*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 24.07.2009

%   Date of decision : 23.10.2009

\+   **FAO (OS) No. 86 of 2009**

HORLICKS LTD. AND ANR. … … … … APPELLANTS

Through : Mr.C.M. Lall,
Mr. Dushyant K. Mahant and
Ms. Kripa Pandit, Advocates.

\- V E R S U S -

HEINZ INDIA (PVT.) LIMITED … … … RESPONDENT

Through : Mr.C.A.Sundaram, Sr.Adv. with
Ms.Anuradha Salhotra,
Ms.Bhavna Gandhi,
Ms.Rohini Musa,
Mr.Rahul Chaudhary,
Mr. Sumit Wadhwa,
Mr.Amritesh Mishra,
Mr.Abhishek Gupta and
Mr.Zafar Inayat, Advocates.

AND

FAO (OS) NO. 87 OF 2009

GLAXOSMITHKLINE CONSUMER HEALTHCARE LIMITED
.. … … APPELLANT

Through : Mr.C.M.Lall,
Mr.Dushyant K.Mahant and
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Mr.Abhishek Gupta and
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CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether the Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. The principle of forum non convenience emerged as a concept primarily applicable to a foreign forum. The important question whether it will apply to domestic forum in India governed by Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') has given rise to the present appeals since the appellants have been non suited by the learned Single Judge applying the said principle.

2. The doctrine of forum non convenience which originated in Scotland and thereafter brought to England and United State of America simply put means that if legal proceedings are initiated in a particular forum and that forum is of the opinion that there is a more convenient forum where such

lis should be tried, it desists from trying the particular *lis*. The meaning to be given to “convenience”, and as to whether other parameters also come into play, is another aspect which has developed in respect of this doctrine over a period of time making its application more stringent.

The factual background

3. M/s Glaxo Smithkline Consumer Healthcare Limited is a company incorporated and registered under the Companies Act, 1956 while Horlicks Limited, United Kingdom is a foreign company which owns the registered trade mark Horlicks (hereinafter referred to as ‘appellants’). M/s Heinz India Pvt Limited (hereinafter referred to as ‘respondent’) is the licensed user of the trademark Complan. There is a commonality in the products to the extent that both these products are positioned as a complete planned food for better growth of the children. The products manufactured under the two brand names became competing products in the market.

4. The appellants being the owners of the trademark Horlicks filed a civil suit in the Calcutta High Court in August, 2004 alleging the disparagement of their product by an advertisement of the respondent who are the licensed users of the trade mark Complan. The Complan advertisement had depicted the two cups including one cup with the alphabet ‘H’. In the said advertisement, Complan cup was shown as growing in height as compared to the cup with the

alphabet 'H'. The appellants succeeded in getting injunction orders against the respondent restraining the respondent to continue with the said advertisement or any other advertisement which reflected adversely on the appellants product Horlicks. It was, however, clarified that the order would not prevent the respondent from publishing the advertisement of its product without showing the cup marked with alphabet 'H' in the said advertisement.

5. The respondent introduced another advertisement replacing the alphabet on the second cup with the alphabet 'X' which gave rise to contempt proceedings where the judge once again found that the act of the respondent was in disregard of the intent of the injunction and thus directed for deletion of even the brown cup/mug from the disputed advertisement. The matter is stated to be pending in appeal.

6. The second set of litigation was instituted in the same year in the Madras High Court by the appellants alleging that a series of advertisements had been issued throughout the country in August, 2004 disparaging the products 'Horlicks' and 'Boost' with false and misleading comparison with the product 'Complan'. The advertisement showed two cups on either side bearing alphabets 'X' and 'Y' with white colour liquid and chocolate colour liquid which was suggested to be indicative of 'Horlicks' and 'Boost'. The children consuming Complan were shown to grow taller. The Madras High Court

vide a detailed order held that the appellants were entitled to the temporary injunction restraining the respondent from using the two cups with the alphabets 'X' and 'Y' along with Complan cup and that the respondent was not entitled to use the words 'largest selling brand'.

7. The third suit was instituted by the respondent against the appellants in the Bombay High Court in respect of a moving advertisement of the appellants.

8. This suit was filed in the year 2008 titled Heinz India (P) Ltd v. Glaxosmithkline Consumer Healthcare Limited before Bombay High Court in Suit(L) No.3308/2008. The advertisement showed the two products Complan and Horlicks visible in the baskets held by two mothers with their sons. The maximum retail price of the two products is stated and it is highlighted that the product of the appellants is lower in price. The respondent further claimed that there were disparaging remarks against Complan in regard to nutrients and health value comparison to the appellants' product. In the said proceedings a statement was made by the counsel for the appellants that while showing the costs of the products and their comparison relevant flavour would be mentioned so that the comparison of price is flavour to flavour. Subject to compliance of this, interim relief was rejected. The respondent went in appeal but the appeal was ultimately withdrawn.

9. In December, 2008, the respondent introduced an advertisement in the print media which according to the appellants sought to give an impression to the readers that Horlicks was a cheap and ineffective product which did not give balanced complete planned nourishment to the child. The lower price of Horlicks is sought to be attributed to use of cheaper and inferior quality ingredients and the question posed to a mother of a child is whether the cheaper price or a child's complete growth is important while choosing a health drink.

10. The appellants thus contended that the advertisement sought to convey that though Horlicks was cheaper in price it also compromised on a child's growth. Such a comparison was sought to be made more apparent by putting a choice to the mother as to whether she knew the difference between what is good or what is cheap.

11. There are other aspects also alleged of disparagement, it is not necessary to go into the details of the same. Suffice to say that this gave rise to the institution of the suit by the appellants. The respondent subsequently even came up with a televised version of the advertisement and the appellant sought to amend the plaint, but thereafter withdrew the same with leave to file a fresh suit. It is thereafter that the second suit was instituted in Delhi. Hearing of these two suits was taken up together.

The fate of the Delhi suits

12. The hearing on the interlocutory applications of these two suits were taken up by the learned Single Judge. The learned Single Judge also considered the question of maintainability of the suit at Delhi within the parameters of the principle of forum non convenience. The learned Judge in terms of the impugned judgment after considering the scope of the subject matter of the two suits and the provisions of the said Code, came to a finding that the proceedings before the Bombay High Court and the proceedings now initiated before the Delhi High Court were intertwined and interrelated, if not, a counter blast by the respondent. The plaints were directed to be returned and rejected giving liberty to the appellants if they were so advised to file fresh suits before the Bombay High Court. It may be noticed at this stage that the finding of the learned Single Judge is not that the Delhi Court has no territorial jurisdiction to try the suits and the plaint is being returned to be presented before the appropriate court. In fact, it is clearly recorded that it is not even disputed that the Delhi Court would have jurisdiction.

13. The suit has also not been stayed on the ground that the subject matter of the suit involves matters which are directly and substantially an issue in a previously instituted suit. No preliminary issue has been framed. The suit has been simultaneously returned and rejected. The appellants have thus filed the present appeals against the said order.

The principle question, as noticed above, of course is as to whether the suits could have been returned and rejected on the principle of forum non convenience. There are, however, other linked issues also about whether at all the subject matter of the Bombay suit itself can be stated to be interlinked and intertwined with the Delhi suits.

Are the Delhi suits interlinked with the Bombay suits

14. We cannot lose sight of the fact that litigation between the parties is pending in three courts. The first two litigations were initiated by the appellants in Calcutta and Madras while the third litigation was initiated by the respondent at Bombay. There is an interlinkage between the first and second litigation to the extent that the advertisement was of a similar nature though in a different language and the appellants chose to institute the litigation in respect of the published advertisement in the area concerned. The learned Single Judge in the impugned judgment has sought to make a distinction between the scope of these two litigations and the one instituted at Bombay while discussing these aspects in para 10 of the impugned judgment. In the opinion of the learned Single Judge, the product of the competitor was not displayed but reference was made to the other product. While in the Bombay suit, there was specific reference to the two products. We are unable to accept this factual reasoning because the very principle of disparagement has to satisfy a

dual test of the identification of the competitor's product and the disparagement of the plaintiff's product. The injunction would not have been granted by the Calcutta and Madras High Courts if there was no identification of the product of the appellants. It is only because the product sought to be disparaged was perceived in the advertisement to be indicative enough to be identified as the appellants' product, did the courts proceed to grant injunction on specific parameters. The dual test was thus satisfied in those two proceedings.

15. Undoubtedly in the Bombay suit, there was a direct comparison but limited to the aspect of the price of the two products. The appellants agreed to compare the price product to product in respect of the identical flavours. Once this was conceded by the appellants, the court did not prima facie find that there was any disparagement of the product of the respondent. The appeal filed by the respondent also failed inasmuch as the respondent withdrew the appeal and sought to raise the issues before the learned Single Judge. The advertisements in question in the Delhi suits identify the product of the appellants and make a comparison with the same. The comparison is not on pricing but on the quality of the products based on its ingredients clearly giving an impression that the pricing cannot be a real yardstick and that the quality of their product is superior. The question whether such a

comparison can be made or not would be an aspect to be adjudicated on weighing the material produced by both the sides to form a prima facie view for grant or refusal of injunction. However, that endevour has not been made by the learned Single Judge since the learned Single Judge has really proceeded only on the issue of forum non convenience to non suit the plaintiffs. The factual dispute thus remains to be decided.

16. The advertisement in question is a different advertisement from the one in challenge before the Bombay High Court. In fact, in Bombay, it is the respondent who have sought to allege disparagement by an advertisement of the appellants. The suits in Calcutta and Madras are by the appellants alleging disparagement by the respondent. The suits in Delhi are in respect of a completely different advertisement of the respondent where the appellants allege disparagement. Thus the factual matrix of the suit at Delhi is neither intertwined nor interlinked in any manner with the litigation in the Bombay High Court. The matter however cannot rest at this since elaborate arguments have been advanced by learned counsel for the parties on the applicability of the principle of forum non convenience to domestic forums and that issue would have to be examined in the appeal.

Doctrine of anti suit injunction and the principle of forum non convenience as applicable to foreign forums

17. The doctrine of anti suit injunction as applicable to international forums is not disputed by the learned counsel for the parties. However, this doctrine has to be applied with care and caution as it involves the issue of respect for corresponding international forums.

18. The aforesaid legal position is abundantly clear in view of the judgment of the Supreme Court in Modi Entertainment Network and Anr. v. W.S.G. Cricket Pte. Ltd.; AIR 2003 SC 1177. It was observed in the said judgment that the courts in India like the courts in England are courts of both law and equity and thus the principles governing grant of injunction an equitable relief by the court would also govern grant of anti suit injunction, which is a species of injunction. However, the rule of Comity of Courts require this power to be exercised sparingly because such an injunction though directed against a person in effect causes interference in exercise of jurisdiction by another court. The test adopted by the House of Lords in Castanho v. Brown and Root (U.K.) Ltd and Anr; (1981) AC 557 'to avoid injustice' was noted. A reference was also made to SNI Aerospatiale v. Lee Kui Jak and Anr; (1987) 3 All ER 510 and it was noticed that in recent cases the test is whether the foreign proceedings are "oppressive or vexatious". Although, Lord Goff explained, in SNI Aerospatiale v. Lee Kui Jak and Anr's (supra) that these words could have a different meaning in different contexts, he was inclined, in

Airbus Industrie GIE v. Patel and Others; {(1998) 2 All ER 257}, to agree, albeit obiter, with Judge Sopinka in Amchem Products Incorporated v. British Columbia (Workers' Compensation Board); 1993 CanLII 124 (SCC)., who preferred to use, simply, 'ends of justice'. However, Lord Goff did not expressly abandon those words. The High Court of Australia in CSR Ltd v. Cigna Insurance Australia Ltd. and Ors.; 146 A.L.R. 402 used them in the sense that only if there is nothing which can be gained by them over and above what may be gained in local proceedings.

19. The plea of the respondent is that the principle of forum non convenience is nothing but the other side of the same coin of the doctrine of anti suit injunction. It was thus contended that if the court is entitled to pass an anti suit injunction restraining a party from proceeding in another court, which actually tantamounts to the other court not proceeding further, then certainly that court is also entitled to stay its own hands. Learned counsel submitted that in fact almost all the judgments in question have dealt with both the principles of anti suit injunction and forum non convenience parallely and the judgment in Modi Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra) is no exception to it. Leaned counsel emphasized that the observations of the House of Lords in Spiliada Maritime Corporation v. Cansulex Ltd; (1987) AC 460 were cited with approval in para 18 of Modi

Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra), which are as follows:

> "18. ... ...
>
> The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice".

20. The principles governing anti suit injunction were set out in para 23 of the Modi Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra), which are as follows:

> "From the above discussion the following principles emerge:
>
> (1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:-
>
> (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
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> (b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and
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> (c) the principle of comity -- respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained -- must be borne in mind;
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> (2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (Forum conveniens) having regard to

the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexations or in a forum non-conveniens;

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

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

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

> (6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and
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> (7) the burden of establishing that the forum of the choice is a forum non- conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

21. We may notice that the aforesaid judgment is relies on the earlier judgment of the Supreme Court in Oil and Natural Gas Commission v. Western Company of North America; (1987) 1 SCC 496. The said judgment was almost the first case where exercising jurisdiction under Section 151 of the said Code, the power of anti suit injunction was exercised.

22. We would now proceed to discuss from all the other judgments referred to in this context.

English View

23. The court of appeal in Castanho v. Brown and Root (UK) Limited and Anr.; 1980 (3) All ER 72 had three judges giving separate opinions. The relevant discussion is as under (in the opinion of Brandon L.J.) :

> "So far as the jurisdiction of the court generally in matters of this kind is concerned, it has long been established that there may be

circumstances in which an English court will (i) compel a plaintiff, who desires to sue in England, to sue in another forum elsewhere instead, or (ii) compel a plaintiff, who desires to sue in another forum elsewhere, to sue in England instead. In case (i) the court achieves its purpose by staying any proceedings which the plaintiff has brought here, so leaving him with the only practical alternative of beginning or continuing proceedings in the other forum. In case (ii) the court achieves its purpose by granting an injunction restraining the plaintiff from beginning or continuing proceedings in the other forum, leaving him with the only practical alternative of beginning or continuing proceedings here.

It follows that, when on 1st May 1979 the defendants in the action here applied for an injunction restraining the plaintiff from proceeding against his employers in Texas or elsewhere outside England, the court certainly had jurisdiction to intervene in the manner sought. Difficult questions arise, however, as to the effect on that jurisdiction of the discontinuance of the action by the plaintiff on 15th May 1979. Did the discontinuance, by brining the action to an end, also bring to an end the court's jurisdiction to intervene? If so, does the court have power to restore that jurisdiction, as it were, by striking out the notice of discontinuance as an abuse of its process? If so, ought the court to exercise that power in the circumstances of the case?

These questions do not need to be answered unless the court considers that, if it had jurisdiction to intervene by granting the injunction sought, it ought to do so. I propose therefore to leave them on one side for the time being, to assume that the necessary jurisdiction exists and to consider whether on that assumption it ought to be exercised.

The circumstances in which an English court will compel a plaintiff, who desires to sue in England, to sue in another forum elsewhere instead were examined in two recent cases in the House of Lords: The Atlantic Star (1973) 2 All ER 175, (1974) AC 436 and Macshannon v. Rockware Glass Ltd (1978) 1 All ER 625, (1978) AC 795.

In the second of these two cases Lord Diplock, stated the criteria applicable in this way ({1978})1 All ER 625 at 630, (1978) AC 795 at 812):

'In order to justify a stay, two conditions must be satisfied, one positive and the other negative: a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and b) the stay must not deprive the plaintiff of a legitimate personal or jurisdical advantage which would be available to him if he invoked the jurisdiction of the English Court.'

It is clear from *The Atlantic Star* that, if the positive condition at a) above is satisfied, but the negative condition b) above is not, the court has to carry out a balancing operation. It has to weigh in the one scale the advantage to the plaintiff of suing in England, and in the other scale the disadvantage to the defendant of being sued there, and then decide which of the two should, as a matter of justice, prevail. In carrying out that balancing operation the court must have regard to all the relevant circumstances of the particular case.

It was submitted for the defendants on this appeal that there is no difference, in principle, between compelling a plaintiff, who desires to sue in England, to sue in another forum elsewhere (as was done in the two House of Lords cases referred to above), and compelling a plaintiff, who desires to sue in another forum elsewhere, to sue or go on suing in England (as it is sought to compel the plaintiff to do in the present case); and that the same criteria should therefore apply, mutatis mutandis, to the exercise of the court's power of compulsion in either case.

I would accept this submission as a broad proposition. In my opinion, however, some qualification of it is necessary for this reason. Where a stay is granted of an action here, the English court is doing no more than exercising control over its own proceedings. By contrast, where an injunction is granted restraining a person from suing in another forum elsewhere,

the English court is interfering, albeit indirectly, with proceedings in another jurisdiction.

This distinction led Scrutton LJ to say, in Cohen v. Rothfield (1919) 1 KB 410 at 413, (1918-19) All ER Rep 260 at 261, that the power to grant injunctions in such cases 'should be exercised with great caution to avoid even the appearance of undue interference with another Court.' I agree with that observation and consider that, while the power to compel a plaintiff to sue in another forum elsewhere by staying proceedings here should itself (as the authorities show) be exercised with caution, the power to compel a plaintiff to sue here by restraining him from proceeding in another forum else where should be exercised with ever greater caution.

Bearing this qualification in mind, I propose to consider first whether the criteria laid down by Lord Diplock in MacShannon v. Rockware Glass Ltd are satisfied, *mutatis mutandis*, in the present case."

24. The matter was taken up to the House of Lords. The House of Lords in Castanho v Brown & Root (UK) Ltd & Anr.; [1981] AC 557 was of the view that there was really no majority *ratio decidendi* in the court of appeal judgment. The legal principle set out by the House of Lords is as under:

"I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings. The modern statement of the law is to be found in the majority speeches in The Atlantic Star [1974] A.C. 436. It had been thought that the criteria for staying (or restraining) proceedings were two-fold: (1) that to allow the proceedings to continue would be oppressive or vexatious, and (2) that to stay (or restrain) them would not cause injustice to the plaintiff: see Scott L.J. in St. Pierre v. South American Stores (Gath and

Chaves) Ltd. [1936] 1 K.B. 382, 398. In The Atlantic Star this House, while refusing to go as far as the Scottish doctrine of forum non conveniens, extended and re-formulated, the criteria, treating the epithets "vexatious" and "oppressive" as illustrating but not confining the jurisdiction. My noble and learned friend Lord Wilberforce put it in this way. The "critical equation," he said at p. 468, was between "any advantage to the plaintiff" and "any disadvantage to the defendant." Though this is essentially a matter for the court's discretion, it is possible, he said, to "make explicit" some elements. He then went on, at pp. 468-469:

"The cases say that the advantage must not be 'fanciful' - that a 'substantial advantage' is enough... A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so. Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than mere disadvantage of multiple suits;... I think too that there must be a relative element in assessing both advantage and disadvantage - relative to the individual circumstances of the plaintiff and defendant." (Emphasis supplied.)

In MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, 812 my noble and learned friend, Lord Diplock, interpreted the majority speeches in The Atlantic Star [1974] A.C. 436, as an invitation to drop the use of the words "vexatious" and "oppressive" (an invitation which I gladly accept) and formulated his distillation of principle in words which are now very familiar:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

25. In Smith Kline & French Laboratories Ltd and Ors. v. Bloch; (1983) 2 All ER 72, Lord Denning MR. penned down one of the opinions of the court of appeal. All the three learned Judges came to the same conclusion and dismissed the appeal. It may be noticed that one of the opinions in Castanho v. Brown and Root (UK) Limited and Anr.; 1980(3) All ER 72 was of Lord Denning M.R. and his view did not find favour with the House of Lords. He noticed this aspect and thereafter proceeded to observe as under:

> "The law
>
> It often happens that a plaintiff is entitled to bring proceedings in two or more jurisdictions. Sometimes it is said that the choice is his. He can choose whichever of them suits him best. If he can get more damages in one than he can in the other, then good luck to him. Let him go there. If he will be met by a time bar in one and not in the other, let him go to the one where he is not barred. If it is more convenient for the plaintiff in one than it is for the defendant, then the plaintiff can choose. You need not spin a coin between the two contestants. It always comes down in favour of the plaintiff, so it is said, unless the defendant can prove that it would work an injustice to him. That was the way the English Court of Appeal approached the problem in St Pierre v South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382, [1935] All ER Rep 408 and the Supreme Court of Illinois approached it in James v Grand Trunk Western Railroad Co (1958) 152 NE 2d 858. Once a plaintiff institutes an action in accordance with this prior claim of his, then no court in a rival jurisdiction should grant an injunction to prevent the plaintiff from exercising and pursuing his action to its determination. This is the only way, it is said, to avoid unseemly conflict and to ensure comity.
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> The basis of all this reasoning has now been removed. In England by the House of Lords in

MacShannon v Rockware Glass Ltd [1978] 1 All ER 625, [1978] AC 795. In the United States by the Supreme Court in Piper Aircraft Co v Reyno (1981) 454 US 235. The plaintiff has no longer an inborn right to choose his own forum. He no longer wins the toss on every throw. The decision rests with the courts. No matter which jurisdiction is invoked, the court must hold the balance between the plaintiff and the defendant. It must take into account the relative advantages and disadvantages to each of them: not only the juridical advantages and disadvantages, but also the personal conveniences and inconveniences: not only the private interests of the parties but also the public interests involved. The court decides according to which way the balance comes down. This was the approach of the House of Lords in MacShannon v Rockware Glass Ltd, where it was much to the juridical advantage of the plaintiff to bring his action in England, where he would get higher damages, but the natural forum was Scotland. It was in the public interest that a Scottish case should be tried in Scotland. So he was bound to go to Scotland. His action in England was stayed. It was also the approach of the Supreme Court of the United States in Piper Aircraft Co v Reyno, where it was much to the juridical advantage of the plaintiffs that they should sue in Pennsylvania, where they would get higher damages and the lawyers would get contingency fees. But the public interest was against trial in the United States. If claims such as these aircraft claims were all to be brought in the United States, it would involve far too great a commitment of judicial time and resources. Scotland was the natural forum. The public interest favoured Scotland. So the trial should take place there.

By contrast, in Castanho v Brown & Root (UK) Ltd [1981] 1 All ER 143, [1981] AC 557 the plaintiff had an undisputed claim for damages against a Texan-based group of companies. The only question at issue was quantum. The plaintiff had a legitimate advantage in suing in Texas where he could get such damages as a Texan court thought appropriate. Although I took the other view, the House of Lords held that the balance came down clearly in the

> plaintiff 's favour (see [1981] 1 All ER 143 at 152, [1981] AC 557 at 577).”

26. In SNI Aerospatiale v. Lee Kui Jak and Anr; (1987) 3 All ER 510, the question of restraining foreign proceedings in Texas was discussed in the context of whether the same principles would apply in restraining foreign proceedings as applicable to stay of English proceedings. The injunction was granted restraining the plaintiffs from continuing their Texas proceedings. The relevant observations are as under:

> “Mr. Commissioner O'Connor delivered a concurring judgment to the same effect. The President of the Court, Sir Geoffrey Briggs, agreed.
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> It is plain from their judgments that the Court of Appeal were concerned, and understandably concerned, about the relationship between the decisions of the House of Lords in Castanho's case [1981] A.C. 557 and Spiliada's case [1987] A.C. 460. Since a proper identification of the applicable legal principles lies at the heart of the present case, their Lordships consider that their first duty is to identify those principles, giving due consideration to those two decisions. That they should undertake this task is, they consider, all the more necessary because certain observations of Lord Scarman in Castanho's case [1981] A.C. 557 are substantially founded on the much-quoted dictum of Lord Diplock in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, 812, which has to a considerable extent been overtaken by the subsequent development of the law in Spiliada's case [1987] A.C. 460, 475-478, and 482-484. For this purpose, no material distinction is to be drawn between the law of Brunei and the law of England.
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> The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far

as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the "ends of justice" require it: see Bushby v. Munday (1821) 5 Madd. 297, 307, per Sir John Leach V.-C.); Carron Iron Co. v. Maclaren (1855) 5 H.L. Cas. 416, 453, per Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham, at p. 459). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557 and by Lord Diplock in British Airways Board v. Laker Airways Ltd. [1985] A.C. 58, 81. Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach V.-C. said in Bushby v. Munday, 5 Madd. 297, 307:

"If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court; ..."

There are, of course, many other statements in the cases to the same effect. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy: see, e.g. In re North Carolina Estate Co. Ltd. (1889) 5 T.L.R. 328, per Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see e.g., Cohen v. Rothfield [1919] 1 K.B. 410, 413, perScrutton L.J., and, in more recent times,

> Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, 573, per Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case."

27. The learned Judges thereafter discussed the concept of vexatious or oppressive proceedings and concluded as under:

> "For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of forum non conveniens has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460, care was taken to state the principle of forum non conveniens without reference to cases on injunctions: see especially, at p. 480, per Lord Goff of Chieveley. They cannot help but think that the suggestion in Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, 574, that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially upon that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and

further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay on terms."

28. The judgment in Spiliada Maritime Corporation v. Cansulex Ltd's case (supra), known as the Spiliada Judgment, is noticed in the aforesaid judgment. A detailed discussion took place on the principle of forum non convenience. The principle and its application have been discussed in the following terms:

"(5) The fundamental principle

In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

For earlier statements of the principle, in similar terms, see Longworth v. Hope (1865) 3 Macph. 1049, 1053, per Lord President McNeill, and Clements v. Macaulay (1866) 4 Macph. 583, 592, per Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Soci t du Gaz de Paris v. Soci t Anonyme de Navigation "Les Armateurs Fran ais," 1926 S.C.(H.L.) 13, 22, per Lord Sumner.

I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow, 19 R. 665, 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the Soci t du Gaz case, 1926 S.C.(H.L.) 13, 18, 19, and 22 respectively. Lord Dunedin, with reference to the expressions forum non competens and forum non conveniens, said, at p. 18:
"In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for 'conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'"
Lord Sumner referred to a phrase used by Lord Cowan in Clements v. Macaulay (1866) 4 Macph. 583, 594, viz. "more convenient and preferable for securing the ends of justice," and said, at p. 22:
"one cannot think of convenience apart from the convenience of the pursuer or the defender or the court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as 'more convenient, that is to say,

preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at. The object, under the words 'forum non conveniens' is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends."

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the appropriate forum.

(6) How the principle is applied in cases of stay of proceedings

When the principle was first recognised in England, as it was (after a breakthrough in The Atlantic Star [1974] A.C. 436) in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, it cannot be said that the members of the Judicial Committee of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows, at p. 812:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of "a legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive: see The Abidin Daver [1984] A.C. 398, 410, where he recognised that a balance must be struck. Second, Lord

Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens: see The Abidin Daver [1984] A.C. 398, 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular, not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the Soci t du Gaz case, 1926 S.C.(H.L.) 13. Third, it is necessary to strike a note of caution regarding the prominence given to "a legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679, in which your Lordships unanimously approved the decision of the trial judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e., Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz. the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Soci t du Gazcase, 1926 S.C.(H.L.) 13, 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the

party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,": see Scoles and Hay, Conflict of Laws (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see Castel, Conflict of Laws (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the Soci t du Gaz case, 1926 S.C.(H.L.) 13, 21, where he said:

"All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction

may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in The Atlantic Star [1974] A.C. 436 (Belgium); in MacShannon's case [1978] A.C. 795 (Scotland); in Trendtex [1982] A.C. 679 (Switzerland); and in the The Abidin Daver [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795, perLord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Soci t du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word

"convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin
Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Cr dit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, perLord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.”

American View

29. In Gulf Oil Corporation v. Gilbert; 330 U.S. 501, there is a discussion on the power of the court to decline jurisdiction in exceptional circumstances and one such reason cited is where for kindred reasons, the litigation can be more appropriately conducted in a foreign tribunal. The principle of forum non convenience is set out to simply mean that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute since a plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself. The court went on to say that :

> "It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed."

30. In Koster v. (American) Lumbermens Mutual Casualty Co.; 330 US 518, it was observed that the ultimate enquiry is where trial will best serve the convenience of the parties and the ends of justice. It was also observed that:

> "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum

> inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."

31. In a comparatively recent judgment in Sinochem International Co.Ltd v. Malaysia International Shipping Corporation; 549 U.S. 422, it was observed that forum non convenience was a threshold, non merits ground for dismissal since resolving such a motion did not entail any assumption by the court of substantive law-declaring power. The dismissal for forum non convenience was opined to reflect the courts assessment of a range of considerations most notably the convenience to parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality. It was observed :

> "The common-law doctrine of *forum non conveniens* "has continuing application [in federal courts] only in cases where the alternative forum is abroad," *American Dredging, 510 U.S., at 449, n 2, 114 S. Ct. 981, 127 L. Ed. 2d 285*, and perhaps in rare instances where a state or territorial court serves litigational convenience best."

32. Thus, it was held to be "a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *American Dredging, 510 U.S., at 453*; cf. *In re Papandreou, 139 F.3d, at 255* (*forum non conveniens* "involves a deliberate abstention from the exercise of jurisdiction").

33. The principle of forum non convenience was observed to be a common law doctrine which has a continuing application only in cases where alternative forum is abroad and perhaps in rare instances where a State or territorial court serves litigational convenience best. For the federal court system, the Congress had codified the doctrine and had provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for the trial of an action.

Canadian View

34. The Canadian viewpoint is reflected in Amchem Products Incorporated v. British Columbia (Workers' Compensation Board); 1993 CanLII 124 (SCC). The Supreme Court of Canada was hearing an appeal from the Court of Appeals for British Columbia. A tort action had been initiated by 194 persons who claimed to have suffered injury by exposure to asbestos or by dependents of such persons and damages were sought from the asbestos company. Most of the claimants were residents of British Columbia when the injuries were sustained had been paid compensation in the form of disability or death benefits for those whose health had been affected by the Workers Compensation Board of British Columbia. The respondent-Companies did not have any connection with British Columbia and were located in United States of America. The companies, though not incorporated in Texas, were carrying

on the business in the form of asbestos manufacturing plants in Texas. The action was commenced in Texas where the defendants challenged the jurisdiction and venue on the ground that Texas was forum non convenience. This motion of the respondent-companies was dismissed and the appeals also met the same fate. However, the companies successfully applied in the Supreme Court of British Columbia for anti suit injunction to prevent continuation of Texas actions and the said injunction was upheld in appeal. The Texas in turn issued an "anti-anti-suit" injunction prohibiting seeking of such injunction in British Columbia. The result was that the principles for grant of anti suit injunction and the principle of forum non convenience both came into question in the facts of the case. The companies succeeded in their action before the Supreme Court of Canada.

35. The Canadian Supreme Court emphasized that while choosing the forum in modern litigation, the business of litigation had become increasingly international and frequently there is no single forum that is clearly the most convenient or appropriate for trial of action but rather several which are equally suitable alternatives. The discussion on the various aspects is so lucid that we consider it appropriate to reproduce the same rather than endeavour to put them in different words. The same is as follows:

Choosing the Forum in Modern Litigation

This Court has not considered this question since its decision in *Antares Shipping Corp. v. The Ship* "*Capricorn*", [1977] 2 S.C.R. 422. Meanwhile, the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "[t]he substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.

This does not mean, however, that "forum shopping" is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others.

The courts have developed two forms of remedy to control the choice of forum by the parties. The first and more conventional device is a stay of proceedings. This enables the court of the forum selected by the plaintiff (the domestic forum) to stay the action at the request of the defendant if persuaded that the case should be tried elsewhere. The second is the anti-suit injunction, a more aggressive remedy, which may be granted by the domestic court at the request of a defendant or defendants, actual or potential, in a foreign suit. In the usual situation the plaintiff in the domestic court moves to restrain the defendant or defendants from launching or continuing a proceeding in the courts of another jurisdiction. Occasionally, as in this case, the defendants in a foreign jurisdiction who allege that the plaintiff in that jurisdiction has selected an inappropriate forum seek an injunction from the courts of the alleged appropriate forum, in which no proceeding is pending, to restrain continuation of the foreign proceedings. While the restraining order operates *in personam* on the plaintiff in the foreign suit and not on the foreign court itself, it has the latter effect and therefore raises serious issues of comity.

Although both the remedy of a stay and an injunction have as their main objectives the selection of an appropriate forum for the trial of the action, there is a fundamental difference between them which is crucial to the development of the principles which should govern each. In the case of the stay the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court. Any doubts that a foreign court will not regard this as a breach of comity are dispelled by reading the reaction of Wilkey J. of the District of Columbia Circuit of the United States Federal Court of Appeal in *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (1984), in which the British courts restrained Laker from continuing an anti-trust suit in United States courts against British airlines. In assessing the role of comity in the formulation of the principles which should inform the exercise of this power, I adopt the definition of

comity approved by La Forest J.in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1096:

"Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . . .

It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. See Richard W.Raushenbush, "Antisuit Injunctions and International Comity" (1985), 71 *Va. Law Rev.* 1039, and *Laker Airlines*, *supra*. A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court's staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.

While the above scenario is one we should strive to attain, it has not yet been achieved. Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not

satisfy the basic requirements of the *forum non conveniens* test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti suit injunction. This then indicates the general tenor of the principles that underlie the granting of this form of relief. In order to arrive at more specific criteria, it is necessary to consider when a foreign court has departed from our own test of *forum non conveniens* to such an extent as to justify our courts in refusing to respect the assumption of jurisdiction by the foreign court and in what circumstances such assumption amounts to a serious injustice. The former requires an examination of the current state of the law relating to the stay of proceedings on the ground of *forum non conveniens*, while the latter, the law with respect to injunctions and specifically anti-suit injunctions.

Forum Non Conveniens

The law of Canada and other common law countries on this subject evolved from the law of England which was most recently restated by the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460. In setting out the principles which should guide a British court, Lord Goff, who delivered the main judgment, stated at p. 477 that "on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions". The English approach has gone through several stages of evolution tending to a broader acceptance of the legitimacy of the claim of other jurisdictions to try actions that have connections to England as well as to such other jurisdictions. Other common law jurisdictions have either accepted the principles in *Spiliada*, or an earlier version of them.

Earlier English cases declined to apply the principle of *forum non conveniens*, which was a Scottish principle, preferring a rule which required a party who had been served within the jurisdiction to establish: (1) that the continuation of the action would cause an

injustice to him or her because it would be oppressive or vexatious or constitute an abuse of the process, and (2) that stay would not cause an injustice to the plaintiff. The foundation for this rule was not balance of convenience for the trial of the action but rather abuse of the rights of the parties. A different test applied with respect to cases in which service outside the jurisdiction was necessary. In such a case an order for service *ex juris* was required and the plaintiff had to show that England was the appropriate forum and that the rule authorizing such service was otherwise complied with. In *The Atlantic Star*, [1973] 2 All E.R. 175, the House of Lords was urged to adopt the principle of *forum non conveniens* from the Scottish law and to discontinue the test which required proof that the action was oppressive or vexatious as a prerequisite to a stay. The House of Lords declined to adopt the Scottish doctrine but opined that since the words "oppressive and vexatious" were flexible (indeed they had never been satisfactorily defined), liberalization of the English rule could be achieved in the application of those terms. In *Rockware Glass Ltd. v. MacShannon*, [1978] 2 W.L.R. 362, those words were discarded in favour of a more liberal and flexible test which required the defendant to establish: (1) that there is another forum to which the defendant is amenable in which justice can be done at substantially less inconvenience or expense, and (2) that the stay did not deprive the plaintiff of a legitimate personal or juridical advantage if the action continued in the domestic court. This was substantially the same as the Scottish rule of *forum non conveniens*.

In *Spiliada*, *supra*, the House of Lords restated the rule and elaborated on its application. In particular, the court dealt with its application in what it considered two different circumstances. In the "as of right" cases in which the defendant was served in the jurisdiction, the burden of proof that a stay should be granted was on the defendant who was required to show that there is another forum which is clearly more appropriate for the trial of the action. This so-called "natural forum" is the one with which the action has the most real and substantial connection. If this first condition is

established, a stay will be granted unless the plaintiff establishes special circumstances by reason of which justice requires that the trial take place in England. Mere loss of a juridical advantage will not amount to an injustice if the court is satisfied that substantial justice will be done in the appropriate forum. In cases in which service is effected *ex juris*, the burden is on the plaintiff throughout and is the obverse of that applicable in cases as of right; that is, the plaintiff must show that England is clearly the appropriate forum. Lord Goff provided some guidance with respect to the relevant factors that determine the appropriate forum. While not intending to provide an exhaustive list, His Lordship referred to the principal factors in his reasons at p. 478:

So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

These principles were reaffirmed in *de Dampierre v. de Dampierre*, [1987] 2 W.L.R. 1006 (H.L.). The case provides an interesting illustration of the application of the second branch of the rule. The petitioner wife resisted a stay of her divorce proceedings in England on the ground that in France, where her husband had also commenced proceedings, she would be deprived of support if her conduct was found to be the exclusive cause of the break-up of the marriage. Having found that the husband had satisfied the first condition establishing France as the appropriate forum, the loss of this juridical advantage was considered not sufficient to work an injustice in that substantial justice would still be done under the matrimonial regime obtaining in France.

In Australia, the High Court, while not adopting all of the wording of *Spiliada*, has enunciated principles that the court acknowledged would likely yield the same results in the majority of cases. See *Voth v. Manildra Flour Mills Pty Ltd.*

(1990), 65 A.L.J.R. 83, at p. 90. The test for a stay is whether the forum selected by the plaintiff is clearly inappropriate rather than whether there is another forum that is clearly more appropriate. The same test applies in "as of right" and "service *ex juris*" cases. In New Zealand the applicable test is the *Spiliada* test which was adopted in *Club Mediterranee NZ v. Wendell*, [1989] 1 N.Z.L.R. 216 (C.A.) The United States Federal Courts apply similar principles in actions in those courts. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court of the United States approved of the decision of the District Court which dismissed an action brought in California by the administratrix of the estates of Scottish citizens involved in an air crash in Scotland against the American manufacturers of the aircraft. The test applied by the District Court judge was whether the relevant factors clearly pointed to a trial in the alternative jurisdiction. The test was applied on the basis of a presumption in favour of the plaintiff's choice of forum, the impact of which was lessened when the home forum was not selected.

The current state of the law in Canada is summed up adequately by Ellen L. Hayes in "*Forum Non Conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992), 26 *U.B.C. Law Rev.*41, at pp. 42-43:

The status of the doctrine of *forum non conveniens* in Canada is unclear. In general terms the Canadian courts have looked to English authorities when considering *forum non conveniens* issues. Their specific approach, however, is not consistent. The most recent cases from the Western provinces refer to the current English test, but at the same time resist adopting a comprehensive test or rule which would result in an "overly legalistic approach." The Ontario courts, on the other hand, have fallen behind the English courts' development of the doctrine and continue to apply a test which has now been replaced by the House of Lords. There is confusion in many of the cases as to whether the test is different when the defendant is served within the jurisdiction rather than *ex juris*, where the burden of proof lies and the weight to be given personal or

juridical advantages to the plaintiff of proceeding in the home jurisdiction.

The only recent decision of this Court on the subject is *Antares*, *supra*, which, while an admiralty case in the Federal Court, discusses the general principles relating to *forum non conveniens*. At p. 448, Ritchie J., for the majority, stated the test that should be applied when the court is asked to stay an action on this ground:

In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

This case was decided before *Spiliada* and *MacShannon*. It is significant that there is no mention in the statement of general principles of any requirement that the domestic proceeding be shown to be oppressive or vexatious. There is no specific discussion of the second condition of the English rule but it is clear from the judgment that a principal factor in the determination that there was no alternative forum more convenient than Canada was the fact that it was the only jurisdiction in which the plaintiff could obtain an effective judgment. The ship, which was the subject of the suit, had been arrested in Quebec and the bond posted to obtain its release was security for enforcement of any judgment obtained in Canada. No such security was available in the other jurisdictions which were potential appropriate fora for the action. Accordingly, Canada was the most convenient forum for both "the pursuit of the action" and "for securing the ends of justice".

In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when

oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. The law in England has evolved by reworking a passage from the reasons of Scott J. in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382, which contained two conditions. In its original formulation the second condition required the court to ensure that there was no injustice to the plaintiff in granting the stay. No doubt this was because the oppression test concentrated largely on the effects on the defendant of being subjected to a trial in England. When the first condition moved to an examination of all the factors that are designed to identify the natural forum, it seems to me that any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account. The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

Finally, I observe that *Antares*, *supra*, was a case in which leave to serve *ex juris* was required. The Court did not, however, consider this an important matter in formulating the test. It seems to me that whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors. If the defendant resides out of the jurisdiction this is a factor whether or not service is effected out of the jurisdiction. Residence outside of the jurisdiction may be artificial. It may have been arranged for tax or other reasons notwithstanding the defendant has a real and substantial connection with this country. The special treatment which the English courts

have accorded to *ex juris* cases appears to be based on the dictates of Ord. 11 of the English rules which imposes a heavy burden on the plaintiff to justify the assertion of jurisdiction over a foreigner. In most provinces in Canada, leave to serve *ex juris* is no longer required except in special circumstances and this trend is one that is likely to spread to other provinces. This phenomenon was considered by the High Court of Australia in *Voth*, *supra*, in reaching its conclusion that the test should be the same for service *ex juris* cases and others. Whether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service *ex juris* where no order is required, then the rule must govern. The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties. While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. This was the position adopted by McLachlin J.A. (as she then was) in *Avenue Properties Ltd. v. First City Dev. Corp.* (1986), 7 B.C.L.R. (2d) 45. She emphasized that this had particular application where there were no parallel foreign proceedings pending.

This review establishes that the law in common law jurisdictions is, as observed by Lord Goff in *Spiliada*, remarkably uniform. While there are differences in the language used, each jurisdiction applies principles designed to identify the most appropriate or appropriate forum for the litigation based on factors which connect the litigation and the parties to the competing fora. A review of the law of Japan by Ellen L. Hayes in the study to which I refer above (*supra*, at p. 63) led her to conclude that similar principles are applied there. Regard for the principles of international comity to which I have referred suggests that in considering an anti-suit injunction the fact that a foreign court has assumed jurisdiction in circumstances

which are consistent with the application of the above principles is an important factor militating against granting an injunction.

Anti-Suit Injunctions

England

The English courts have exercised jurisdiction to restrain proceedings in a foreign court and to stay domestic actions since 1821. Leach V.-C. in *Bushby v. Munday*, *supra*, at p. 307 and p. 913, stated the rule as follows:

Where parties Defendants are resident in England, and brought by *subp{oe}na* here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other Court of Justice, whether in this country, or in a foreign country.

The sentiment expressed at that time was that the relief sought, whether an injunction or a stay, operated *in personam* and was not intended to interfere with the other court. Thus viewed, the question to be determined was whether the ends of justice required the issuance of an injunction or a stay. In deciding that an injunction should be granted in *Bushby v. Munday*, *supra*, the Vice-Chancellor made findings that the English Court was a more convenient jurisdiction; and, that the proceedings in Scotland, due to procedural law, were less likely to elicit the truth. Leach V.-C. concluded (at p. 308 and p. 913) that the English court should pursue its superior means for determining both law and fact.

The same test evolved for anti-suit injunctions and stays, based on the judgment of Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, *supra*. Where these requirements were met, the court would exercise its discretion in granting the stay or enjoining the foreign proceedings. The principles governing the issuance of a stay and an anti-suit injunction remained identical until the House of Lords' decision in *The Atlantic Star*, *supra*,

when the English jurisprudence regarding stays of domestic proceedings underwent the first of the modifications to which I have referred. In *The Atlantic Star*, the House of Lords held that the words "oppressive" and "vexatious" should be interpreted liberally. After the decision in *The Atlantic Star*, it was unclear whether the principles governing the issuance of an anti-suit injunction remained the same or whether they evolved along with the principles governing a stay of domestic proceedings. The House of Lords directly considered this question in *Castanho v. Brown and Root (U.K.) Ltd.*, *supra*, which involved an application for an anti-suit injunction. Lord Scarman pronounced, at p. 574, that "[t]he principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings". Lord Scarman approved the reformulation of the principles as set out by Lord Diplock in *The Atlantic Star*, *supra*, and concluded, at p. 575, that:

. . . to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, *and* (*b*) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction. [Emphasis in original.]

Lord Scarman emphasized that the "critical equation" in an application for a stay or an anti-suit injunction was between the advantage to the laintiff and the disadvantage to the defendants. For the purposes of this determination, the prospect of higher damages in the foreign jurisdiction was a legitimate juridical advantage for a plaintiff. The House of Lords applied the law as set out in *Castanho*, *supra*, in two succeeding cases involving applications to enjoin foreign proceedings (*British Airways Board v. Laker Airways Ltd.*, [1985] A.C. 53, and *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] A.C. 24).

This test, in so far as it regarded anti-suit injunctions, did not withstand the scrutiny of

the Judicial Committee of the Privy Council. In 1987, the Privy Council overturned the liberalized principles that the House of Lords enunciated. The definitive statement of the law was pronounced in *SNI*, *supra*: an anti-suit injunction will not be issued by an English court unless it is shown that the foreign proceedings will be oppressive or vexatious. It was made clear that the traditional principles as summarized in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, *supra*, were to govern applications to restrain foreign proceedings. Thus, the liberalized principles formulated in *Spiliada*, *supra*, in the context of an application for a stay of domestic proceedings were not to apply to anti-suit injunctions because to do so would be inconsistent with the principles of comity and would disregard the fundamental requirement that an injunction will only be available where it is required to address the ends of justice.

In coming to his conclusion on the law in *SNI*, Lord Goff considered the long history of English law as well as American and Scottish authorities. He stated, at p. 519, that the following basic principles were beyond dispute:

First, the jurisdiction is to be exercised when the `ends of justice' require it. . . . Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. . . . Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy. . . . Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution. . . . [Cites omitted.]

In considering the above principles, Lord Goff set out the following test (*SNI*, *supra*,at p. 522):

In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court,

the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

This analysis represents the current test for issuance of an anti-suit injunction in England.

The United States of America

Although American courts have exercised the equitable power to restrain parties subject to their jurisdiction from litigating in another forum (see *Cole v.Cunningham*, 133 U.S. 107 (1890)), most American jurisdictions allow parallel foreign proceedings for *in personam* actions. Anti-suit injunctions are used only when "necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum" (*Laker Airways v. Sabena, Belgian World Airlines*, *supra*, at p. 927). As in the case of other jurisdictions, the power to issue such injunctive relief must be exercised with extreme caution because, although in theory the order operates *in personam*, an antisuit injunction "effectively restrict[s] the foreign court's ability to exercise its jurisdiction" (*Laker Airways, supra*, at p. 927).

In American jurisprudence there are no precise rules governing the issuance of anti-suit injunctions; rather, the equitable circumstances are examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice. A court is to be guided by two tenets. Firstly, the fundamental

corollary to concurrent jurisdiction must be respected: parallel proceedings in concurrent *in personam* actions are allowed to proceed simultaneously. Second, impedance of the foreign jurisdiction is to be avoided. (See *Laker Airways*, *supra*, at pp. 926-27.)

As noted by one author, when faced with foreign courts of concurrent jurisdiction, not all American courts abide by the rule favouring parallel proceedings. Richard W. Raushenbush, "Antisuit Injunctions and International Comity", *supra*, at pp. 1049-50, describes two distinct approaches which have developed. Under the "liberal" approach to anti-suit injunctions, a court will be willing to grant an injunction where the proceedings are duplicative in nature, and they "(1) frustrate a policy of the forum issuing the injunction; (2) [are] vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) . . . prejudice other equitable considerations" (*per Unterweser Reederei, GmbH v. M/S Bremen*, 428 F.2d 888 (5th Cir. 1970), at p. 890). The "conservative" approach, as exemplified by Wilkey J. in *Laker Airways*, *supra*, advances the view that issuing anti-suit injunctions to prevent duplicative litigation is inconsistent with the rule permitting parallel proceedings in concurrent *in personam* actions. In the application of the "conservative" approach (at p. 927), anti-suit injunctions are only deployed when it becomes "necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum". Often an applicant is additionally required to establish the conventional requirements for issuance of an injunction: a likelihood of success on the merits, a risk of irreparable injury, a lack of significant harm to the defendant, and a public interest in issuing an injunction. (See *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992).)

As observed by Lord Goff in *SNI*, there is no suggestion in American jurisprudence that applications for stays of proceedings and anti-suit injunctions are governed by the same principles.

Australia

The Federal Court - General Division has discussed the English and American authorities regarding anti-suit injunctions: Gummow J. in *National Mutual Holdings Pty. Ltd. v. Sentry Corp.* (1989), 87 A.L.R. 539, at p. 563, concluded that:

The conduct of foreign proceedings which have a tendency to interfere with the due process of the domestic court may, in the circumstances of a particular case, generate the necessary equity to enjoin those foreign proceedings as vexatious or oppressive. . . .

He added three observations. First, "[i]n Australia, there is the further consideration that where a court has begun to exercise the judicial power of the Commonwealth in relation to a particular matter, it has the exclusive right to exercise or control the exercise of the functions which form part of that power or are incidental to it: cf *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 C.L.R. 460 at 471-3, 474. . . ." Secondly, "[i]t is also to be asked whether effectual relief can be obtained in the courts of the foreign country . . .: cf White and Tudor's *Leading Cases in Equity* [9th ed., vol. 1], pp 635-6". And lastly, "[a] relevant consideration is the existence of substantial reasons of benefit for the plaintiff in bringing the foreign proceedings: [*SNI*] (at 893-4)".

The High Court of Australia has not specifically considered the principles upon which an anti-suit injunction will be granted.

Canada

Canadian jurisprudence is not widely developed on this subject matter. Even the early cases, however, admonished that the power to restrain foreign proceedings should be exercised with great caution and that the strict purpose of such injunctions was to prevent the abuse of the courts by vexatious actions. There is no decision of this Court on the point.

Two recent Nova Scotia decisions dealt with anti-suit injunctions. *Canadian Home Assurance Co. v. Cooper* (1986), 29 D.L.R. (4th) 419 (N.S.S.C. App. Div.), predated the English judgment of *SNI*. In that case, an injunction was granted upon MacKeigan J.A.'s findings that the foreign action involving the same parties was of no value to the respondents since, if its resolution was the same as the domestic action, it would not add to the domestic judgment, and, if the judgment were not the same, it would not be recognized in the domestic jurisdiction because of what would be considered to be a jurisdictional error. Without discussion of the governing principles, the injunction was granted. In the later Nova Scotia case of *Rowan Companies, Inc. v. DiPersio* (1990), 69 D.L.R. (4th) 224, which was decided after *SNI*, an anti-suit injunction was refused by the Court of Appeal. Jones J.A., delivering the judgment for the court, stated that the balance of convenience favoured the respondent. The factors he relied on were that the action was brought in the *lex loci delicti* which was the appropriate forum and that the applicant carried on business in the foreign jurisdiction where, presumably, some of the witnesses resided. He found, at p. 240, that the action could not be termed "frivolous or vexatious".

In the recent Alberta Queen's Bench decision in *Allied-Signal Inc. v.Dome Petroleum Ltd.* (1988), 67 Alta. L.R. (2d) 259, Medhurst J. purported to apply the English principles enunciated in *SNI* in an action for an anti-suit injunction. He stated, at p. 266:

After considering all of the submissions that have been made, it is my view that these applications before me should be decided on the basis of which forum is more suitable for the ends of justice in determining the issues in dispute. This includes a consideration of the tripartite test for obtaining interlocutory injunctions in other proceedings.

Medhurst J. concluded that on the basis of the *forum non conveniens* test the injunction should be granted. He added that the injunction might also be justified on two further grounds: (1) the foreign action is oppressive

due to the risks of inconsistent findings and subsequent actions for contribution and indemnity, and (2) the tripartite test for granting interim injunctions which includes consideration of the public interest and private interests of the parties was satisfied.

Kornberg v. Kornberg (1990), 30 R.F.L. (3d) 238 (Man. C.A.) (leave to appeal refused, [1991] 1 S.C.R. x), is a case which applied the *SNI* principles. The majority of the Court of Appeal recognized that the principles applicable to an antisuit injunction were not the same as those applicable to a stay of domestic proceedings. Philp J.A., writing for the majority, held that an anti-suit injunction should not be granted unless continuing the foreign proceedings would lead to injustice to the other party or the pursuit of the foreign proceedings was vexatious and oppressive. This decision was in contrast to the Manitoba Court of Appeal decision in *Aikmac Holdings Ltd. v. Loewen*, [1989] 6 W.W.R. 759, which applied the English approach in *Castanho*, *supra*, which was overruled in 1987 by the Privy Council in *SNI*.

No consistent approach appears to emerge from these cases other than recognition of the principle that great caution should be exercised when invoking the power to enjoin foreign litigation.

The Test

In my view, the principles outlined in *SNI* should be the foundation for the test applied in our courts. These principles should be applied having due regard for the Canadian approach to private international law. This approach is exemplified by the judgment of this Court in *Morguard*, *supra*, in which La Forest J. stressed the role of comity and the need to adjust its content in light of the changing world order. I now turn to the formulation of the test in light of the foregoing.

First, it is useful to discuss some preliminary aspects of procedure with respect to anti-suit injunctions. As a general rule, the domestic court should not entertain an application for an injunction if there is no foreign proceeding pending. While *quia timet* injunctions are

granted by the courts, that is done only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong. In general, an injunction is a remedy ancillary to a cause of action. See Case Comment by Elizabeth R. Edinger (1992), 71 *Can. Bar Rev.* 117, at p. 127. In this respect the anti-suit injunction is unique in that the applicant does not have to establish that the assumption of jurisdiction by the foreign court will amount to an actionable wrong. Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.

If the foreign court stays or dismisses the action there, the problem is solved. If not, the domestic court must proceed to entertain the application for an injunction but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum. In any case in which an action has been commenced in the domestic forum, it can be expected that the domestic forum is being put forward as an appropriate forum by the plaintiff. In resisting a stay, the plaintiff will also contend that there is no other forum which is clearly more appropriate and that, therefore, the defendant has not complied with the test which I have outlined above. If no action has been commenced in the domestic forum, it has no juridical basis for entertaining an application for an injunction unless it is contended by the applicant that the action should have been commenced in the domestic forum as the more appropriate place of trial and it is potentially an appropriate forum.

The first step in applying the *SNI* analysis is to determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest

connection with the action and the parties. I would modify this slightly to conform with the test relating to *forum non conveniens*. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to *forum non conveniens* and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the *SNI* test. I prefer the initial formulation of that step without reference to the terms "oppressive or vexatious". At p. 522, Lord Goff states:

This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to

do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. [Emphasis added.]

That case was decided on the basis of the injustice to SNI by reason of the loss of juridical advantages in Brunei but not available to it in Texas. The characterization of this loss as oppressive added nothing to the analysis. This is especially so since neither "oppressive" nor "vexatious" was satisfactorily defined in *SNI* nor, from my reading of the cases, anywhere else. If flexibility is the desired objective, it is achieved by the use of the term "injustice" which, in addition, is more in keeping with the language of the statutes which provide for injunctive relief. For example, the British Columbia *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 36, authorizes an injunction when "it appears to the court to be just or convenient."

When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum. I pointed out in my discussion of the test for determining the *forum non conveniens* that loss of juridical advantage is one of the factors and it will have been considered in step one. It will also be

> considered in the second step to determine whether, apart from its influence on the choice of the most appropriate forum, an injustice would result if the plaintiff is allowed to proceed in the foreign jurisdiction. The loss of a personal or juridical advantage is not necessarily the only potential cause of injustice in this context but it will be, by far, the most frequent. Indeed most of the authorities involve loss of juridical advantage rather than personal advantage. Nonetheless, loss of personal advantage might amount to an injustice if, for example, an individual party is required to litigate in a distant forum with which he or she has no connection. I prefer to leave other possible sources of injustice to be dealt with as they arise.
>
> The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the *forum non conveniens*, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

Austrialian View

36. In CSR Limited v. Cigna Insurance Australia Limited and Ors's case (supra), which was referred to in the judgment of Modi Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra), the principles relating to forum non convenience were emphasized by reference to the Judgment in Voth v.Manildra Four Mills Pty.Ltd, (1990)

65 A.L.J.R. 83, which has been dealt with in detail by the Canadian Supreme Court in Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)'s case (supra). The test which governs the stay of proceedings in favour of proceedings in another country is that if a finding is reached that the Australian Court is clearly the inappropriate forum. It was observed that every court must have to prevent its own processes being used to bring about injustice and the principles of equity, vexation or oppression are applied while granting anti suit injunction including in a foreign court.

37. The view taken was that the test is that "the equitable power to grant injunction in a restraint of litigation exists to serve equity and good conscience. It is not a power which involves a determination that proceedings instituted in a foreign court are vexatious or oppressive in the sense that they are an abuse of that court's processes or, even in the sense that they should be stayed by a foreign court on forum non conveniens grounds."

Some other Indian Judgments

38. We had at the inception itself referred to the judgment of the Supreme Court in Modi Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra) dealing with the principle of anti suit injunction relating to foreign forums. One of us (Sanjay Kishan Kaul, J.) had the occasion to consider the principle of anti suit injunction and forum

non convenience in (India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc and Ors; 2007 (35) PTC 177 (Del.) where the plaintiff had adopted the mark "INDIA TV" and domain name "indiatvnews.com". The defendant was the owner of the domain name "indiatvlive.com" registered in Arizona. The plaintiff filed the suit at Delhi seeking restraint order against the defendant from using the words "INDIA" and "TV" in combination as a domain name. It was held that the defendant-company had a global presence and the website being accessible in India as such courts in India can exercise personal jurisdiction over the defendants. It was observed that in order to grant an anti suit injunction, one of the conditions is amenability of the defendant to the personal jurisdiction of the court. The position in the United States was slightly different where jurisdiction could be exercised under the 'long arm' statute of the State and the second condition in respect of finding of the jurisdiction satisfying the constitutional requirements of due process was satisfied. The plaintiff's channel being primarily an Indian news channel intended for Indian audiences, any damage alleged to have been caused or alleged to be likely to arise to the goodwill, reputation etc. of the plaintiff would be in India and would be the consequence of the fact that the impugned website was accessible in India and the services provided can be availed of in India. It was also observed

that the plaintiff's choice of forum is usually not disturbed unless the balance of convenience is strongly in favour of the defendant and in determining which of the available forums is the forum convenience in a given matter, the convenience of all the parties had to be seen. The defendant had instituted a subsequent suit in Arizona after institution of the suit by the plaintiff and the defendant was restrained from proceeding with the said suit.

39. Another learned Single Judge of this Court in Moser Baer India Ltd. V. Koninklijke Philips Electronics NV. and Ors; (151) 2008 DLT 180 has observed as under:

> "The concepts of anti-suit injunction and forum non conveniens require some examination. An anti-suit injunction is granted by a court preventing the parties before it from instituting or continuing with proceedings in another Court. On the other hand, the doctrine of forum non conveniens is invoked by a court to not entertain a matter presented before it in view of the fact that there exists a more-appropriate court of competent jurisdiction which would be in a better position to decide the lis between the parties. So, in a sense the principle on which an anti-suit injunction is invoked is just the reverse of the principle on which the doctrine of forum on conveniens is employed. To make it absolutely clear, an example would be appropriate. Assuming that there are two courts A and B at different places and both having jurisdiction in a particular matter, a party may approach court A for an anti-suit injunction against the other party preventing them from instituting a suit or other proceedings in court B. Of course, while considering the grant of an anti-suit injunction, court A would take into account as to which of the two courts is the more convenient forum. However, when a party approaches court A and the defendants take up the plea that court A is a forum non

> conveniens and that the matter ought to be more appropriately dealt with by court B, then court A, invoking the principles of forum non conveniens, may refuse jto entertain the matter presented to it and direct the parties to approach court B being the more convenient forum. Thus, it is seen that in an anti-suit injunction, one court grants an injunction restraining the parties from approaching another court. Whereas, in the case of the doctrine of forum non conveniens, the court before whom the matter is presented, itself refuses to entertain the same and directs the parties to approach the other court being the more appropriate and convenient forum. It must also be kept in mind that the court granting an anti-suit injunction must otherwise have jurisdiction over the matter. Similarly, the court rejecting a matter on the principle of forum on conveniens, must otherwise also have jurisdiction to entertain the same. This is so because if the court in either case does not have jurisdiction then, it cannot deal with the matter and, consequently, it can neither grant an anti-suit injunction nor pass an order refusing to hear the matter on the plea of forum non conveniens.

Legal position

40. The legal position arising from the conspectus of the aforesaid judgments is thus abundantly clear that the principle of anti suit injunction and forum non convenience do apply to the foreign forums/courts once the test laid down for exercise of such jurisdiction is satisfied and this legal position is prevalent in UK, USA, Australia, Canada as also in India.

The option under the Civil Procedure Code, 1908

41. The legal philosophy behind the impugned judgment is that the power under Section 151 of the said Code permits the Civil Court to apply the principle of forum non

convenience, the same being in the nature of a residuary power. The learned Single Judge has thus observed that in exceptional circumstances, the court can exercise the power *ex debito justitiae* to prevent a proceeding from becoming vexatious or oppressive. The aforesaid line of reasoning is sought to be challenged by learned counsel for the appellants by referring to different provisions of the said Code to advance the plea that Section 151 of the said Code being in the nature of a residuary power, recourse cannot be taken to the said provision where specific provisions are contained in the said Code. The plea is based on the incorporation of the provisions under Sections 16 to 20 of the said Code. The said Sections fall under the heading "place of suing". Section 16 of the said Code requires a suit to be instituted where the subject matter is situate while Section 17 refers to suits for immovable property situate within jurisdiction of different courts. Section 18 of the said Code refers to uncertainty about local limits of jurisdiction of Courts while Section 19 deals with suits for compensation for wrongs to person or movables. Section 20 of the said Code provides for other suits to be instituted where defendant resides or cause of action arises. The plea of the learned counsel for the appellants is thus that in respect of instituting a suit of the nature in the present case, the plaintiff can be guided by Section 20 of the said Code.

42. An objection to the jurisdiction is to be taken in the Court of first instance at the earliest opportunity as provided under Section 21 of the said Code. Section 22 of the said Code refers to powers to transfer suits which may be instituted in more than one court and as to in which court such an application for transfer would lie is provided in Section 23 of the said Code. The application can in turn be entertained only by the appellate court which is common to the subordinate courts or in the absence thereof to the High Court. Section 24 of the said Code refers to general power of transfer and withdrawal but the principle behind both Section 23 and 24 of the said Code is that it would lie to the superior court having jurisdiction in the matter. The power under Section 25 of the said Code is much wider and is conferred on the Supreme Court for transfer of suits from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State. The plea thus is that it is only the Supreme Court which can transfer a matter from one State to another and when such power has been conferred on the Supreme Court this power cannot be usurped by a High Court to itself by exercise of this power indirectly on the principle of forum non convenience.

43. In Durgesh Sharma v. Jayshree; (2008) 9 SCC 648, it was held that after amendment of the said Code in 1976, Section 25 is a self-contained code and comprises substantive as well as procedural law and thus Section 23

must be read subject to Section 25 of the said Code. The powers under Section 151 of the said Code cannot be exercised in contravention or conflict of or ignoring express and specific provisions of law. It was thus observed that Section 151 of the said Code cannot be invoked for transferring a case from one court to another as exhaustive law relating to transfer of cases is contained in Sections 22 to 25 of the said Code.

44. In Indian Overseas Bank, Madras v. Chemical Construction Company and Ors; (1979) 4 SCC 358, it has been observed that the principle governing the general power of transfer and withdrawal under Section 24 of the said Code is that the plaintiff is the *dominus litis* and, as such, entitled to institute a suit in any forum which the law allows him and the court should not lightly change that forum and compel him to go to another Court, Thus a mere balance of convenience in favour of proceedings in another court, albeit a material consideration, may not always be a sure criterion justifying transfer. However, as compared with Section 24 of the said Code, the power of transfer of civil proceedings to another court, conferred under Section 25 on the Supreme Court, is far wider.

45. The moot question which would thus arise for consideration would be whether exercising the principle of forum non convenience actually amounts to exercising the power of transfer and thus is not permissible in view of the

aforesaid observations. It is not in doubt, in our considered view, that the power of transfer has to be exercised in the mode and manner prescribed under the said Code and we find support for such a view in view of the observations of the Supreme Court in the aforesaid two judgments. It is in that context that the question of evoking the principle of forum non convenience arises which will, however, be dealt with in detail while referring to this principle as applicable to domestic forums/courts hereinafter.

46. Learned counsel for the appellants also drew our attention to the relief granted by the learned Single Judge in the impugned order whereby the plaints have been returned and rejected. In this context, learned counsel has referred to the provisions of Order 7 Rule 11 of the said Code which stipulates as to when a plaint can be rejected. Thus, a plaint can be rejected only if it fails to adhere to sub paragraphs (a) to (f) of Order 7 Rule 11 of the said Code. We may also refer to Order 7 Rule 10 of the said Code which provides for return of plaint to be presented in a court in which the suit should have been instituted. Learned counsel for the appellants thus rightly contends that rejection or return of the plaint can only take place within the purview of the said provisions. However, distinct from the same, dismissal of a suit is directed if the suit is not diligently prosecuted and the same is incorporated under Order 9 Rules 2,3,5 and 8 which are the eventualities that arise on the failure of the

plaintiff to pay the court fees or postal charges, or where none appears for the parties when the suit is called for hearing, failure of the plaintiff to apply for fresh summons when earlier summons are unserved and where the defendant alone appears.

47. Learned senior counsel for the respondent, in fact, did not even contend to the contrary that the final directions, as passed in the suit, need not have been so worded. The plaint has been rejected and returned. The rejection of plaint can only occur if the test of Order 7 Rule 11 of the said Code is satisfied; and the plaint is returned under Order 7 Rule 10 of the said Code. Undisputedly, the parameters of the aforesaid provisions are not applicable to the plaint in question. It is not a case for dismissal of a suit for not being prosecuted diligently as envisaged under Order 9 Rules 2,3 5 and 8 of the said Code. In fact, Order 10 Rule 4 of the said Code provides for consequences of refusal or inability of the pleader to answer any question relating to the suit which the court may pose. In such a situation, the party would have to appear in person and if the party also fails to appear, the court can pronounce judgment. Similarly, under Order 12 Rule 6 of the said Code, if there are admissions in the written statement, a judgment can be pronounced in favour of the plaintiff based on such admissions. In case the parties are not at issue or there is failure to produce evidence, the court may at once

pronounce the judgment as envisaged under Order 15 Rules 1, 2 and 4 of the said Code.

48. The bedrock of the case of the appellants is that the orders of this nature can be passed only if the test laid down under the provisions of the Code are satisfied. The additional exception is where in suits for injunction there are wide powers to decline relief in case of unclean hands of any of the parties.

49. Learned counsel for the respondent has referred to the judgment in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal; AIR 1962 SC 527. In the said judgment, the Supreme Court while dealing with rival contentions in respect of grant of interim injunction under Order 39 of the said Code, accepted the view that interim injunctions can be issued even under the circumstances which are not covered under Order 39 of the said Code as the Code cannot be exhaustive since the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation. The inherent powers of the court were held to be in addition to the powers specifically conferred on the court and are not controlled by the provisions of the said Code. Such exercise of power should, however, be not in conflict with what is expressly provided in the said Code or against the intention of the legislature. There is also discussion of the provisions of Section 22 of the said Code but then that was the prevalent

position prior to the amendment to the said Code. A reference has also been made in respect of power of the court to restrain a party in proceeding in another court where such proceedings are vexatious.

50. We may also refer to the other judgments in this behalf which have been cited by both the learned counsel for the parties. The first is the judgment in M/s.Ram Chand and Sons Sugar Mills Private Ltd., Barabanki, UP v. Kanhayalal Bhargava and Ors; AIR 1966 SC 1899. Once again the observations made by the Supreme Court are that powers under Section 151 of the said Code are to be exercised in the manner referred to aforesaid. The second is the judgment in Shipping Corporation of India Ltd. v. Machado Brothers and Ors.; (2004) 11 SCC 168 where the opinion of the Court was that subsequent events could be taken into account to decide whether a pending suit should be disposed of or kept alive and that the courts below had erred in continuing an infructuous suit just to keep the interlocutory order alive which in a manner of speaking amounts to putting the cart before the dead horse.

51. The ratio which arises from the aforesaid judgments is that the power of a court under Section 151 of the said Code is distinct and is not constrained if any of the eventualities as specified under the said Code do not arise. The theme is that such residuary power can be utilized by the court to deal with any non-envisaged circumstance but in case the

said Code itself provides for something, such exercise of power cannot be utilized contrary to the said Code as that would be in violation of the statute and the intent of the legislature. No doubt, the said Code has provided for situations where a plaint can be returned or rejected, the suit dismissed and a judgment pronounced. However, certain other situations have been dealt with as in Shipping Corporation of India Ltd. v. Machado Brothers and Ors's case (supra) to put an end to the litigation which has become infructuous by passage of time. Further, in equitable reliefs the power to throw out a suit is wider, trial of which would be an abuse of process of court. The impugned order proceeds on the basis that such a power exists under Section 151 of the said Code especially if the proceedings are vexatious or oppressive.

52. The moot point, however, remains as to whether the exercise of power of anti suit injunction in respect of another domestic forum or of the principle of forum non convenience is something which is permissible under Section 151 of the said Code as being matters which are not envisaged. Once again as noticed above, there is really no dispute that Section 151 of the said Code is the fountain from which flows the power to stay another suit or to give a finding that the court where the suit is filed is not the forum convenience in respect of matters where litigation has been instituted in foreign forums. However, its application to

domestic forums would have to be dealt with separately as there are pronouncements dealing with this aspect in different situations as also legislative enactments taking into consideration the earlier legal perspective and providing for a change in the legal position by specific acts of the legislature.

Doctrine of anti suit injunction and the principle of forum non convenience as applicable to domestic fourms

53. The crux of the issue in the present case is the applicability of the principles of forum non convenience i.e. whether the court in which the suit is filed and which would otherwise have jurisdiction under the said Code can non suit the plaintiff on the ground that there is a better situated forum to decide the matter in issue and the court where the suit is filed is forum non convenience. The learned Single Judge in the impugned judgment has taken a view that this is permissible. The contention of the respondent that the principle of forum non convenience being the other side of the coin of the doctrine of anti suit injunction and having been applied to domestic forums of the Indian courts, there could be no doubt that the principle of forum non convenience would equally apply. It would thus be appropriate to consider the issue of applicability of the doctrine of anti suit injunction to domestic forums.

54. In this behalf, learned counsel for the respondent has relied upon the judgment of the Calcutta High Court in

Mungle Chand v. Gopal Ram; (1907)ILR 34 Cal 101 where Sale, J. was of the view that the court had acted for a long series of years on the view that its powers of control over persons within its jurisdiction, by injunctions operating in personam, are not restricted by the provisions of the Civil Procedure Code and thus the Court had the power to restrain the defendant from proceeding with the suit at Bareilly if justice requires the step. This view was followed once again by the Calcutta High Court in A.Milton and Co. v. Ojha Automobile Engineering Co.; AIR 1931 Cal 279. In Durgaprasad v. Kantichandra Mukerji; AIR 1935 Cal 1, the plea of the respondent that it would be more convenient to have the suit tried in Calcutta rather than in Delhi was accepted on the ground that the court had the jurisdiction to restrain the defendant from litigating in another court on the ground of convenience. These judgments came to be once again discussed in Bhagat Singh Bugga v. Dewan Jagbir Sawhney; AIR 1941 Cal 670. The court took the view that an injunction may be granted restraining the defendant from proceeding in the suit filed in another domestic forum on the ground of convenience alone in spite of the provisions of Section 10 of the said Code. It may be noticed at this stage itself by us that in case the matters in issue are directly and substantially in issue in a previously instituted suit then undoubtedly the subsequent suit can be stayed by

the court seized of the matter exercising powers under Section 10 of the said Code.

55. The aforesaid legal position as existing at the relevant stage of time is not disputed by learned counsel for the appellants, but it is his submission that the legal position has changed as the legislature, conscious of the aforesaid judicial view, brought a material change in the statute. The Specific Relief Act of 1887 was repealed by the Specific Relief Act of 1963 ('the said Act' for short) which came into force. In the Specific Relief Act of 1887, the relevant provision was as under:

> "56. **An injunction cannot be granted**:
>
> a).......
>
> b) To stay proceedings in a court not subordinate to that from which injunction is sought.

The aforesaid provision has been replaced by Section 41 of the said Act, which reads as under:

> 41. **An injunction cannot be granted**:
>
> a).......
>
> b) To restrain any person from instituting or prosecuting any proceedings in a court not subordinate to that form which the injunction is sought."

56. It was thus contended that since the judicial interpretation was permitting anti suit injunction in domestic forums, the legislature taking note of this judicial

interpretation materially altered the language of the succeeding provision in the said Act.

57. Insofar as the aforesaid plea is concerned, our task is made simple in view of the lucid elucidation of the background in which such legislative change took place and the consequent legal position which emerged from the same in the pronouncement of the Supreme Court in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors; (1983) 4 SCC 625. The controversy which was examined in the said judgment was set out in para 5, which is as under:

> "**5.** A very narrow question which we propose to examine in this appeal is: Whether in view of the provision contained in Section 41(*b*) of the Specific Relief Act, 1963 ('Act' for short), the court will have jurisdiction to grant an injunction restraining any person from instituting any proceeding in a court not subordinate to that from which the injunction is sought? The contention may be elaborated thus: Can a person be restrained by an injunction of the court from instituting any proceeding which such person is otherwise entitled to institute in a court not subordinate to that from which the injunction is sought? In the facts of the present case, the narrow question is whether the Corporation can be restrained by an injunction of the Court from presenting a winding up petition against the Bank? The High Court seems to hold that the court has such powers in view of the provisions contained in Order 39 of the Code of Civil Procedure read with Section 37 of the Specific Relief Act, 1963 or in exercise of the inherent powers of the court under Section 151 of the Code of Civil Procedure. This position is seriously contested by the appellant in this appeal."

58. After referring to the earlier provision and the subsequent provision, it was observed as under:

"A glance at the two provisions, the existing and the repealed would reveal the legislative response to judicial interpretation. Under Section 56(*b*) of the repealed Act, the court was precluded by its injunction to grant stay of proceeding in a court not subordinate to that from which the injunction was sought. In other words, the court could stay by its injunction a proceeding in a court subordinate to the court granting injunction. The injunction granting stay of proceeding was directed to the court and the court has to be the court subordinate to the one granting the injunction. This is postulated on the well recognised principle that the superior court can regulate proceedings in a court subordinate to it. It is implicit in this assumption and the language used in Section 56(*b*) that the court could 'not grant injunction under Section 56(*b*) of the repealed Act to stay proceeding in a court superior in hierarchy to the court from which injunction is sought. But by judicial interpretation, a consensus was reached that as injunction acts in personam while the court by its injunction cannot stay proceedings in a Court of superior jurisdiction, it could certainly by an injunction restrain a party before it from further prosecuting the proceeding in other courts may be superior or inferior in the hierarchy of courts. To some extent this approach not only effectively circumvented the provision contained in Section 56 of the repealed Act but denuded it of its content. The legislature took notice of this judicial interpretation and materially altered the language of the succeeding provision enacted in Section 41(*b*) replacing Section 56(*b*) of the repealed Act while enacting Specific Relief Act of 1963. The legislature manifestly expressed its mind by enacting Section 41(*b*) in such clear and unambiguous language that an injunction cannot be granted to restrain any person, the language takes care of injunction acting in personam, from instituting or prosecuting any proceeding in a court not subordinate to that from which injunction is sought. Section 41(*b*) denies to the court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a court which is not subordinate to the court from which the injunction is sought. In other words, the court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a court which is

subordinate to the court from which the injunction is sought. As a necessary corollary, it would follow that the court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of coordinate or superior jurisdiction. This change in language deliberately adopted by the legislature after taking note of judicial vacillation has to be given full effect.

8. It is, therefore, necessary to unravel the underlying intendment of the provision contained in Section 41(6). It must at once be conceded that Section 41 deals with perpetual injunction and it may as well be conceded that it has nothing to do with interim or temporary injunction which as provided by Section 37 are dealt with by the Code of Civil Procedure. To begin with, it can be said without fear of contradiction that anyone having a right that is a legally protected interest complains of its infringement and seeks relief through court must have an unhindered, uninterrupted access to law courts. The expression 'court' here is used in its widest amplitude comprehending every forum where relief can be obtained in accordance with law. Access to justice must not be hampered even at the hands of judiciary. Power to grant injunction vests in the court unless the legislature confers specifically such power on some other forum. Now access to court in search of justice according to law is the right of a person who complains of infringement of his legally protected interest and a fortiori therefore, no other court can by its action impede access to justice. This principle is deducible from the Constitution which seeks to set up a society governed by ride of law. As a corollary, it must yield to another principle that the superior court can injunct a person by restraining him from instituting or prosecuting a proceeding before a subordinate court. Save this specific carving out of the area where access to justice may be impeded by an injunction of the court, the legislature desired that the courts ordinarily should not impede access to justice through court. This appears to us to be the equitable principle underlying Section 41(*b*). Accordingly, it must receive such interpretation as would advance the intendment, and thwart the mischief it was enacted to suppress, and to keep the path of access to justice through court unobstructed.

9. Viewed from a slightly different angle, it would appear that the legal system in our country envisages obtaining of redressal of wrong or relief against unjust denial thereof by approaching the court set up for the purpose and invested with power both substantive and procedural to do justice that is to grant relief against invasion or violation of legally protected interest which are jurisprudentially called rights. If a person complaining of invasion or violation of his rights is injuncted from approaching the court set up to grant relief by an action brought by the opposite side against whom he has a claim and which he wanted to enforce through court, he would have first to defend the action establishing that he has a just claim and he cannot be restrained from approaching the court to obtain relief. A person having a legal right and complains of its violation or infringement, can approach the court and seek relief. When such person is injuncted from approaching the court, he has to vindicate the right and then when injunction is vacated, he has to approach the court for relief. In other words, he would have to go through the gamut over again: when defending against a claim of injunction the person vindicates the claim and right to enforce the same. If successful he does not get relief but a door to court which was bolted in his face is opened. Why should he be exposed to multiplicity of proceedings? In order to avoid such a situation the legislature enacted Section 41(*b*) and statutorily provided that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. Ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a court with a view to restraining any person from instituting or prosecuting any proceeding and this is subject to one exception enacted in larger public interest, namely, a superior court can injunct a person from instituting or prosecuting an action in a subordinate court with a view to regulating the proceeding before the subordinate courts. At any rate the court is precluded by a statutory provision from granting an injunction restraining a person from instituting or prosecuting a proceeding in a Court of coordinate jurisdiction or superior jurisdiction. There is an unresolved controversy whether a court can grant an injunction against a person from instituting or prosecuting a proceeding before itself but that is not relevant in the present circumstances and we do not propose to enlarge the area of controversy."

59. The innovative plea of the counsel for the respondent that perpetual injunction or interim injunction are regulated by the said Code separately and thus at least temporary injunctions can be granted was rejected by observing that the power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted and thus where final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. The court thus concluded that the court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by Order 39 of the said Code but while exercising this inherent power, the court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41 (b) of the said Act is one such provision and in that context it was observed that the inherent power of the court cannot be invoked to nullify or stultify a statutory provision. The aforesaid judgment has not even been brought to the notice of the learned Single Judge who has passed the impugned judgment. This judgment cuts at the root of the argument of the respondent that grant of anti suit injunction in domestic forums is a settled proposition of law. If the principle of forum non convenience is the other side of the

coin, as contended on behalf of the respondent, then the same would not be available in a domestic forum.

60. It is also relevant to note that in Oil and Natural Gas Commission v. Western Company of North America; (1987) 1 SCC 496, the judgment in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) has been referred and distinguished on the ground that it refers to an anti suit injunction in a domestic forum and the ratio would not be applicable to a foreign forum. The Indian company had entered into a contract with an American company and the parties opted to be governed by the Indian Arbitration Act, 1940. The award rendered by the umpire in London (being the agreed venue) was sought to be enforced by the American company in the New York court. The Indian company instituted proceedings before the Bombay High Court by filing arbitration petition under Sections 30 and 33 of the Arbitration Act, 1940 and sought an injunction restraining the American company from enforcing the award. It is in this factual matrix that while dealing with the judgment of Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) and referring to the provisions of Section 41(b) of the said Act, it was observed as under:

> "This provision, in our opinion, will be attracted only in a fact-situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a court in India which is either of co ordinate jurisdiction or is higher to

> the court from which the injunction is sought in the hierarchy of courts in India. There is nothing in *Cotton Corporation case* which supports the proposition that the High Court has no jurisdiction to grant an injunction or a restraint order in exercise of its inherent powers in a situation like the one in the present case. In fact this Court had granted such a restraint order in *V/O Tractoroexport, Moscow* v. *Tarapore & Company* and had restrained a party from proceeding with an arbitration proceedings in a foreign country (in Moscow)."

61. A Division Bench of this Court in Kangaro Industries (Regd.) v. Jaininder Jain; 2007 (34) PTC 321 referred to the judgment of the Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) and naturally followed the same. However, a distinction was once again made that the said judgment would not apply in the case of a foreign forum like the Dubai court. A similar view was taken by a learned Single Judge of this Court (as he then was) in Anant Raj Industries Ltd. v. Industrial Finance Corporation of India Ltd.; 1999 (79) DLT 273.

62. In our considered view, there is little doubt in the legal proposition that an anti suit injunction cannot be issued by a domestic forum against another domestic forum in India in view of the specific bar contained in Section 41(b) of the said Act. The only thing now to be considered is whether there can be a different legal position applicable to the principle of forum non convenience. The plea of the learned counsel for the respondent, in fact, was that since anti suit injunction could be granted, principles of forum non

convenience would apply as it would be the other side of the same coin. If that be so, nothing survives in the contention of the learned counsel for the respondent. We, however, consider it appropriate to discuss some of the judgments referred to by learned counsel for the parties in support of their respective pleas.

63. In Frank Finn Management Consultants v. Mr.Subhash Motwani and Anr.; 154 (2008) DLT 95, Rajiv Sahai Endlaw,J. has observed that the doctrine in international law of forum non convenience cannot be used to not-suit a plaintiff. Similarly, A.K.Sikri, J. in L.G.Corporation & Anr. v. Intermarket Electroplasters (P) Ltd and Anr.; 2006 (32) PTC 429 (Del.) has observed as under:

> " The principle laid down by the Supreme Court in the aforesaid case to the effect that in appropriate cases the High Court may refuse to exercise discretionary jurisdiction by invoking the doctrine of Forum convenience has no applicability in suit. However, those observations are clearly in the context of Article 226 of the Constitution as the Court exercises extraordinary jurisdiction in writ petitions and it is trite law that the jurisdiction under Article 226 is discretionary. That would not be a position when a suit is filed, as in the instance case, and if it is established that even a part of cause of action has arisen, there is no question of then refusing to exercise the jurisdiction."

64. Once again Badar Durrez Ahmed, J. in WP(C) 10480/2005 titled as Jayaswals NECO Limited v. Union of India and Ors. and other connected matters decided on 02.07.2007, while discussing writ jurisdiction, has made following observations:

“35. Some comment is called for on the issue of forum conveniens (or forum non conveniens as it is more commonly known). The principle was stated by Lord Kinnear in Sim v. Robinow (1892) 19 K. 665 thus:

The general rule was stated by the late Lord President in Clements v. Macaulay 4 Macph. 593, in the following terms: 'In cases in which jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. Judex tenetur imperator judicium suum;6and the plea7 under consideration must not be stretched so as to interfere with the general principle of jurisprudence.' And thereforee the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice... In all these cases there was one indispensable element present when the court gave effect to the plea of forum non conveniens, namely, that the court was satisfied that there was another court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice." (underlining added)

36. In a recent decision of the House of Lords Tehrani v. Secy of State for the Home Department [2006] UKHL 47 it was observed:

The doctrine of forum non conveniens is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of forum non conveniens do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum on conveniens could never be a bar to the exercise by the other court of its jurisdiction.

Thus, the doctrine of forum non conveniens can only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction to decide the case. The U.S. Supreme Court also held in Gulf Oil Corp. v. Gilbert 330 U.S. 501 that "[I] ndeed, the

doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue".

In this very decision (viz. Gulf Oil Corp.) the doctrine is stated as follows:

The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even where jurisdiction is authorised by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

37. From the above discussion, it is clear that the doctrine of forum non conveniens can only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction in the strict sense. So, if the Supreme Court directs the High Courts as it did in the case of Kusum Ingots (supra) and Mosaraf Hossain Khan (supra) to be mindful of the doctrine of forum non conveniens, the same would clearly be applicable only in cases where the High Court otherwise has jurisdiction. The argument of forum non conveniens cannot be raised in conjunction with the argument of lack of jurisdiction. It is also worthwhile to note that in Om Prakash Srivastava v. Union of India and Anr., the Supreme Court did not find favor with the approach of the High Court in not dealing with the question as to whether it had or did not have jurisdiction and by merely observing that the Court may have jurisdiction but the issues could be more effectively dealt with by another High Court. The Supreme Court while remanding the matter to the High Court made the following observations:

18. In the instant case the High Court has not dealt with the question as to whether it had jurisdiction to deal with the writ petitioners. It only observed that the Delhi High Court may have jurisdiction, but the issues relating to conditions of prisoners in the State of U. P. can be more

> effectively dealt with by the Allahabad High Court. As noted supra, there were two grievances by the appellant. But only one of them i.e the alleged lack of medical facilities has been referred to by the High Court. It was open to the Delhi high Court to say that no part of the cause of action arose within the territorial jurisdiction of the Delhi High Court. The High Court in the impugned order does not say so. On the contrary, it says that jurisdiction may be there, but the Allahabad High Court can deal with the matter more effectively. That is certainly not a correct way to deal with the writ petition. Accordingly, we set aside the impugned order of the High Court and remit the matter to it for fresh hearing on merits....
>
> 38. It must also be kept in mind that the doctrine of forum non conveniens is essentially a common law doctrine originating from admiralty cases have trans-national implications. It is clear that the doctrine of forum non conveniens is only available when a Court has the jurisdiction but the respondent is able to establish the existence of an adequate alternative forum. In this context, the doctrine of forum non conveniens would be appropriate only when an adequate alternative forum is available but again this doctrine is a common law doctrine which cannot override statutory or constitutional provisions."

65. Gita Mittal, J. in Rashtriya Mahila Kosh v. The Dale View and Anr.; 2007 (4) AD (Delhi) 593 has referred to her earlier judgment in WP(C) 5133/2005 where it was observed that even if it was to be held that a court has jurisdiction, yet guided by principles of forum non conveniens, the court may divert the parties to the court having a closer connection with the subject matter of the litigation.

66. There are also some passing observations in this behalf in Milkfood Limited v. Union Bank of India; 2007 (2) CTLJ 362 (Del.) by one of us (Sanjay Kishan Kaul, J.) in respect of the principles of forum non convenience. The

Judgment in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) was, however, not brought to the notice of the court and thus one is wiser after a greater elucidation of the legal principles enunciated in different judgments of the Supreme Court.

67. Learned senior counsel for the respondent had given a list of judgments relating to the principle of forum non convenience as applicable to writ jurisdiction. Out of the said list, there are three judgments specifically referred to by the learned counsel. The first one is Kusum Ingots and Alloys Ltd v. Union of India and Anr.; (2004) 6 SCC 254 where the matter involved exercise of writ jurisdiction under Article 226 of the Constitution of India and was not one governed by the said Code. In that context, it was observed that the court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum convenience. The judgment in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) was not referred to.

68. The learned Single Judge in the impugned judgment has referred to the second judgment in this series i.e. Ambica Industries v. Commissioner of Central Excise; (2007) 6 SCC 769. The matter involved a question as to which would be an appropriate High Court which would deal with the order of an appellate tribunal under the Central Excise

Act. It was held that a High Court situated in the State where the first court is located should be considered to be the appropriate Appellate Authority. The court further observed that keeping in view the expression "cause of action" used in Clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction thereof accrues within the jurisdiction of the court, the court will have jurisdiction in the matter though the doctrine of forum conveniens may also have to be considered.

69. The third judgment is in Mosaraf Hossain Khan v. Bhagheeratha Engg.Ltd. and Ors; (2006) 3 SCC 658. The only relevant observations in that are that the High Courts must remind themselves about the doctrine of forum non conveniens. This case also involved exercise of jurisdiction under Articles 226 and 227 of the Constitution of India.

70. The learned Single Judge of this Court in Indra Deo Paswan and Ors.v. Union of India & Ors.; 125 (2005) DLT 763 discussed the principles of forum non convenience by referring to it in para 23 as under:

> "23. The test of forum convenience was applied in subsequent judgments, and was noted, with approval, by the Supreme Court in Kusum Ingots (supra). Blacks Law Dictionary (Seventh Edition) page 665 defines "Forum Convenience", as follows:
>
> "The Court in which an action is most appropriately brought, considering the best interests of the parties and witnesses".
>
> "Forum Non-convenience" on the other hand, has been described as follows:

> "The doctrine that an appropriate forum – even though competent under law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought."

The learned Single Judge concluded that all the material circumstances viz the service or cadre of the petitioners; the seat of government; the State Advisory Committee and the concerned records of the relevant government departments were not at Delhi and, therefore, the grievance of the petitioner should be agitated before the concerned High Courts either at Bihar or Jharkhand.

71. Learned counsel for the respondent also referred to the judgement in M/s. New Horizons Ltd. v. Union of India; AIR 1994 Del 126 where it was observed that while exercising jurisdiction under Article 226, a court having jurisdiction could refuse to exercise the same.

72. A Full Bench of this Court in New India Assurance Co.Ltd v. Union of India and Ors; 2009 (161) DLT 55 made telling observations, which are as under:

> "The principle of forum non conveniens originated as a principle of international law, concerned with Comity of Nations. A domestic court in which jurisdiction is vested by law otherwise ought not to refuse exercise of jurisdiction for the reason that under the same law some other courts also have jurisdiction."

We may, however, note that the aforesaid judgment was rendered in the context of Article 226 of the constitution of India.

73. The aforesaid exposition thus shows that principles while exercising the discretionary jurisdiction under Article 226 of the Constitution of India cannot *ipso facto* be applied to a civil proceeding governed by the said Code. Not only that, the principle of forum non convenience emerged as a principle of admiralty law applicable primarily to foreign forums. It finds no place in a domestic forum in India. The plaintiff is always the *dominus litis* and so long as the court has jurisdiction to try a suit, a party cannot be non-suited. A suit has to be governed by the provisions of the said Code. In this context, we may refer to the observations made in Abdul Gafur and Anr. v. State of Uttarakhand and Ors; (2008) 10 SCC 97 where the Supreme Court held that since Section 9 of the said Code provides that a civil court shall have jurisdiction to try all suits of civil nature excepting the suits of which their cognizance is either expressly or impliedly barred, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute. It was further observed that a plaint can only be rejected in terms of Order 7 Rule 11 of the said Code and similarly a plea of bar to jurisdiction of a civil court can be examined.

74. Learned senior counsel for the respondent had placed reliance on the observations made by the Supreme Court in

Modi Entertainment Network and Anr. v. W.S.G. Cricket Pvt. Ltd's case (supra) where in para 9 the Supreme Court had observed that the courts in India have the power to restrain a party to a suit/proceeding before it from instituting or prosecuting a case in another Court including a foreign court. We may note that the said judgment does not refer to the judgment in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) and that the said judgment was in respect of grant of an anti suit injunction when the alternate forum was a foreign forum.

75. We have found that there have been some passing references made to the principle of forum non convenience. Some of them are in the context of exercising writ jurisdiction while others are in the context of a foreign forum. Every judgment is not to be treated as a precedent nor every passing sentence in a judgment is to be read as a provision in a statute.

76. In Municipal Corporation of Delhi v. Gurnam Kaur; (1989) 1 SCC 101, it was observed that quotability as 'law' applies to the principle of a case, its *ratio decidendi* and the only thing which is binding is the principle upon which the case was decided. The statements which are not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative. A decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a

statute or of a rule having the force of a statute. It would be useful to reproduce paras 11 and 12 of the said judgment, which are as follows:

> "**11.** Pronouncements of law, which are not part of the *ratio decidendi* are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in *Jamna Das case*1 and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on *Jurisprudence,* 12th edn. explains the concept of *sub silentio* at p. 153 in these words :
>
> A decision passes *sub silentio,* in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour.; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not .an authority on point B. Point B is said to pass sub silentio.
>
> **12.** In *Gerard* v. *Worth of Paris Ltd.* (*k*)., the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an

account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in *Lancaster Motor Co.* (*London*) *Ltd.* v. *Bremith Ltd.*, the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed *sub silentio* by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents *sub silentio* and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an *ex cathedra* statement, having the weight of authority."

77. Learned counsel for the appellants had brought to our attention the prevalence of the doctrine of forum non convenience in domestic courts in the US is based on the codified US law, which is as under:

"Section 1404. Change of Venue

a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Similarly, in the UK the Civil Jurisdiction and Judgments Act, 1982 as amended by Civil Jurisdiction and Judgments Act, 1991 states as under:

"Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not

> inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention."

Article 22 of the Brussels Convention, 1968 reads as under:

> "Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.
>
> A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
>
> For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The aforesaid provisions have been referred to clarify that it is specific statutes which permit exercise of such principles of forum non conveniens in domestic forums in US and UK.

In Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)'s case (supra), the Canadian Supreme Court summarized the position in England as under:

> The English courts have exercised jurisdiction to restrain proceedings in a foreign court and to stay domestic actions since 1821. Leach V.-C. in *Bushby v. Munday*, *supra*, at p. 307 and p. 913, stated the rule as follows:
>
> Where parties Defendants are resident in England, and brought by *subp{oe}na* here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other

> Court of Justice, whether in this country, or in a foreign country.
>
> The sentiment expressed at that time was that the relief sought, whether an injunction or a stay, operated *in personam* and was not intended to interfere with the other court. Thus viewed, the question to be determined was whether the ends of justice required the issuance of an injunction or a stay. In deciding that an injunction should be granted in *Bushby v. Munday*, *supra*, the Vice-Chancellor made findings that the English Court was a more convenient jurisdiction; and, that the proceedings in Scotland, due to procedural law, were less likely to elicit the truth. Leach V.-C. concluded (at p. 308 and p. 913) that the English court should pursue its superior means for determining both law and fact.

Even the Supreme Court in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra) in para 14 elucidated this difference.

78. The impugned judgment is predicated on the omnibus powers under Section 151 of the said Code where despite the plaintiff being dominus litis, the Court is empowered to pass orders in litigation, which may be vexatious or oppressive. We have already discussed the legal principles aforesaid to conclude how in a domestic forum, the institution of a suit must necessarily be governed by the provisions of the said Code and the interpretation of the same by the Supreme Court after amendment of the said Code. The reasoning in the impugned judgment, thus, cannot be sustained. The principle of forum non conveniens cannot be introduced by concluding that Section 20 of the said Code is not exhaustive or draw strength from the power

to stay suit under Section 10 of the said Code. The stay of suit proceedings under Section 10 of the said Code must be for the reasons set out in the said provision.

79. We may at this stage notice that we have already discussed the scope and ambit of the suits in the Bombay High Court and this Court from which the impugned judgment arises and do not find that the reliefs are inter-linked or inter-related. The factual basis on which the impugned judgment is predicated, thus, also does not find favour with us.

80. We are in agreement with the submissions of the learned counsel for the appellants that if the principle of forum non convenience would be applied to a civil suit governed by the said Code, the plaintiff would be left in the dark. There may be more than one court which may have jurisdiction in the matter but so long as a particular court has the jurisdiction, the privilege is of the plaintiff. The plaintiff may be made to run from one court to the other without knowing where the initial case ought to be instituted. Such a situation is not envisaged by the said Code.

81. We have discussed the aforesaid judgments despite the sub stratum of the case of the respondent not surviving as it was based on the contention of principle of forum non convenience being the other side of the coin of the doctrine of anti suit injunction since if a court could restrain another

court indirectly, it could certainly restrain itself. We find that the views expressed by the learned Single Judges in Frank Finn Management Consultants v. Mr.Subhash Motwani and Anr's case (supra), L.G.Corporation & Anr. v. Intermarket Electroplasters (P) Ltd and Anr's case (supra) and Jayaswals NECO Limited v. Union of India and Ors' case (supra) holding that the principle of forum non convenience has no application to suits, enunciates the correct legal position and thus are unable to approve the view taken in Rashtriya Mahila Kosh v. The Dale View and Anr's case (supra) and the impugned judgment.

82. We thus hold that the principle of forum non convenience has no application to domestic forums in India which are governed by the said Code.

Conclusion

83. The appeals had been argued at length. The legal position enunciated in different countries was cited before us. This required all the aspects and the judgments to be analyzed. The fact, however, remains that there was really no dispute about the applicability of the doctrine of anti suit injunction and the principle of forum non convenience as applicable to foreign forums. The question was only whether the principle of forum non convenience would apply to domestic forums and the same required consideration of the application of doctrine of anti suit injunction to domestic forums on account of direction of the arguments of the

learned counsel for the respondent that the principle of forum non convenience was the other side of the coin of the doctrine of anti suit injunction. The factual aspect which required consideration was even if such a principle of forum non convenience was applicable in the given facts of a case whether it could be said that such a principle ought to have been applied to the present case and the nature of relief.

84. On the conspectus of the aforesaid, we hold as under:

i) The doctrine of anti suit injunction though may be applicable both in foreign forums and domestic forums in different countries has no place in India regarding another domestic forum in view of the specific bar created by Section 41(b) of the said Act as interpreted in Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's case (supra). It would apply only in case of a foreign forum or in a situation where an injunction is sought against a domestic court which is subordinate to the one where such an application is made.

ii) The principle of forum non convenience applies to foreign forums and Indian courts can apply the said principle vis-à-vis foreign forums or while exercising discretionary

jurisdiction under Article 226 of the Constitution of India.

iii) The principle of forum non convenience does not apply to civil suits in India which are governed by the said Code, there being no provision under the Code for the same and recourse to Section 151 CPC is not permissible for application of the principle of forum non convenience to domestic forums especially keeping in mind that it is the other side of the coin of the doctrine of anti suit injunction. An aggrieved party can, however, approach the Supreme Court under Section 25 of the said Code.

iv) The impugned judgment of the learned Single Judge rejecting and returning the plaint cannot be sustained and is thus set aside.

v) In the given facts of the case, even otherwise, if the principle of forum non convenience had been applicable, then there was no reason not to proceed with the suits on merits.

vi) The interlocutory applications for injunction would be required to be heard on merits by

the learned Single Judge and decided in accordance with law.

85. The appeals are accordingly allowed and the plaints as well as the interlocutory applications are restored to their original numbers. The appellants shall also be entitled to costs quantified at Rs.50,000/-. The suits and the interlocutory applications be listed before the learned Single Judge on 06.11.2009 for directions.

SANJAY KISHAN KAUL, J.

OCTOBER 23, 2009 SUDERSHAN KUMAR MISRA, J.
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