IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN
&
THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

FRIDAY, THE 15TH DAY OF NOVEMBER 2024/24TH KARTHIKA, 1946

RFA NO.210 OF 2019

AGAINST THE JUDGMENT DATED 30.06.2018 IN O.S NO.152 OF 2014 OF ADDITIONAL SUB COURT-I, THIRUVANANTHAPURAM

APPELLANT-DEFENDANT:

***1 CHARUVILA PHILIPPOSE SUNDARAN PILLAI, *[DIED]**
AGED 69 YEARS, S/O.PHILIPPOSE, KINAVOOR MURI,
KP 1/1041, NALANCHIRA CONVENT ROAD,
KUDAPPANAKKUNNU VILLAGE,
THIRUVANANTHAPURAM VILLAGE AND TALUK.

***ADDL.A2 IMPLEADED**

***ADDL.A2**
JAYA MARY JOHN, AGED 52 YEARS,
D/O.CHARUVILA PHILIPPOSE SUNDARAN PILLAI,
RESIDING AT G-201 /202, TRINITY SUNRISE APTS,
SOMPUR GATE, SARJPURA ROAD, BENGALURU- 562125.

BY ADVS.
R.S.KALKURA
M.S.KALESH
HARISH GOPINATH
R.BINDU
P.ANJANA

RESPONDENT-PLAINTIFF:

1 P.N.SIVADASAN, AGED 66 YEARS, S/O.NARAYANAN,
T.C.3/2384, KAVALLOORKONAM LANE, PATTOM P.O.,
KOWDIAR VILLAGE, THIRUVANANTHAPURAM-695 003.

***ADDITIONAL R2 TO R4 IMPLEADED**

***ADDL.R2 JINI VARGHESE,**
D/O.CHARUVILA PHILIPOSE SUNDRAN PILLAI,
AGED 51 YEARS, MARY VILLA TC 32/2366-1,
HOUSE NO.SRA D 23A,
CHERUPALODU DEVI TEMPLE ARCH ROAD,
MANIKANDESHWANRAM, VAZHAYILA,

THIRUVANANTHAPURAM- 695013.

***ADDL.R3** **JEAN SABU THOMAS,**
D/O.CHARVILA PHILIPPOSE SUNDARAN PILLAI,
AGED 49 YEARS, 1565 DAVIS FARM DRIVE,
KENNESWA, GA 30152, USA.

***ADDL.R4** **LEWIS PHILIP JOHN,**
S/O.CHARUVILA PHILIPPOSE SUNDARAN PILLAI,
AGED 45 YEARS, 6601 DUBLIN BOULEVARD, APARTMENT 313,
DUBLIN CA 94568, USA.

***[THE LEGAL HEIRS OF THE DECEASED APPELLANT ARE IMPLEADED AS ADDL.A2 AND ADDL. R2 TO R4 VIDE ORDER DATED 06.09.2021 IN IA 1/2021].**

**** <u>ADDITIONAL R5 TO R6 IMPLEADED</u>**

****ADDL.R5** **THE MINISTRY OF HOME AFFAIRS,**
REP.BY SECRETARY, GOVERNMENT OF INDIA,
IS-II DIVISION/LEGAL CELL-1, II FLOOR,
DHYANCHAND NATIONAL STADIUM, NEAR INDIA GATE,
NEW DELHI-01.

****ADDL.R6** **THE MINISTRY OF LAW AND JUSTICE (MOLJ),**
DEPARTMENT OF LEGAL AFFAIRS, REP.BY SECRETARY,
IV FLOOR, A-WING, SHASTRI BHAVAN,
NEW DELHI - 110 001.

****[THE ADDITIONAL RESPONDENTS 5 AND 6 WERE SUO MOTU IMPLEADED VIDE ORDER DATED 01/07/2024 IN RFA 210/2019].**

BY ADVS.
M.NARENDRA KUMAR
N.S.DAYA SINDHU SHREE HARI
ABRAHAM GEORGE JACOB
JACOB P. ALEX (AMICUS CURIAE)

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 15.11.2024, ALONG WITH RFA.73/2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2024:KER:84933

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN
&
THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

FRIDAY, THE 15TH DAY OF NOVEMBER 2024/24TH KARTHIKA, 1946

RFA NO.73 OF 2021

AGAINST THE FINAL JUDGMENT AND FINAL DECREE DATED 28.07.2020 IN IN OS NO.5 OF 2018 ON THE FILE OF THE ADDITIONAL DISTRICT COURT-I, KOTTAYAM

APPELLANT/3RD DEFENDANT:

DR.JAMES W.THOMAS, AGED 51 YEARS, S/O.A.K.THOMAS,
NOW RESIDING IN UNITED STATES OF AMERICA AT 257,
NORTH MOUNTAIN AVE, UPPER MONTCLAIR,
NEW JERSEY-07043 AND ADDRESS IN INDIA AT
MURRIYAN KAVUMKAL, PERUMPANACHY P.O., KOTTAYAM.

BY ADVS.
S.ANANTHAKRISHNAN
GEORGE V.THOMAS

RESPONDENTS/PLAINTIFF & DEFENDANTS 2, 4 & 5:

1 **FR.JOSE THOMAS.SJ., CHAIR PERSON, EMMANUEL THOMAS,**
MURIYANKAVUNKAL FAMILY TRUST,
REPRESENTED BY AUTHORISED TRUSTEE FR.ANTONY (LOVELY)
THEVARY HOUSE, CHATHUTHYAKARY P.O, ALAPUZHA,
AUTHORISED PERSON/TRUSTEE EMMANUEL THOMAS,
MURIYANKAVUNKAL FAMILY TRUST, MURIYANKAVUNKAL HOUSE,
PERUMBANACHY KARA, CHANGANACHERRY,
KOTTAYAM – 686 101.

2 **DR. TERESA THOMAS ROSS, M.D., AGED ABOUT 56 YEARS,**
1284 RALLS COURT, TORNS RIVER, NEW JERCY, U.S.A.

**3 CRISTINA M. THOMAS, JD., MBA, AGED ABOUT 48 YEARS,
257, NORTH MOUNTAIN AVE UPPER MONTCLAIR,
NEW JERSEY-07043, USA.**

**4 DR.GRACE THOMAS, M.D., AGED ABOUT 46 YEARS,
257 NORTH MOUNTAIN AVE UPPER MONTCLAIR,
NEW JERSEY-07043, U.S.A.**

(THE 1ST DEFENDANT IN THE SUIT MRS.MARY EMMANUEL THOMAS @ MARY KANJUPARAMBAN DIED DURING THE PENDENCY OF THE SUIT BEFORE THE WRITTEN STATEMENT WAS FILED. THE DEATH HAS BEEN INTIMATED AND RECORDED; LEGAL HEIRS ALREADY ON RECORD AS DEFENDANTS 2 TO 5, HENCE 1ST DEFENDANT NOT MADE PARTY IN THIS APPEAL)

*** ADDITIONAL R5 TO R6 IMPLEADED**

***ADDL.R5 THE MINISTRY OF HOME AFFAIRS
REP.BY SECRETARY, GOVERNMENT OF INDIA,
IS-II DIVISION/LEGAL CELL - 1, II FLOOR,
DHYANCHAND NATIONAL STADIUM,
NEAR INDIA GATE, NEW DELHI – 01.**

***ADDL.R6 THE MINSTRY OF LAW AND JUSTICE (MoLJ),
DEPARTMENT OF LEGAL AFFAIRS, REP.BY SECRETARY,
IV FLOOR, A-WING, SHASTRI BHAVAN,
NEW DELHI – 110001.
* [THE ADDITIONAL RESPONDENTS 5 AND 6 WERE SUO MOTU IMPLEADED VIDE ORDER DATED 01/07/2024 IN RFA 73/2021].**

**BY ADVS.
RAJESH CHERIAN KARIPPAPARAMBIL
ABRAHAM GEORGE JACOB
N.S.DAYA SINDHU SHREE HARI
C.MURALIKRISHNAN (PAYYANUR)
AKSHAY R
JACOB P. ALEX (AMICUS CURIAE)**

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 15.11.2024, ALONG WITH RFA.210/2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2024:KER:84933

'C.R.'

JUDGMENT

C.Jayachandran, J.

The issue referred remind us of the Shakespearean quote in Macbeth, as it looks like an innocent flower, beneath which lies a serpentine conundrum.

At its core, the matter before us addresses the procedural framework for effecting service of summons in suits where defendants reside beyond India's borders. The question arose on account of an apparent dichotomy between the modes prescribed under Order V of the Code of Civil Procedure, 1908 (for short, 'C.P.C') and the one under the “Convention on The Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial matters” ('the Hague Service Convention' for short). The answer lies in an analysis of the legal requirements to enforce an international treaty, in the backdrop of the constitutional provisions and precedents, binding. Whether the

covenants of an international treaty/convention are enforceable per force of India subscribing its hands to such treaty? What if, such covenants are in conflict with the municipal laws? Should such covenants be specifically en-grafted to municipal law, applying the doctrine of incorporation? An answer to this reference require answer to these questions too.

2. A Division Bench of this Court in ***Mollykutty v. Nicey Jacob*** [2019 (3) KHC 118] held that the summons to a defendant, who is residing in a foreign country, which is party to the Hague Service Convention, can only be served as provided for in the Hague Service Convention; and that it cannot be sent directly to defendants residing abroad. When the question of serving summons to a defendant residing abroad arose in the above appeals, another Division Bench doubted the correctness of ***Mollykutty*** (supra), essentially on the premise that, in the absence of an amendment to the Code, the methodology envisaged in the Code can still be resorted to. Accordingly, the subsequent Division Bench sought a reference on the following

questions to a Full Bench:

> *"i). Could not a summons issued by an Indian Court to be served on a defendant who is actually or voluntarily residing or carrying on business or personally working for gain in a foreign territory be sent to him through the modes mentioned in Rule 25 of Order V of the Code?*
>
> *ii). Should every summons issued by an Indian court to be served on a defendant who is actually or voluntarily residing or carrying on business or personally working for gain in a foreign territory be sent through the Ministry of Law and Justice?"*

The matter was accordingly referred by the Chief Justice and placed before us.

3. Having regard to the complexity of the issue, we appointed **Adv.Jacob P Alex**, as Amicus Curiae.

4. By Order dated 01.07.2024, We suo moto impleaded the Ministry of Home Affairs and the Ministry of Law and Justice of the Government of India, the said respondents being important

stakeholders to submit on the enforceability of the Hague Service Convention, as also, the action in terms of Article 73 of the Constitution. The Order dated 01.07.2024 specifically referred to the necessity of such impleadment, being to explore the possibility of an alternate mode of service, which can be productive, practical and effective, especially in view of the advancement of technology.

5. Heard the learned Amicus, the learned counsel for the appellants and respondents in the above R.F.As. Heard the learned Central Government Counsel on behalf of the additional respondents as well.

6. ARGUMENTS ADVANCED BY THE AMICUS CURIAE:-

Learned Amicus would first impress upon us the importance of serving summons on the defendant in a suit. Relying on **Halsbury's Laws of India** [Volume 7 Butterworths, paragraph (65.277)], it was pointed out that service of summons on the defendant is of prime importance, as it is intended to inform

him of the institution of the suit and to extend an opportunity to resist the same. ***Sangram Singh v. Election Tribunal and Another*** [AIR 1955 SC 425] underscores that serving proper summons on the defendant is grounded on the principles of *audi alterum partem*, a facet of Article 14 of the Constitution. Referring to Order V of the Code, the Amicus would reiterate the significance of ensuring service of summons, actual or deemed, on the defendant, as a vital procedural requirement to proceed with the suit. It was then submitted that, under Rule 25 of Order V, there is no procedure to ensure service of summons, or for that matter, for declaration of deemed service. No rules in terms of Rule 25 has been en-grafted. The absence of a mechanism to confirm service of summons on the defendant under Rule 25 violates the principles of natural justice, is the submission made. Coming to Rule 26, learned Amicus would point out that, no political agents were appointed; nor any court established in terms of Rule 26, which renders this mode of service futile. Under Rule 26A, summons could be served through diplomatic channels, as recommended in the 27th report

of the Law Commission. Rule 26A was inserted by the C.P.C. Amendment Act, 1976. Service of summons through Mutual Legal Assistance Treaty (Civil) is in accord with Rule 26A.

7. Learned Amicus then took us through the relevant constitutional provisions, as also, the case laws. Our attention was invited to Article 246, 7th Schedule, List 1, Entry 14, and thereafter to Article 253 and Article 73, and finally to Article 51(c). Relying on Article 73, read with Entries 13 and 14 of List 1 of 7th schedule, it was contended that, Executive (Central Government) has the power to give effect to treaties by issuing necessary gazette notification and guidelines. In elaboration, it was pointed out that, India became a signatory to the Hague Service Convention on 23.11.2006 and ratified the same on 01.08.2007. Accordingly, the Ministry of Law and Justice was notified as the Central Authority in accord with Article 2 of the Hague Service Convention. As regards Article 10 of the Convention providing for service by alternative channels, India has taken exception, wherefore, service can only be through the

Central Agency. Invoking the executive power under Article 73, the Central Government issued notification (GSR 24E) on 12.01.2009 to give effect to the convention. That apart, the Department of Legal Affairs, Ministry of Law and Justice issued Office Memorandum [bearing F.No.12(77)/10-Judl] dated 18.08.2011 and another one bearing FTS No.1003/.../15 no.12(80)/2013-Judl and yet another Office Memorandum dated 10.09.2018 elaborating the modalities for service abroad. According to the learned Amicus, the said guidelines are enforceable as law. It was also pointed out that, the Hon'ble Supreme Court in its “Hand book on Practice and Procedure and Office Procedure” had detailed in Chapter XVII, titled “Process, Warrants and Service of Documents” the procedure in Hague Service Convention as the proper mode of service. Learned Amicus would submit that, inasmuch as the Hague Service Convention has thus become enforceable in India, service to the defendants residing in the 84 contracting states (parties to the Hague Conference on Private International Law) and 66 other connected parties to Hague conference could be effected through the Hague Service

Convention. As regards 14 countries, with which India had executed Mutual Legal Assistance Treaty (Civil), service could be effected as provided therein, in terms of Rule 26A. In respect of other countries, service can be carried out through "Letter Rogatory Route/Diplomatic Channel". Relying on the decisions in ***Union of India and others v. Agricas LLP and others*** [(2021) 14 SCC 341] and ***Union of India and another v. Azadi Bachao Andolan and another*** [(2004) 10 SCC 1], it was submitted that no legislative measure is required to give effect to the international agreement/treaty, unless the rights of the citizens or others are affected, or its covenants are in conflict with municipal law. As held in ***Agricas LLP*** (supra), municipal law has to be interpreted, so as to give effect to the obligations under the international treaty/convention, especially when the covenants of the treaty is not in conflict with domestic law. Article 51(c) was pressed into service to pinpoint the State's duty to make every endeavour in fostering respect for International Law and treaty obligation, which is a directive principle of the State policy. Any attempt to effect

direct service on the party may amount to violation of the foreign country's sovereignty, which course is, therefore, impermissible, especially in view of India's exception to Article 10 of the Hague Service Convention.

8. Finally, it was pointed out that no person has a vested right in any course of procedure. Mode of service of summons being wholly and completely procedural in nature, no party before a court can claim any vested right as regards the particular mode of service. In substantiation of this point, the judgments in ***Anand Gopal Sheorey v. State of Bombay*** [AIR 1958 SC 915]*;* ***Hitendra Vishnu Thakur v. State of Maharashtra*** [(1994) 4 SCC 602] *and* ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*** [(2018) 6 SCC 287]*,* were relied upon.

9. Elaborating as above, it was submitted by the learned Amicus that the various stake holders are unaware of the procedural formalities to be followed to take out summons in terms of the Hague Service Convention. It is the suggestion of

the learned Amicus to direct the Registry of the High Court to formulate detailed guidelines by issuing necessary circular, in consultation with the Ministry of Law and Justice, which may be given vide circulation, both in English and Malayalam, for strict compliance. A further suggestion is also made to depute an officer of the Registry to function as a contact person to guide the stake holders about the process of serving summons in foreign countries.

10. ARGUMENTS OF R2 IN R.F.A. NO.73/2021:-

Adv.Abraham George Jacob, learned counsel for the 2nd respondent in R.F.A.No.73/2021 would submit that the power of legislation is exclusively with the Parliament under Article 253 of the Constitution, wherefore, it is for the Parliament to legislate for enforcement of an international treaty/convention within the Republic of India. The same is the case, if the municipal law has to be changed to accommodate an international treaty. In this regard, learned counsel would rely on a recent judgment of the Hon'ble Supreme Court, titled ***Assessing Officer Circle***

(International Taxation) 2(2)(2), New Delhi v. M/s.Nestle SA [2023 SCC Online SC 1372], as also, the various judgments referred to therein. It was pinpointed that the treaties binds the Union, but would not, by its own force, bind the Indian nationals. If the treaty/agreement restricts or affects the rights of citizens or others, or if it tends to modify the law of India, the treaty is not enforceable, in the absence of a law made by the Parliament. It was then contended that the C.P.C confers substantive and vested rights also to the parties, such as the right to appeal, etc., as held by the Hon'ble Supreme Court in ***Garikapati Veeraya v. N.Subbiah Choudhry and Others*** [AIR 1957 SC 540], wherefore the provisions in the Code cannot be treated as merely procedural in nature. To ascertain whether the provisions of the Hague Service Convention would militate against the municipal law, learned counsel invited the attention of this Court to Articles 15 and 16 of the Hague Service Convention, to contend that by virtue of Article 16, even the power of the Indian Courts to deal with an *exparte* judgment, as also, the provisions regarding

limitation thereof stand modified by prescribing conditions, which are not there in the Code. Learned counsel would point out that, if Article 2 of the Convention, which deals with service of summons, is held to be enforceable without amending the municipal law/C.P.C, the same treatment will have to be given to the provisions of Articles 15 and 16 as well, the latter of which definitely interferes with the vested rights of the litigants under the C.P.C. On the criticism that Order V, Rule 25 cannot ensure proof of service, it was pointed out that, even in the mechanism under the Article 15 of the Hague Service Convention, the uncertainty prevails. In other words, the service on the defendant residing in a foreign country is dependent on the mechanism available in that country for such service, over which India or its judicial system have no control. Therefore, the ambiguity, if any, with respect to actual service of a postal article abroad, should equally weigh in respect of the service contemplated in Hague Service Convention as well. Learned counsel would hasten to add that the Universal Postal Union (U.P.U.) has established a treaty

from the year 1864 onwards, to ensure service of notice through post. As against only 84 contracting parties to the Hague Service Convention, as many as 192 member States, out of the total 195 countries, are part of the Universal Postal Union, is the submission made. It was argued that merely because 84 countries have ratified Hague Service Convention, it cannot be said that the provisions of Order V, Rule 25 has become otiose, since the mechanism in Order V, Rule 25 will have to be adhered to in respect of the non contracting States. Learned counsel relied upon a judgment of the Hon'ble Supreme Court in United States in the case of ***Water Splash Inc. v. Menon*** [(581 US SC) 2017], which held that the services contemplated in Order V, Rule 25 can be followed, as long as a State does not object to such mode of service. Learned counsel then pointed out that the notification No. G.S.R.24(E) dated 12.01.2009 of the Ministry of Law & Justice is invoking the power under Section 29(c) of the Code, which caters only to documents issued by courts in other countries to the courts within the Indian territory; and not vice versa. On Article 73, it was pointed out that, the

executive power cannot be exercised over domains which are already occupied by the existing laws. The provisions of C.P.C cannot therefore be amended by executive action, as held by the Hon'ble Supreme Court in ***Rai Sahib Ram Jawaya Kapur v. State of Punjab*** [1955 KHC 388]. Learned counsel would conclude his argument by submitting that, as long as Order V, Rule 25 has not been modified by the Parliament by necessary enactment/ amendment, the said provisions have to be followed by the courts in India. Learned counsel would thus vouch for reconsideration of ***Mollykutty*** (supra).

11. ARGUMENTS OF THE APPELLANT IN R.F.A NO. 73/2021:-

Sri.S.Ananthakrishnan, learned counsel for the appellant in R.F.A.No.73/2021 would completely support the above contentions urged by Adv.Abraham George Jacob, besides pointing out the practical difficulties in complying with the Hague Covenants, as also, the poor success rate in serving summons/notice as per the Convention.

12. ARGUMENTS OF R2 IN R.F.A NO. 210/2019:-

Sri.R.S.Kalkura, learned counsel for the 2nd appellant in R.F.A.No.210/2019, would submit that the law laid down in ***Mollykutty*** (supra) would abrogate the procedure contained in Order V, Rule 25. The municipal law contained in the Code regarding service of summons cannot be made subservient to the Hague Service Convention, is the submission made. Referring to Order V, Rule 25, the submission made is that, the Rules need to be framed by the High Court only for 'any other means' not prescribed under Rule 25. The submission made by the learned counsel is that, only in cases where the mechanism in Rule 26 or 26A of Order V is resorted to, the summons need be sent through the Ministry of Law and Justice. The guidelines issued by the Ministry of Law and Justice for sending summons/notice in civil and commercial matters through the Ministry had application only in that context. In other words, summons issued as per the provisions of Order V, Rule 25 need not be sent through the Ministry of Law and Justice. The law laid down in ***Mollykutty*** (supra) imposing a complete ban on serving

summons by any of the means contemplated in Order V, makes Rule 25 of Order V nugatory. The presumption to be drawn in terms of Order V, Rule 25 is only in accord with Section 27 of the General Clauses Act, which presumption is a rebuttable one. Learned counsel would submit that when there is conflict between international and municipal law, the municipal law should prevail, as settled by the Hon'ble Supreme Court in a catena of decisions. On facts, it was submitted that the methodology envisaged in the Hague Service Convention is very cumbersome, causing serious hardship to the litigants in terms of cost as well. Besides, it was also pointed out that, in majority of the cases where summons were issued in terms of the Hague Service Convention, service could not be completed and therefore, the said method is a failure.

13. ARGUMENTS OF ADDITIONAL RESPONDENTS, THE MINISRTY OF HOME AFFAIRS AND MINISTRY OF LAW AND JUSTICE:-

Sri. Daya Sindhu Sreehari. N.S, learned Central Government Counsel would endorse the submissions of the learned Amicus, to maintain that summons can be served only as provided in the

Hague Service Convention, India being a signatory to, and have ratified, the same. Specific reference was made to Notification G.S.R No.24E dated 12.01.2009 and the O.M dated 18.08.2011, to contend that the Hague Service Convention have been directed to be enforced by the Central Government.

14. Having heard the learned Amicus and the learned counsel appearing for the respective parties, we will now address the issue hereunder:

15. THE CONSTITUTIONAL PROVISIONS:-

Under Article 246, read with Entry 14 of List 1 to the Seventh Schedule, the power to enter into treaties and agreements with foreign countries and implementing such treaties, agreements and conventions is a subject, over which the Parliament has the exclusive power to make laws. Under Article 253 of the Constitution, a specific power to make law for giving effect to international agreements, is seen bestowed upon the Parliament. Under Article 51(c), the State shall endeavour to foster

respect for international law and treaty obligations in the dealings of organised people with one another. Article 73 of the Constitution is relevant and extracted here-below:

> ***"73. Extent of executive power of the Union.-***
> *(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend -*
> *(a) to the matters with respect to which Parliament has power to make laws; and*
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:*
> *Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.*
>
> *(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof*

could exercise immediately before the commencement of this Constitution.”

16. Thus, the executive power of the Union extends to all matters over which Parliament has power to make laws and the rights, authority and jurisdiction, as are exercisable by the Government of India by virtue of any treaty or agreement, can be exercised by the Union Executive as well, under Article 73.

17. MONISM *Versus* DUALISM:-

Before referring to the precedents on the point, it is relevant to take note of two concepts namely monism and dualism. A monistic system is one which recognizes the supremacy of international law, even within the national sphere. It treats international conventions as superior to all law, including its Constitution, wherefore, such treaties are directly applied without any '*act of transformation*'. Whereas, the dualistic system is one where the international law will impact the domestic jurisdiction only when the covenants thereof are specifically transformed into municipal law. It stresses that

international law and municipal law exists separately, and one cannot overrule the other. Thus, the former system contemplates '*direct application of treaties in domestic law*', whereas, the latter require an '*act of incorporation/transformation*' for the international treaty to apply as apart of domestic jurisprudence. The constitution of Netherlands, France, Belgium, Switzerland etc., are generally regarded as monistic, whereas, the United Kingdom, Australia etc., propounds the dualistic theory. These concepts have been taken stock of and narrated succinctly by the Supreme Court in ***Union of India and others v. Agricas LLP and others*** [(2021) 14 SCC 341], about which detailed reference will be made here-below.

18. THE PRECEDENTS:-

One of the earliest exposition of law on the topic arose in ***In Re; the Berubari Union and Exchange of Enclaves*** *[(1960) 3 SCR 250],* a case which arose pursuant to a reference by the President of India, based on the India–Pakistan agreement, agreeing to transfer the Berubari Union to Pakistan. One among

the questions posed was whether any legislative action is necessary for the implementation of the said agreement. The question was answered in the affirmative by the Hon'ble Supreme Court, inasmuch as, the agreement purports to cede a territory of India to Pakistan; and not an ascertainment of boundary between the two countries. In **Berubari-II** [***Ram Kishore Sen and Others v. Union of India and Others*** - (1966) 1 SCR 430], the question again arose in the context of the village of Chilhati, the subject matter of transfer to Pakistan based on the Indo-Pakistan agreement, which however was not transferred while implementing the said agreement. A contention was raised that the said village cannot be ceded without adhering to the procedure laid down in **Berubari-I** (supra). The contention was repelled holding that there cannot be any question on the constitutional validity of the proposed transfer of the village to Pakistan, inasmuch as, that area actually belonged to Pakistan, but happened to be administered by West Bengal, by mistake.

19. ***Maganbhai Ishwarbhai Patel etc. v. Union of India and Another*** [(1970) 3 SCC 400] is a leading case on the point, wherein a five Judges Bench of the Hon'ble Supreme Court delineated the legal position as regards the implementation/ enforceability of the international treaty, within the domestic limits. ***Maganbhai*** (supra) arose in the context of a challenge made in the Supreme Court under Article 32 of the Constitution to restrain the Government of India from ceding certain areas in the Rann of Kutch, pursuant to an international Award between India and Pakistan. As taken note in Paragraph no.19, there was no quarrel/challenge to the Award, which has been accepted by the Government; and the solitary question raised was with respect to the implementation of the same. Thorough discussion is made in ***Maganbhai*** (supra), after referring to the legal position on the topic prevailing in various countries. The principles laid down in ***Maganbhai*** (supra) has been summarized in ***Karan Dileep Nevatia v. Union of India, through Commerce Secretary & Others*** [(2010) SCC Online Bom 23] as follows:

“36. ……..

(i) The stipulations of a treaty duly ratified by the Central Government, do not by virtue of the treaty alone have the force of law.

(ii) Though the Executive (Central Government) has power to enter into international treaties/ agreements/conventions under Article 73 (read with Entries 10 & 14 of List I of the VII Schedule to the Constitution of India) the power to legislate in respect of such treaties/ agreements/conventions, lies with Parliament, it is open to Parliament to refuse to perform such treaties/agreements/conventions. In such a case, while the treaties/agreements/conventions will bind the Union of India as against the other contracting parties, Parliament may refuse to perform them and leave the Union of India in default.

(iii) Though the applications under such treaties/agreements/conventions are binding upon the Union of India (referred to as "the State" in Maganbhai's case) these treaties/agreements/ conventions "are not by their own force binding upon Indian nationals".

(iv) The making of law by Parliament in respect of such treaties/agreements/conventions is necessary when the treaty or agreement restricts or affects the rights of citizens or others or

modifies the law of India,
(v) If the rights of citizens or others are not affected or the laws of India are not modified then no legislative measure is needed to give effect to such treaties/agreements/conventions."

Out of the three situations culled out in clause (iv) above, we are more concerned in this case, with the 3rd one, which has been couched as a situation where the treaty '*modifies the law of India*'.

20. This concept of 'modification' has undergone a change and has been made a bit stricter by employing the idea, "in conflict with the laws of India" in ***Gramaphone Company of India Ltd v. Birendra Bahadur Pandey and Others*** [(1984) 2 SCC 534]. The relevant findings in paragraph no.5 are extracted here-below:

"5. There can be no question that nations must march with the international community and the municipal law must respect rules of International law even as nations respect international opinion. The comity of nations requires that rules of International law may be

accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established

principles of International law. But if conflict is inevitable, the latter must yield."

(underlined, for emphasis)

This judgment illustrates the 'doctrine of incorporation' of the covenants of the international treaty to the domestic law.

21. The question again fell for consideration of the Hon'ble Supreme Court in the context of prohibition of civil imprisonment for non-discharge of decree debt in ***Jolly George Varghese v. Bank of Cochin*** [(1980) 2 SCC 360]. **V.R.Krishna Iyer J.,** speaking for the Bench, after taking note of Article 51(c) of the Constitution, held that the international covenant concerned does not automatically become enforceable as part of *corpus juris* of India, but should go through the 'process of transformation' into municipal law, before the international treaty can become an internal law. It was held that, international law does not have the force or authority of civil law *proprio vigore,* until legislation is undertaken under its inspirational impact. It is relevant to note that the concept

of “the act of transformation” has been coined in this judgment.

22. A pro-active interpretation has been given by the Hon'ble Supreme Court in ***Visakha and Others v. State of Rajasthan and Others*** [(1997) 6 SCC 241]. In paragraph no.7, it was held that, to formulate effective measures to check the evil of sexual harassment of working women, the contents of international conventions and norms are significant for the purpose of interpretation of the guaranty of gender equality and right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution. This, however, was an interpretation on the applicability of international covenants and norms, in the absence of any domestic law occupying the field, which is not the fact situation we are dealing with.

23. An elaborate consideration of the issue has been received in ***Agricas LLP*** (supra). After referring to the concepts of monism and dualism, as also, the constitution bench decision in

Maganbhai (supra), ***Gramaphone Co.*** (supra), ***Jolly George Varghese*** (supra) etc., the opinion of the three Judges bench is reflected in paragraph nos.27, 28 and 29. In paragraph no.27, the Hon'ble Supreme Court observed that the application of treaties to national legal system are extraordinarily complex and vary from country to country, depending upon constitutional and other Municipal rules. The principle of '*invocability*' or '*justiciability*' as contrasted from '*direct applicability*', where the treaty norms conflict with the norms of the domestic law is seen referred to. Quoting **Prof.John H.Jackson** from his essay 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', the Supreme Court took note that there is no uniformity in the provision on the aspects concerned, since there are different national systems of treaty applications. Two relevant aspects coined in paragraph no.27 are 1)application of the international treaty in domestic law, and 2)invocability of the treaty in municipal law and before municipal courts. Further findings in paragraph nos.28 and 29 are extracted here-below:

"28. In spite of there being different constitutional and statutory approaches on applicability, the States as signatories to the international treaty are under an obligation to act in conformity and bear responsibility for breaches, be it as a consequence of legislative enactment, executive action or even judicial decisions. The State cannot plead and rely upon internal law including judicial decisions as a defence to a claim for breach of an international obligation. Acts of legislation, executive measures and judicial decision-making are not treated as third party acts for which the State is not responsible. The national law, executive mandate and action and the decisions of the domestic courts are facts which express the will and constitutes activities of the State. In international law, municipal laws cannot prevail upon the treaties as internal actions must comply with the international obligation. They may constitute breach of the treaty.

29. Thus, breach of a stipulation in international law cannot be justified by the State by referring to its domestic legal position. This rule of international law is unexceptionable and prosaic, as the contra view would permit the international obligations to be evaded by the simple method of domestic

> *legislation, executive action or judicial decision. Contracting States are under an obligation to act in conformity with the rules of international law and bear responsibility for breaches whether committed by the legislature, executive or even judiciary. In a way, therefore, international treaties are constraint on sovereign activity, albeit voluntarily agreed."*

(underlined, for emphasis)

24. Recently, the legal issue is dilated by the Hon'ble Supreme Court in ***M/s.Nestle SA*** (supra). After taking note of the various judgments on the point, the Hon'ble Supreme Court summarized its findings in paragraph no.44 thus:

> *"47. The holding in the decisions discussed above may thus be summarized:*
> *(i) The terms of a treaty ratified by the Union do not ipso facto acquire enforceability;*
> *(ii) The Union has exclusive executive power to enter into international treaties and conventions under Article 73 [read with corresponding Entries - Nos.10, 13 and 14 of List I of the VIIth Schedule to the Constitution of India] and Parliament, holds the exclusive power to legislate upon such conventions or treaties.*
> *(iii) Parliament can refuse to perform or give effect*

to such treaties. In such event, though such treaties bind the Union, vis a vis the other contracting state(s), leaving the Union in default.

(iv) The application of such treaties is binding upon the Union. Yet, they "are not by their own force binding upon Indian nationals".

(v) Law making by Parliament in respect of such treaties is required if the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India.

(vi) If citizens' rights or others' rights are not unaffected, or the laws of India are not modified, no legislative measure is necessary to give effect to treaties.

(vii) In the event of any ambiguity in the provision or law, which brings into force the treaty or obligation, the court is entitled to look into the international instrument, to clear the ambiguity or seek clarity."

25. Duncan B. Hollis in his paper on *'Executive Federalism: Forging New Federalist Constraints on the Treaty Power'* opines thus on the enforceability of a treaty.

"The treaty lives a double life. By day, it is a creature of international law, which sets forth extensive substantive and procedural rules by which the treaty must operate [….]. By night,

> *however, the treaty leads a more domestic life. In its domestic incarnation, the treaty is a creature of national law, deriving its force from the constitutional order of the nation state that concluded it."*

This is referred in ***M/s.Nestle SA*** (supra).

26. OUR ANALYSIS:-

In the light of the above exposition of law, we may summarise our impressions now. In view of Article 253 of the Constitution, empowering the Parliament to make law for implementing any treaty, agreement or convention with other countries or any decision made at any international conference, we may safely conclude that our constitutional allegiance is not monistic, but only dualistic in nature. Here, we are only following a Constitution Bench of the Hon'ble Supreme Court in ***State of W.B. v. Kesoram Industries Ltd. and Others*** [(2004) 10 SCC 201, at page no.410], which held:

> *"490. It is true that the doctrine of "monism" as prevailing in European countries does not prevail in India. The doctrine of "dualism" is applicable...."*

All the same, Article 51(c) adumbrates India's directive principle to foster respect for international law and treaty obligations in the dealings of organised people with one another. Therefore, rather than treating the political ethos as reflected in the constitution as completely dualistic, thereby meaning that a legislative enactment is required for implementing any and every international treaty, the right path lies in striking a balance between the monistic and the dualistic concepts. We are of the view that Article 253 do not mandate the Parliament to make law for implementing every treaty/convention. Instead, the power bestowed by Article 253 is only enabling, in the sense that, Parliament has the power to make such laws for implementing treaties/conventions. Meaningfully interpreted, it can only mean that the Parliament has the power to make law, if the same is necessary for implementing any treaty/convention.

27. It is in this context that the law propounded by the Constitution Bench in ***Maganbhai*** (supra), which held that making

of law by Parliament in respect of such treaties/ agreements/conventions is necessary only when the covenants thereof 'modifies' the law of India. As already indicated, the term 'modification' has been elated to that of being in "conflict with an Act of the Parliament" as enunciated in ***Gramaphone Co.*** (supra). As it is well settled, the terms used in a judgment are not to be read and understood as *Euclid's* theorem. Always, there exists room for understanding a term, which has been used earlier, in later context. If one seeks to understand that modification of municipal law includes any and every minor deviation thereof, which may perhaps be procedural and inconsequential, and to insist that legislation incorporating/transforming the international treaty should necessarily follow on account of such *modification*, it appears that we may *miss the wood for the trees*. We are of the definite opinion that, it is not any and every deviation from the law laid down by the Parliament, which requires a legislation, in tune with the international treaty. Instead, it is only when the covenants of international treaty is <u>in conflict with the</u>

law laid down by the Parliament – in the sense that both cannot co-exist together - that the doctrine of incorporation comes into play, mandating a consequential legislation, to give effect to the treaty covenants. But for that exercise, the treaty covenants, which are in conflict with domestic/existing law, cannot be enforced/implemented. This aspect of the matter is particularly significant, once it comes to the resolution of the issue at hand before us. We remind ourselves that we are addressing the issue of enforceability of an international treaty, in the context of a procedural aspect of serving summons/notice in a suit, where the defendants are residing abroad.

28. It is profitable in this regard to refer to the observations of the Hon'ble Supreme Court as regards the nature, sanctity and effect of procedural/processual law. In ***Sangram Singh*** (supra), the Supreme Court observed thus:

> *"16. Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal*

enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

29. The above observations are highlighted only to show that the covenants of the Hague Service Convention only touches upon a procedural aspect prescribed in the C.P.C, as regards the mode of serving summons to a defendant residing abroad; and not, in terms, affecting any substantive provision, or for that matter, any substantive right of the parties.

30. We will now come back to ***Maganbhai*** (supra) to ascertain whether the mode of service of summons as per the Hague Service Convention affects the rights of the citizens of this country; or is in conflict with the provisions of the C.P.C, of which the latter, we will examine first. Order V, Rules 25, 26 and 26A provide three different modes to effect service on a

defendant residing out of India. Rule 25 deals with the situation where the defendant resides out of India, and the country where he is so residing has no agent in India empowered to accept service. In such circumstance, summons is to be addressed to the defendant at his residence, or he may be served by post or courier service approved by the High Court, or even by electronic-mail service. Rule 26 prescribes the mode for service to a defendant residing in a foreign country, over which the Central Government has appointed a political agent, or in a situation where a Code has been established or continued with power to serve summons. Rule 26A is more significant and is extracted here-below:

> *"**26A. Summonses to be sent to officer to foreign countries.-**Where the Central Government has, by notification in the Official Gazette, declared in respect of any foreign territory that summonses to be served on defendants actually and voluntarily residing or carrying on business or personally working for gain in that foreign territory may be sent to an officer of the Government of the foreign territory specified by the Central Government, the summonses may be sent to such officer, through the Ministry of the Government of India dealing with*

> *foreign affairs or in such other manner as may be specified by the Central Government; and if such officer returns any such summons with an endorsement purporting to have been made by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service.”*

31. Having referred to the three Rules under Order V, we are of the opinion that the covenants of the Hague Service Convention providing for service of documents, is quite in harmony with Rule 26A. Rule 26A envisages service of summons through an officer appointed by the foreign country, specified by the Central Government, say by a notification in the official gazette. Summons are to be sent to the appointed officer, through the Ministry of Government of India, dealing with foreign affairs. Service is deemed, if such officer returns the summons, with an endorsement indicating service on the defendant.

32. Now, let us examine the provisions of the Hague Service Convention as regards service of civil and commercial

documents, which includes the summons. Articles 2 and 3 of the Hague Service Convention are extracted here-below:

> ***"Article 2***
>
> *Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.*
>
> *Each State shall organise the Central Authority in conformity with its own law.*
>
> ***Article 3***
>
> *The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.*
>
> *The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate."*

33. It could thus be seen that, instead of serving a judicial document through an officer of the foreign country under Rule 26A, a Central Authority, constituted by each contracting State, is recognized under the Hague Service Convention. We are

of the opinion that, the Hague Convention is very close and proximate to the contemplation in Rule 26A. In other words, the Hague Service Convention, in its practical effect, only recognizes Rule 26A, but for the solitary difference of constituting a Central Authority, as against an appointed officer, through which service is to be effected. Suffice to notice that the above provisions of the Hague Service Convention is *not in conflict with* the municipal law, so as to warrant an act of incorporation/ transformation for its enforceability. Coming to Rule 26, we are given to understand that no political agent was appointed; nor was any court established, wherefore, conflict with that provision does not arise at all. What remains is Rule 25, which we may deal with in detail here-below:

34. It remains a fact that, by the implementation of the Hague Service Convention, the operation of Order V, Rule 25 - insofar as the contracting States to the Hague Service Convention are concerned - stands eclipsed, but for Article 10 of the

Convention, to which detailed reference will be made later. The surfacing question is whether the provisions of the Hague Service Convention is '*in conflict with*' Order V, Rule 25. While answering, we have to bear in mind the distinction in the rigor of applying the concept of conflict with law, when it deals with substantive law *vis-a-vis* the procedural law. If the Municipal law, with which the conflict of the international treaty/ convention has to be adjudged, is a procedural law, we are of the opinion that the rigor will be less, in contrast to a substantive law. That apart, out of the three modes prescribed in Order V, Rules 25, 26 and 26A to serve a defendant residing abroad, the mode contemplated under Rule 25 alone is being eclipsed by virtue of the Hague Service Convention, for, we have already found that the provisions of the Conventions are in genuine harmony with the method envisaged in Rule 26A. Bearing in mind the change of the requirement from '*modifying*' the Municipal law, to that of being *'in conflict with'* such law, we are of the considered opinion that the provisions of the Hague Service Convention,

insofar as it applies to service of summons/notices to defendants residing abroad, is not *in conflict with* the municipal law/C.P.C.

35. WHETHER THE HAGUE SERVICE CONVENTION AFFECTS ANY RIGHT OF THE CITIZENS?

We may now address the above issue. It is settled that no party to a litigation has a vested right in any course of procedure. The legal position is no more *res integra* and has been laid down categorically in the following decisions:

A. ***Anant Gopal Sheorey v. State of Bombay*** [AIR 1958 SC 915],

B. ***Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others*** [(1994) 4 SCC 602],

C. ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. And Others*** [(2018) 6 SCC 287].

36. From the above discussion, we are of the view that the present fact situation is outside the teeth of the exceptions carved out in ***Maganbhai*** (supra)**,** ***Gramaphone Co.*** (supra) ***and Agricas LLP*** (supra)**.**

37. DUTY OF COURTS WHILE ADJUDGING ENFORCEABILITY OF AN INTERNATIONAL TREATY:-

It was held in ***Gramaphone Co.*** (supra)**,** that the courts are under an obligation, within the legitimate limits, to so interpret the municipal statute, so as to avoid confrontation with the comity of nations or the well established principles of international law. If and only if conflict is inevitable, the international treaty/law should yield to the domestic law. We, therefore, conclude that a harmonious reconciliation of the covenants of the international law with the provisions of the domestic law should be the endeavour of all courts, unless of course, such international covenants are in direct conflict with the domestic law. This principle of law would also persuade us to hold that in the given facts, especially in the context of a procedural law, the courts should not readily infer a conflict, even if it is conceived that the mode envisaged in Order V, Rule 25 may have to give way to the mode prescribed in the Hague Service Convention.

38. CONCLUSION ON ENFORCEABILITY OF HAGUE SERVICE CONVENTION:-

In the light of the above discussion, we conclude the discussion by holding that the Hague Service Convention, insofar as it pertains to service of judicial documents in the contracting States, does not require an enabling legislation for the implementation/enforceability of its covenants. Though an argument was mooted based on Article 15 and 16 of the covenants by propounding that the acceptance of the same would amount to amendment of provisions in the C.P.C. dealing with setting aside an *ex parte* judgment etc., we are not inclined to go into that question, inasmuch as the same does not form part of the issues referred to us. Our conclusion as regards the absence of dichotomy between the Hague Convention and the municipal law, insofar as service of documents is concerned, would not automatically vouch that all other covenants in the Hague Service Convention are in harmony with the municipal law. All what we clarify in this regard is that, we, in this reference, are not called upon to answer the above contention pertaining to the alleged dichotomy, if any, in the context of

the provisions of the Code dealing with setting aside *ex-parte* judgment etc.

39. ANALYSIS OF THE EXECUTIVE ACTION UNDER ARTICLE 73:-

Before winding up the topic, we should deal with one final aspect seriously stressed by the learned Amicus based on Article 73 of the Constitution. According to the learned Amicus, the Central Government issued notification bearing no.G.S.R. 24 E dated 12.01.2009, invoking the executive power under Article 73 to give effect to the Hague Service Convention. Moreover, an Office Memorandum dated 18.08.2011 bearing no.F.No.12(77)10 Judl was issued by the Ministry of Law and Justice, Department of legal affairs constituting the said department as the central authority for service of summons and notices in foreign countries under the provisions of the Hague Service Convention, as also, the Mutual Legal Assistance treaties. One more directive, FTS No.1003/.../15 bearing no.12(80)/2013-Judl issued by the Department of Legal Affairs, Judicial Section was also relied upon, all to point out that

necessary action under Article 73 of the Constitution has been taken by the Executive, by virtue of which, the Hague Service Convention has become enforceable. Out of the above, O.M. dated 18.08.2011 is acceptable, inasmuch as it constitutes the Department of Legal Affairs as the central authority as envisaged in Article 2 of the Hague Service Convention, as also, under other treaties for the purpose of summonses/notices to foreign countries. However, as regards the basic notification dated 12.01.2009 issued under Section 29(c) of the C.P.C, we have our own reservations. Section 29(c) is extracted here below:

> *"29. **Service of foreign summonses**.-Summonses and other process issued by-*
>
> *(a) xxxx*
>
> *(b) xxxx*
>
> *(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply,*
>
> *may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts."*

40. It could be seen from the above that Section 29 deals with *'service of foreign summonses'*, as indicated in the heading itself. It speaks of summonses and other process '*issued by*' Civil or Revenue Court outside India, to which Section 29 has been made applicable by the Central Government through a notification in the official gazette. If there is any such Civil or Revenue Court outside India, summons and other process issued by such courts can be sent to the courts in the territories to which the Code extends and be served, as if there were summonses issued by such courts. Now, by virtue of notification dated 12.01.2009, Section 29(c) is made applicable to all Civil Courts in the countries, who are parties to the Hague Service Convention. Thus, the effect of the notification is that summonses issued by such Civil or Revenue Courts outside India can be sent to the courts in the territories to which the Code extends, which obviously refers to courts within the territories of India, to which the Code extends. In short, Section 29(c) does not cater to summonses and other process issued by the courts in India to defendants residing abroad.

Therefore, the notification dated 12.01.2009 cannot have the effect of incorporating the international covenants to Municipal law, especially in the context of Order V, Rule 25, for, the notification governs summons and other process '*issued by*' such Civil or Revenue Courts outside India. Therefore, if the learned Amicus want us to treat the notification dated 12.01.2009 merely as an action pursuant to the Hague Service Convention, there may be no difficulty. *Per contra,* if the said notification is to be treated as an act of transformation/incorporation of the Hague covenant to Order V, Rule 25, the argument may not hold the ground. However, the notification dated 12.01.2009 (to the extent it helps) and the Office Memorandum dated 18.08.2011 would constitute adequate action in terms of Article 73, for which reason as well, we are fully inclined to hold that the Hague Service Conventions, insofar as it pertains to service of judicial and extrajudicial document in civil and commercial matters has become enforceable. We also take stock of the relevant Office Memoranda issued by the High Court, as also, the Hand Book of

the Supreme Court, both of which recognise the method of service under the Hague Convention. The said O.Ms and hand book would only justify our above view.

41. THE SWIVEL:-

Having held as above, here comes an interesting twist by virtue of Article 10, which saves service through postal channels directly to persons abroad. Article 10 of the Hague Service Convention is extracted here below:

"Article 10

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State destination."

42. Of the above, we are only concerned with limb (a), as per which, the Hague Service Convention shall not interfere with the freedom to send judicial documents by postal channels directly to persons abroad, provided the State of designation does not object. We notice that India had taken exception/reservation to Article 10, along with Articles 8, 15 and 16. India's reservation to Article 10, as contained in the web page of the Hague Conference on Private International Law (http://www.hcch.net/en/instruments/conventions/status-table/notification/?csdi=984&disp=resdn) reads as follows:

> **'India is opposed to the methods of service provided in Article 10'.**

The scope of India's reservation to Article 10 is the next subject matter for deliberation. Does that reservation only signifies India's objection to the methods of service provided under Article 10; or whether that reservation goes to the extent of opposing the very idea underlying Article 10, which permits freedom to send judicial documents by postal channels. We are inclined to hold the former, for, India, as a

contracting State, can only object to the freedom reserved under Article 10, insofar as service of judicial documents within the Republic of India is concerned; and not in respect of any other country. The way in which Article 10 is couched and commences would establish that the thrust is upon the objection, if any, of the 'State of destination', which supports our above interpretation as regards scope of India's reservation. Profitable reference in this regard may be made to the Vienna Convention on the Law of Treaties dated 23.05.1969, which defines the term 'reservation' as follows:

> *"(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty <u>in their application to that State</u>:"*

(underlined, for emphasis)

43. Though India is not a party to the Vienna Convention, it follows the provisions thereof, in practice. This is clear from the 'Guidelines/SoP on the conclusion of international treaties

in India', the relevant portion of which is extracted here-below:

> *"**A. International Practice:***
> *Under international law, the law and practices pertaining to treaties is governed by the Vienna Convention on the Law of Treaties, 1969. Although, India is not a Party to the Convention, it follows its provisions in practice. The Convention codifies the law, practice including norms concerning the international treaty making....."*

44. The fact that India follows the Vienna Convention in its practice, though not a signatory thereof, is recognised by the Hon'ble Supreme court in ***M/s.Nestle SA*** (supra) and ***Ram Jethmalani and Others v. Union of India and Others*** [(2011) 8 SCC 1]. Coming back to the facts, as is discernible from the definition of the term 'reservation', the same can only mean exclusion or modification of the relevant provision of the treaty, confined in its application to that State, which further fortifies our above view, as regards the scope of India's reservation to the Hague Service Convention, in terms of Article 10 thereof.

45. Whether the service effectuated by social media and e-mail is excluded as a result of India's reservation to Article 10 was the subject matter of decisions by various courts of U.S.A. The scope of India's reservation to Article 10 was the subject matter in (1)***Fed. Trade Comm'n v. PCCare 247 Inc.***[12 F.R.D. CIV 7189 (2013)]; (2)***Gurung v. Malhotra*** [279 F.R.D. 215]; (3)***In re South African Apartheid Litigation*** [643 F.Supp.2d 423 (S.D.N.Y.2009)] and (4)***Philip Morris USA Inc. v. Veles Ltd.*** [2007 WL 725412]. The various District Courts at United States took the view that India's reservation only covers those modes, which are expressly specified in the Hague Service Convention and hence, service effected through alternate media like e-mail to the defendant residing in India is permissible.

46. Per contra, in (1)***Agha v. Jacobs*** [2008 WL 2051061]; (2)***Graphic Styles/Styles International LLC v. Men's Wear Creations and Richard Kumar*** [Civil Action No.14-4283 (16-7-2014)], two other District Courts took the view that the language of Article 10 takes within its sweep service via

e-mail as well, wherefore, service of summons to the defendant residing in India through e-mail was frowned upon. In ***Richmond Technologies, Inc. v. Aumtech Business Soln.*** [Case No.11-CV-0202460-LHK.], the U.S. Court took note that the alternate service through e-mail etc. are more preferable, since service in India through the Central Authority takes six to eight months.

47. The above decisions are referred only to show that there exists ample room for interpretation as regards the scope of India's reservation to Article 10, in respect of which, we take the call to limit the same, as an objection of the destination State, without in any manner affecting the rights of the Indian citizens to send judicial documents by postal channels to other destination States, provided such States does not object.

48. OUR FINDINGS:-

The above discussion would lead us to hold that the method of service through postal channels, as envisaged in Order V, Rule 25, cannot be said to have been excluded/foreclosed

altogether due to the Hague Service Convention, inasmuch as the convention itself - speaking through Article 10 - contemplates such service through postal channels. Thus, even when we hold that the convention is enforceable, *albeit* without an enabling and corresponding legislation, we simultaneously hold that service to defendants abroad can still be taken through postal channels, as per the very convention itself, *proprio vigore*.

49. We may hasten to add a caveat here. As rightly pointed out by the learned Amicus, there exists no mechanism to ensure service of summons in the mode envisaged in Order V, Rule 25, be it a case of service through post or e-mail. As held in ***Sangram Singh*** (supra), the question of actual or deemed service of summons/notice on the defendant is a matter of pivotal significance, as it constitutes sufficient notice on the defendant and confers upon him an opportunity to defend the action brought against him. Therefore, it should be the endeavour of every court to ensure in all cases, where service to defendant abroad is resorted to by postal means or by e-mail as envisaged in Order V, Rule 25, that the summons/notice is

served on the defendant, without which, it would not be legitimate for the courts to proceed further. Thought in that angle, we may go to the extent of saying that the service of summons, as envisaged by the Hague Service Convention, should essentially be the mode, inasmuch as, it ensures service upon the defendant abroad, in the manner contemplated in the Hague Service Convention. Harmonising the two options, we may venture to say that, there is nothing wrong in trying service of summons on the defendant abroad by the mode prescribed in Order V, Rule 25; and if the defendant appears before the court pursuant to such service, well and good, the service is complete. Alternatively, if the court get a confirmation regarding service on the defendant - which essentially depends upon the postal arrangement prevailing in the destination State - the courts are still at liberty to proceed. However, if both these eventualities does not happen within a reasonable time, the parties should necessarily be relegated to the method envisaged in the Hague Service Convention.

50. The precise issue received consideration by the High Courts of **Karnataka** [*Sri.Kaustubha Gudi v. The Management of M/s.Trilogy E-Business Software India (P) Ltd. and another],* **Bombay** [*North East Organised Floritech Pvt. Ltd. v. M.V.CMA CGM Cendrillon and Others* - MANU/MH/2020/2023] and **Delhi** [*Microsoft Corporation and Others v. Tech Heracles OPL Private Limited and Others* – MANU/DE/3118/2022]. However, all the judgments refer to ***Mollykutty*** (supra); and the requirements for enforceability/ implementation of an international treaty, in the context of the law laid down in ***Maganbhai*** (supra), ***Gramaphone Co.*** (supra) and ***Agricas LLP*** (supra) etc., are not seen considered. Moreover, the said judgments have not taken stock of the impact of Article 10 of the Hague Service Convention, as also, the scope of India's reservation to the same. The said judgments therefore offer little assistance to us.

51. REFERENCE ANSWERED:-

On the strength of the above findings, we hold as under:

a) The Hague Service Convention is enforceable, *albeit* without an enabling and corresponding legislation.

The mode of service to defendants residing abroad should essentially be the one contemplated in the Convention.

b) Service to defendants residing abroad through postal channels, as envisaged in Order V, Rule 25, is also permissible, inasmuch as the Hague Service Convention itself - speaking through Article 10 - contemplates the same, provided the destination State does not object the same. This right, however, will be subject to the caveat recorded in paragraph no.49 of this judgment.

c) The declaration of law in ***Mollykutty*** (supra) that summons/notice has to be served on persons residing abroad in strict adherence to the procedure prescribed in the O.Ms - that is to say, in accord with the Hague Service Convention; and that summons/notice cannot be sent directly to defendants residing in the foreign country, does not reflect the correct proposition of law. To that extent, we overrule ***Mollykutty*** (supra).

d) The Registry of this Court will formulate and issue appropriate guidelines/modified O.M in accord with the law declared by this judgment.

e) To address the grievances of litigants nationwide who encounter challenges when required to initiate legal processes abroad, we recommend that the Central Government take steps to establish a portal or a dashboard dedicated to facilitating this process. This portal should enable courts and litigants to submit the necessary documents in accordance with the procedures outlined in the Hague Service Convention. Additionally, it should allow the concerned court officers or litigants to monitor each step of the process, including serving notice to defendants residing abroad, and to issue appropriate acknowledgments to facilitate efficient case proceedings.

Furthermore, there should be a facility to integrate this portal with the Case Management Systems implemented by the Kerala High Court and other High Courts. This integration will enable all stakeholders to monitor the entire process seamlessly, thereby enhancing transparency and accountability across the board.

The reference is answered as above. We place on record our profound appreciation to the learned Amicus

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Sri.Jacob.P.Alex, who enviably assisted us to resolve the issues involved in this reference. Our appreciation is also due to the learned counsel, who appeared for the respective parties, as well.

Sd/-

RAJA VIJAYARAGHAVAN V.,
JUDGE

Sd/-

C. JAYACHANDRAN,
JUDGE

Sd/-

C. PRATHEEP KUMAR,
JUDGE

TR**/WW**