (a) ruler or head of a foreign state, (b) ambassador or envoy of a foreign state, (c) High Commissioners of the Commonwealth States, and (d) members of the staff or retinue of the head or the ruler of the foreign state, ambassador, envoy or High Commissioner, as the Central Government may, by general or special order specify in this behalf. These persons cannot be sued in any court in India except with the consent of the Central Government certified in writing by a Secretary to the Government. The jurisdictional immunity extends to all civil actions as well as to execution proceedings. For filing execution proceedings fresh consent of the Central Government is needed. The aforesaid persons cannot also be arrested under any provision of the Code of Civil Procedure. The Central Government will give consent only in the following cases:

- (a) when the foreign state, etc. has instituted a suit in the court against the person desiring to sue,
- (b) when the foreign state by itself or with another trades within the local limits of the jurisdiction of the court,
- (c) when the foreign state is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or
- (d) when the foreign state has expressly or impliedly waived the privilege accorded to it.

In *Gaekwar-Baroda State Railway v Hafiz*,<sup>31</sup> the Privy Council held the requirement of consent under s. 86 as an important matter of policy and therefore cannot be waived by the defendant.

Consent to sue must be obtained before the institution of suit. Consent given after the institution of the suit is not valid. A suit filed without the consent of the Government of India is not maintainable and must be dismissed. In *Mohanlal v Swami Mansinghji*<sup>32</sup> a suit was filed by the plaintiff against the defendant, ruler of Jaipur state, at a time when s. 86B granting jurisdictional immunity was not

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<sup>29</sup> *Harinder Singh v CIT.*, Punjab, 1972 S.C. 202.

<sup>30</sup> *Mirza Ali Akbar v United Arab Republic*, 1966 S.C. 230.

<sup>31</sup> 1938 P.C. 165.

<sup>32</sup> 1962 S.C. 73.

enacted in the Civil Procedure Code. While the suit was pending, s. 86B came into force and the defendant claimed immunity. The Supreme Court held that the Rule could claim immunity as s. 86 applied to all stages of the action.

The Indian law lays down that even when a foreign Ruler is sued, the suit is to be in the name of the foreign state whose ruler he is, though the Government of India may direct that the Ruler may be sued in the name of an agent or in any other name. The provisions of s. 86 were considered by the Supreme Court in *Mirza Ali Akbar v United Arab Republic*.<sup>33</sup>

Section 86, Civil Procedure Code does modify the rule of private international law in the sense that even in those cases where a plaintiff can file a suit against a diplomatic representative he cannot do so in India, unless he obtains consent of the Government of India. This means that under the Indian law diplomatic representatives are granted additional immunity, in the sense, that even though a diplomatic representative waives his privilege, he cannot be sued unless the government of India consents to such a suit. Section 86 applies to all stages of proceedings.

There are certain exceptional cases where a diplomatic representative may be sued without the consent of the Government of India. These exceptions are:

- (a) A person may, as a tenant of immovable property, sue a diplomatic representative from whom he holds claims to hold the property.<sup>34</sup>
- (b) when a person sets up a claim of set-off in his defence to a suit by the diplomatic representative, no consent of the government of India is necessary.<sup>35</sup>
- (c) if the proceedings in a court of law are not a suit, consent of the Government of India is not necessary.<sup>36</sup>

Section 86 of the Civil Procedure Code does not speak of the jurisdictional immunity of departments and corporations of the foreign governments. This does not mean that under Indian Private International Law, government departments and public corporations do not enjoy jurisdictional immunity. They enjoy jurisdictional immunity like a foreign Ruler. The question was considered in some details by the Calcutta High Court in *Royal Nepal Airlines Corporation v Manorama*<sup>37</sup> wherein the wife of one Mehar Singh Legha, who was employed by the Royal Nepal Airlines Corporation as an aircraft pilot and who died in an air crash, sued the defendants, Royal Nepal Airlines Corporation for damages. The defendant corporation claimed jurisdictional immunity in

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<sup>33</sup> 1966 S.C. 230.

<sup>34</sup> Proviso to S. 86(1).

<sup>35</sup> *Sukhdev Singh v Hazuramal*, (1921) 62 I.C. 778.

<sup>36</sup> *Nawab Usman Ali Khan v Sagarmal*, 1965 SC 1978.

<sup>37</sup> 1966 Cal. 319.

the ground that the Royal State the Royal Nepal Airlines Corporation Act. The corporation was owned by his Majesty's government of Nepal and was functioning as its department. The trial court was asked to try the preliminary issue of jurisdiction first. But the trial court felt that the jurisdiction issue was related with the facts of the case, therefore listed the matter for hearing. An appeal was made against this order. In the appeal the Nepalese ambassador intervened and claimed sovereign immunity, on behalf of his Majesty, the King of Nepal. He also stated that the enterprise was a government enterprise and the airline was operated on a commercial basis. Bose, C.J. after an exhaustive review of all the English authorities, observed that even if the defendant corporation was a separate corporate entity, it would not prevent the Nepal Government from claiming sovereign immunity provided the defendant can be regarded as a department of the Government of Nepal. The learned judges found that the defendant was a department of the government and therefore held that it was entitled to immunity. Thus a foreign state or a foreign corporation which is a department of the government is entitled to jurisdictional immunity.<sup>38</sup> The Indian law recognizes two exceptions:

1. When the foreign ruler or diplomatic representative by himself or another trades within the local limits of the jurisdiction of the Court, he can be sued with the consent of the Government of India.<sup>39</sup>
2. The Government Trading Taxation Act, 1926 applies to trading activities of foreign sovereigns and diplomatic representatives.

Further, the Indian law relating to the jurisdictional immunity of the diplomatic representatives and their staff has been codified by the Diplomatic Relations (Vienna Convention) Act, 1972. It is to be noted that the waiver of immunity by ruler of a state or diplomatic representative is allowed both under the English as well as the Indian law.

## V. WHO MAY FILE A SUIT

### ENGLISH LAW

Under the English law, except the alien enemy, any person can file an action or other proceedings in any English court. Whether a person is an alien enemy depends on the fact that the United Kingdom is at war with another country. A prisoner of war does not come within the definition of alien enemy. The test of alien enemy is not a national one, but a territorial one. A company may also be invested with alien enemy character if incorporated in enemy country or if its directors come within the definition of an alien enemy.<sup>40</sup>

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<sup>38</sup> *Mirza Ali Akbar v United Arab Republic*, 1966 SC 230.

<sup>39</sup> Section 86(2)(b).

<sup>40</sup> At common law alien enemy means any person who voluntarily resides or who carries on business in an enemy

## INDIAN LAW

In India, except the alien enemies, all others can file a suit or other proceedings in an Indian court. The same is the position of foreign corporation. The law is codified and is contained in s. 83, Civil Procedure Code.<sup>41</sup> The section lays down an alien friend may sue in any Indian Court and an alien enemy may also do so with the prior permission of the Government of India.

The term alien enemy includes not only citizens of the enemy country but also of neutral countries whose citizens are voluntarily residing in the enemy country. The test of an alien enemy is that either the person has his residence in the enemy country or that he carries on business in an alien enemy country; nationality is of no consequence. The residence must be voluntary not a prisoner of war.<sup>42</sup>

An alien enemy residing in foreign country cannot sue in Indian courts. An alien enemy residing in India can sue in Indian courts if he is residing here with the permission of the Government of India. Such permission may be express or implied. It may be presumed from circumstances. If a suit is filed against an alien enemy, he has a right to defence.<sup>43</sup>

## VI. ACTIONS IN RESPECT OF PROPERTY

In Indian law strictly speaking there is nothing like an action in *rem*. Section 41 of the Indian Evidence Act defines judgments in *rem*. The section runs as under:

Relevancy of certain judgments in probate, etc., jurisdiction.- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof- that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment 1[ order or decree] declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, 1[ order or decree] declared that it had ceased or

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or enemy-occupied territory during a war in which the United Kingdom is engaged. *Porter v Freudenberg*, (1915) Ch. 155.

<sup>41</sup> Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country.

<sup>42</sup> *Ali Jan v Abdul Zalil Khan*, 1920 Lah. 4.

<sup>43</sup> *Prem Pratap Singh v Jagat Pratap Kunwar*, 1944 All. 97.

should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree] declares that it had been or should be his property.

## **VII. CONCLUSION**

Jurisdiction over private civil disputes either arising on an Indian reservation or involving Indians as parties has been the subject of a great deal of case laws covering a wide variety of situations.

However, several major issues remain unresolved in various Supreme Court decisions. Most are practical questions that arise due to special jurisdiction rules that apply to Indian country.

The present conflict of law rules provides answers to many complicated problems arising out of jurisdiction issues.

Initially, there was a dearth of unanimity over such issues, but now the private international law principles of England as well as India and such like countries have been able to assist the courts in resolving disputes of peculiar nature.

In cases of private international law, jurisdiction is the first and foremost confrontation before the courts. The courts have to decide between the territoriality of dispute versus the onus to deliver justice. But it is also pertinent that the judgment though passed must be enforceable and binding on the interested parties. Else, there is no use of carrying out the entire judicial process.

Therefore, the courts exercise necessary caution and appreciate the private international law principles to solve a dispute at hand, without defeating the ends of justice.

In India much of the jurisdiction principles have been codified under the Civil Procedure Code as well as the Indian Evidence Act. These assist the courts in India to pass an order accordingly.

Besides the principles of jurisdiction of courts in private international law, ancillary issues like who can file a suit and jurisdictional immunity also arises. There is a uniform view taken by the courts in certain landmark decisions till now. The law relating to such issues is quite similar to England.

What is required is better awareness of these rules with the judges and the advocates, in order to chalk out the boundaries of courts jurisdiction and the right to defence in suchlike cases.

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