CHAPTER VIII
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT: JAPAN AND INDIA

8.1. INTRODUCTION

Recognition and Enforcement of foreign judgment is the final stage in Private International Law. A foreign judgement has to be recognised in the receiving State to be enforced by the forum court. In the absence of international convention or multilateral convention like in case of European Union’s Brussels I Regulation\(^1\), State of Japan and India applies its domestic general law principles on the issue. The general principles of recognition and enforcement of foreign judgement are not created for cyberspace oriented cases. Therefore, in the absence of any clear cut policy with regard to cyberspace, the traditional methods of rules relating to the recognition and enforcement has to be applied. The present chapter discuss the application of traditional principles of recognition and enforcement of foreign judgement on the cyberspace related cases.

8.2. JAPAN

Japan is not party to any multilateral convention for recognition and enforcement of foreign judgment like the case of European Union i.e., Brussels I Regulation of 2001, though Japan is member of other selective conventions\(^2\) which are meant for specific purposes.

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\(^1\) Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 2000. Chapter III, Article 32 to 56 of the Regulation deals with the issue of Recognition and Enforcement of foreign judgment. Before this Regulation the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Foreign judgment, 1968 was applicable. The Convention provide uniform rules of Recognition among Member States.

8.2.1. Domestic Law Relating to Recognition and Enforcement of Foreign judgement

The Code of Civil Procedure (‘CCP’) and Civil Execution Act (‘CEA’) of Japan deal with the issue of recognition and enforcement of foreign judgments. The general provisions of both the enactments are equally applicable in cases of Internet related copyright judgments. Code of Civil Procedure of Japan was first codified in Japan in 1890, following the German Code of Civil Procedure, 1877 (‘ZPO’). Subsequently, it was amended majorly in 1926. In 1948 it was amended again to include some features of Anglo American system such as cross examination. In 1996 major change was introduced in CCP. Since copyright is relatively a new concept for private international law, no specific provisions were created for its recognition and enforcement of foreign judgement. Though, a judgment in case of cyberspace is not any way different from the traditional civil judgements; and so it is to be recognised just like the other foreign judgments and need no special rule for enforcement. Therefore, this chapter discuss the general practice of the court with regard to the enforcement of foreign judgment and analyse its applicability in copyright related cases.

8.2.2. Definition of ‘Foreign Judgment’

‘Foreign judgement’ mentioned in Article 24 of the CEA means the final judgement passed by a foreign court, regardless of the name, procedures or form of the court, under the assurance of due process for both parties, with regard to legal relationship in private law. Therefore a ruling having the qualities listed above, even if it is called a ‘decision’ or an ‘order’ is referred to as a ‘foreign judgement’ as per the Japanese legal system.

Therefore, the Japanese courts accept any order of the foreign court, whatever may be the nomenclature of the order. Important is that it has to be pronounced by the competent court of the foreign sovereign State and it must have followed the due

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process. Japan has accepted through various case laws that judgment generally includes money judgments or non money judgments like injunctions, a judgment given after contested proceedings or given in default of the appearance of the defendant\(^5\) or the judgement by default against a party failing to obey a court order,\(^6\) summary procedure judgments.\(^7\)

A “court” means an authority which regularly exercises judicial functions and is entitled to give a judgement as regards legal relationships under private international law. It may be an administrative tribunal also.\(^8\)

8.2.3. **Categories of the judgments recognised and enforceable**\(^9\)

Japan Recognise the following categories of judgments;

- Money judgments
- A specific performance
- A permanent injunction
- judgment which is in itself a recognition of a previous foreign judgment is enforceable
- A judgment against the State is enforceable

**Foreign judgment not to be recognised**\(^10\)

- Arbitration is not a foreign judgment

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\(^5\) Concept Generation International Inc. v. Japan Design Networks Ltd., Tokyo District Court, (14/01/1994), Hanrei Jiho no. 1509, English version of the summary of the judgment is available at [http://www.tomeika.jur.kyushu-u.ac.jp/procedure/E-label/LABEL2-025.pdf] [accessed on 31.08.2011].


\(^10\) id.
• A foreign punitive judgment not recognised
• An interim orders are not enforceable. An interim order is not a final order of the court. In fact it is a temporary relief and so not accepted. Therefore a John doe injunctions, Merva injunctions etc. will not be recognised for the reason that it is exparte and not final.

8.2.4. Provisions of Recognition and Enforcement of foreign judgment

Foreign judgment is generally recognised under Article 118 of the CCP and enforcement is dealt with Article 24 of the CEA. Article 200 of the old CCP is similar to Article 118 of current CCP and Article 24 of the CEA lays down the fundamental rule for recognition and enforcement of foreign judgment. A foreign judgement which clarifies the criteria set forth in Article 118 or previous Article 200 of the CCP is automatically deemed valid in Japan without taking any special procedure for recognition of foreign judgement. Therefore, party seeking for enforcement need to obtain an enforcement judgement (shikkoh hanketsu) from a competent Japanese court. The grounds of ‘Recognition’ and ‘Enforcement’ of foreign judgement are substantially the same. According to Article 118\textsuperscript{11}, it lays down four important criteria of recognition i.e.:

(1) The jurisdiction of the foreign court is acknowledges by the laws or ordinances or international treaties;
(2) There is proper notice of the proceeding;
(3) It is not against the public policy of the State;
(4) Respect for reciprocity.

\textsuperscript{11} Code of Civil Procedure, Article 118 of CCP “Judgments of foreign courts which have taken effect have effect only when they fulfil all the following requirements:
1. The jurisdiction of the foreign court is acknowledges by the laws or ordinances or international treaties;
2. The losing party has been summoned or been served a writ (except by way of public notice and other similar manners of notice) necessary for the commencement of litigation, or has not been summoned or served a writ, but nevertheless, responded to the claim;
3. The content of the judgment and the procedure are not against public order and good morals of the Japan.
4. There is mutual guarantee.
i. **Jurisdiction (Article 118 (i) of CCP)**

The old CCP Article 200 provides the principle of jurisdiction ambiguously as “that the jurisdiction of the foreign court is not denied in laws and ordinance or treaty”. It created confusion for the court while deciding the issue of foreign enforcement of judgement. Supreme Court resolved this finally by laying down the rule in the case of *Sadhwani case*. The court held that:

“It is understood that the foreign court’s jurisdiction is granted under the laws and ordinances and treaties mentioned in article 118 (i) of the CCP means that, viewed from the principles of international civil procedure of our country, it is actively granted that the country to which the foreign court belongs has the international jurisdiction to adjudicate for the relevant cases. Concerning a case in which the judgement country has the international jurisdiction to adjudicate, there are no statutes directly regarding the question, and neither treaties nor clear principle of international law have yet been established. So it is reasonable to determine this in accordance with the principle of fairness between the parties and equitable and prompt administration of justice. Concretely, whether the judgement country has the international jurisdiction to adjudicate should be determined in accordance with the principle of justice and reason, basically applying the provisions of territorial jurisdiction stated in our CCP, and taking into account the concrete circumstances of each case, from the viewpoint of whether or not it is proper for our country to recognise the foreign judgment.”

Further the court held that:

“Whether or not the country of judgment has international jurisdiction should be determined in the light of reasons, basically in accordance with the provisions of the Code of Civil Procedure on the territorial jurisdiction of the courts from the viewpoint of whether it is appropriate

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12 *Sadhwani case, Supra* note 4.
to recognise the given foreign judgment, taking into consideration specific circumstances of each case.”

In the case of *A. Limited v. Ichiro Kono*, the court repeated the almost the same ratio relating to jurisdiction issue. Court held that:

“The country to which the relevant foreign court belongs is positively required to have international jurisdiction over the relevant case, in accordance with the principles of the law of international civil procedure of Japan. It is appropriate to decide whether or not the country has international jurisdiction logically, in accordance with the principles of fairness as between the parties, and expectation of a proper and speedy trial. Specifically, we should determine whether or not the country that handed down the judgement has international jurisdiction in a logical manner, following in principle with the provision on territorial jurisdiction in Japan’s Code of Civil Procedure.”

Therefore, following the same analogy of the concept to cyberspace copyright related cases the international jurisdiction incorporated in CCP is important to take into consideration while enforcing the foreign judgments. Jurisdiction of foreign court should be according to CCP. Therefore, jurisdiction should be according to presence of defendant or defendant’s domicile, place of performance Article 5(1), place of tort Article 5(9), appearance of the defendant under Article 12 and choice of court agreement under Article 11 will decide the international jurisdiction of the court. If foreign court’s jurisdiction is according to these rules the foreign court is a competent court. Since, no separate principle has been developed so far on the issue of copyright violation through internet; the general rule discussed will prevail. Therefore it is difficult to see how a US judgement based on long arm Statute jurisdiction or the Indian judgements based on Section 62 of the Indian Copyright Act, 1957 i.e., the

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13 *id*

plaintiff’s place of business decisions will be recognised under Japanese law as the jurisdiction grounds are not analogous to Japanese courts.

ii. Notice of appearance (Article 118 (ii) of CCP)

It is the fundamental rule of fair justice that the other party should also be aware of the case being brought up before a foreign court. Therefore notice should be served on him to appear before the court and defend his case. This opportunity is very important as it is part of natural justice and rule of law. Article 118(ii) of the CCP expects that “the defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.”

As to the need of summons the court in the case of Sadhwani\(^\text{15}\) held that:

“The serving of process necessary to commence an action against defendants mentioned in Article 118(ii) of the CCP does not have to comply with the laws and rules of our civil procedure. But it is required that the process serving give the defendants actual knowledge of the commencement of action and not hinder the exercise of his/her right to defend. In addition the viewpoint of realising clear and stable procedures leads to the following interpretation of Article 118(ii). Where a treaty is concluded regarding judicial cooperation between our country and the judgment country for the serving of judicial documents necessary to commence an action be undertaken in accordance with the methods provided by that treaty, process serving that does not abide by the methods of that treaty does not satisfy the requisite mentioned in Article 118(ii).”

\(^{15}\) Sadhwani case, Supra note 4.
Court further held that:

“Respond to the action” by the defendant mentioned in Article 118(ii) of the CCP is different from the response to the merits which effectuates the jurisdiction based on the defendant’s response on the merits. It means that a defendant is given an opportunity to defend and actually takes measures of defence in the court. It includes cases where a defense to contest jurisdiction is submitted.”

Therefore the notice of the proceedings has to be communicated to the defendant. However, Japan is party to Hague Convention on the Service Abroad of Judicial and Extra Judicial documents in Civil and Commercial Matters, 1965 and Hague Convention on Civil Procedure, 1954. Therefore, in a given case where the both parties are the member of the above conventions, then the notice has to given to them according to the convention. If the parties are not from the Member State of the convention, then the general rule of service of notice will prevail. In cyberspace the copyright violation happens ubiquitously and the party has the option to file cases either at one place or every other place of violations or infringement. In both cases it is important that the defendant should serve the notice relating to the suit and not necessarily that the notice should be according to the procedure set by other countries procedural rules. What is important is that the defendant should be properly informed about the suit beforehand to give him the opportunity to defend his case.

iii. Public Policy (Article 18 (iii) of CCP)

Article 118 (iii) of the CCP requires the foreign judgment to be compatible with the “public policy or good morals”. The contents and the proceeding in foreign judgement should not be contrary to the public policy of Japan. It is accepted that not only the conclusion of a foreign judgment but also its grounds may became object of the public policy examination in terms of substantive public policy.16 However, a foreign judgement cannot be reviewed on the merits of the case as per Article 24(2) of

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16 Toshiyuki Kono, Supra note 8, p. 315.
CEA. With regard to the procedural public policy due regard has to be given to the
due process under Article 118(iii).

In the case of Sadhwani, the appellant failed to appeal against the orders of
Hong Kong High Court judgment within the limitation time of appeal as provided by
the relevant law. At the time of enforcement of foreign judgment before the Supreme
Court of Japan, appellant raised this ground not to enforce the judgment on the basis
that it was against public policy. Court rejected this appeal and upheld the
enforcement of foreign judgment.\footnote{17} Further the court held in the case that as to how to
allocate the cost of litigation is a matter to be decided by each jurisdiction, and
provided that it is determined within the scope of cost actually incurred, even if one of
the parties is to bear the total cost including lawyers fee, it is not against “public
policy” as provide in Article 118 (iii) of the CCP.\footnote{18}

Further the court in this case held that:

“In order to make a determination on the proceeding leading to the
relevant judgement, we turn to the question of unfair reasoning contrary
to the fundamental principles of civil procedure which gives rise to
problems of procedural violation of public order. Specifically these
include (I) the independence of judiciary; (ii) neutrality of the court; (iii)
the absence of a guarantee of the defendant’s right to demand a hearing
or right of defence; (IV) a plaintiff obtaining a fraudulent judgment, and
(v) interference by the third party’s tort or crime in the process of
reaching of a judgment.”\footnote{19}

In this case the court held defendant living in Japan, has problem of
approaching Singapore where the court according to the international jurisdiction of
Japan has filed the case. Treating this as a violation of public order is against the spirit
of justice.\footnote{20}

\footnote{17} Sadhwani case, Supra note 4.
\footnote{18} \textit{id}.
\footnote{19} \textit{id}.
\footnote{20} \textit{id}.
iv. **Reciprocity (Article 118(iv) of CCP)**

A foreign judgment is to be recognised by the Japanese court on the grounds of reciprocity. It is basically a mutual understanding between the States who agrees to recognise and enforce the judgment on the ground that the other State also recognises the foreign judgment.

Tokyo District court in a case\(^{21}\) elaborated as to the meaning of reciprocity guaranteed in Article 118(iv) as:

“The “reciprocal guarantee” prescribed in Article 118(iv) of the Code of Civil Procedure is understood to mean that, in the country to which the foreign court that handed over the relevant judgment belongs ("Judgment Country"), a judgment by a court in Japan of the same kind as the relevant judgment would be valid under conditions that do not differ in important respects from those in each Item of Article 118.”

Court found in this case the requirements for enforcement of foreign judgments in the Republic of Singapore are based on English common law, and they require that (1) the relevant judgment is final and binding, (2) the relevant judgment was established after proper notice of the trial procedures was given to the defendant, and (3) the relevant judgment is concerning money. Moreover, there are requirements that (4) the relevant judgment is not contrary to public order and morals, and (5) that there is a reciprocal guarantee between the Judgment Country and the Republic of Singapore. Additionally, (6) the Judgment Country must have personal jurisdiction over the relevant case in accordance with the common law principles applicable in the Republic of Singapore. It is accordingly correct to hold that the requirement of a reciprocal guarantee is met in terms of judgments given in the Republic of Singapore.”

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Japan follow the principle of reciprocity with following countries so far i.e., New York, California, Germany, Switzerland, England, Singapore, Hong Kong.

v. Final and binding

The foremost requirement for the enforcement of foreign judgment is that it should be final and binding in nature as per Article 118 of CCP and Article 24(3) of CEA. Thus, the judgment which is not final and binding cannot be enforced. A case which is in appeal is not the final judgment. A judgment will be treated as final, if there is no scope of appeal left in the judgment rendering State.

Article 24 of CEA provides that:

1. Claims on the enforcement of foreign judgment fall within the jurisdiction of the district court which covers the location of ordinary jurisdiction of the debtor. If there is no such location, the court which has jurisdiction over the location of the assets which are the object of seizure, or assets which are sizeable has jurisdiction over such claims.

2. Enforcement judgment shall be rendered without examining the case on its merit or review of the case.

3. Enforcement is not possible if there is no proof that the foreign judgment has taken effect, or does not fulfil the requirements provided by the subparagraphs of Article 118 of the Code of Civil Procedure.

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22 Tokyo District Court 14 January 1994
23 Tokyo District Court 13 February 1994
24 Nagoya District Court, judgment, 6 Feb. 1987
25 Tokyo District Court 13 November 1967
26 Tokyo District Court 31 January 1994
27 Tokyo District Court 19 January 2006
28 Sadhwani case, Supra note 4.
4. In the enforcement judgment, it should be declared that enforcement is allowed on the basis of a foreign judgment.

Article 24(1) requires the judgment creditor seeking to enforce a foreign judgment in Japan to file a case for the execution of decree directly. Article 24(1) requires the judgement creditor to file a case against the judgment debtor in the competent court in Japan. Further the Article requires the foreign judgment to clear the test impose by the Article 24(3) and Article 118 of the CCP to enforce the title. Further, Article 4 of the CCP decides the jurisdiction for the judgement debtor to file case against the other party. The term “court” means an authority which regularly exercises judicial functions and is entitled to give a judgment.

8.3. TRANSPARENCY PROPOSAL

Transparency proposal recognise and propose to amend the recognition and enforcement principles of Japan. It creates 2 different types of principles. While Article 402 discuss the provisions relating to enforcement of foreign judgments which are final and binding, Article 403 discuss the enforcement of provisional judgments and a not “final and binding” judgments.

Article 401 defines “judgment of a foreign court” as a final judgment given by a court of foreign country on civil and commercial matters as a result of fairs trial of both parties. It accepts the existing definition of foreign judgment as per the Japanese law. So it includes money or not money judgment, declaratory judgments, contested proceeding default judgments, judgment by way of summary judgments. Further Article 401(2) of the proposal recognises a provisional measure of the foreign judgment. They are classified in three different parts as (a) a measure that correspond to a provisional seizure or attachment of property for the purpose of securing the enforcement of the right on the merits in a civil action, (b) a measure that corresponds to the provisional disposition of the object in dispute for the purpose of enforcement of the rights on the merits in a civil action.

31 Code of Civil Procedure, Article 4 provides that “An action shall be subject to the jurisdiction of that has jurisdiction over the location of the general venue of the defendants.”

action, (c) a measure that correspond to provisinal disposition to establish a provisional sate in legal relationships on the merit of a civil action.

The proposal under Article 402 recognise the foreign judgment which are final and binding on the parties and under Article 403 it creates the requirement for the foreign judgment which are not binding and final on the parties. In the case of foreign judgment which is final and binding according to the law of the foreign forum, Article 402 requires the parties to prove more to get it enforce and therefore requires to meet all the requirements of Article 402 as (a) foreign court should have international judicial jurisdiction, (b) the defendant received a service of summons or order necessary for the commencement of suit, (c) the content of foreign judgment should not be contrary to public policy of the Japan, (d) parallel litigation in Japan has been dismissed or suspended, (e) the foreign judgment is not compatible with a judgment of a court in Japan which is final and binding before the foreign judgment become final and binding, (f) reciprocity exists between the foreign court and Japanese court relating to recognition nod enforcement of foreign judgment. Japan however recognise the category of (a) to (d) and (f) category of foreign judgment. The principle laid down is a new principle for Japan. As per the principle laid down by the proposal in Article 402(e) Japan would not enforce the foreign judgment if it is incompatible with the national judgment. Incompatibility is not due to international parallel order but due to already existing national judgment on the issue. The proposal at the end retains the reciprocity basis of recognition an enforcement of foreign judgment.

Article 403 deals with the important issue of a foreign judgment which is not conclusive and provisional in nature. The injunction in case of copyright related issue falls in this category. The foreign court may have order injunction till final order during the proceeding cases. The recognition of it is important for the protection of economic rights of the owner of copyright. The Article proposes that the provisional measures of the court should be enforced if it meets the requirements of Article 402. Therefore all requirement of Article 402 has to be complied with for the provisional measures to be enforced. Since the measure is provisional and not final therefore proposal add the requirements of the protection of the defendant against whom the
order has to be applied. It requires in Article 403(2) that the party seeking to enforce the foreign judgment has to provide security. Article 404 further clears that if the part of a judgement or a provisional measure of a foreign court meets the requirement of recognition and enforcement of foreign judgments than that part of the judgement to be recognised and enforced.

8.4. WASEDA UNIVERSITY PROPOSAL

The Waseda University draft\(^33\) suggests that a foreign judgement may not be recognised and enforced if the defendant has not received a service of a summons or orders necessary for the commencement of the proceedings of a suit. Therefore, prior and proper information of the commencement of proceedings is required for a valid judgement. However, the Article makes an exception as it allows the judgement where the defendant submits himself to the foreign court without even the prior information either accidently or intentionally. In this case the judgement of such nature will be recognised.\(^34\)

If the procedure adopted to pronounce the judgement violates the public policy of the requested State than the foreign judgement is not to be acceptable.\(^35\) The foreign judgement should not be reviewed as to its substance or merits by the local courts.\(^36\) This provision is in line with the Japanese Civil Enforcement Code. The draft recognise that depending on the fact and circumstances of the case a foreign judgement may be recognised or enforced partly if it is not possible to enforce full judgement.\(^37\)

Article 403 requires the harmonisation of enforcement mechanism for proper enforcement of foreign awards. According to it a foreign judgement regarding seizure, destruction of infringing article etc. will be recognised and enforced if the same

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\(^{34}\) Waseda University Draft., Article 401(1)(ii).

\(^{35}\) id., Article 401(1)(iii).

\(^{36}\) id., Article 401(2).

\(^{37}\) id., Article 402.
equitable measures are available under the same conditions in enforcing State. Otherwise, it will not be enforced fully but may be done partly.\textsuperscript{38}

According to Article 405 the provisional and protective measures is given to both the States that have the jurisdiction to hear the merits and another in which the disputed property is located. A protective measure ordered by a foreign court that has jurisdiction over the dispute at hand ought to be recognise because it helps the requested court to easily judge the necessity of protection and probability of success. A protective measures ordered by the court in a State in which the property in dispute is situated ought to be recognised because it is enforced within the state.\textsuperscript{39}

A judgement not need to be recognised if it is (1) inconsistent with prior local judgment of the recognising State, (2) inconsistent with prior foreign judgement of same cause of action between the same parties and which can be enforced.\textsuperscript{40}

A foreign judgement which awards punitive damages or monetary relief exceeding the compensatory damages shall not be recognised.\textsuperscript{41} Lastly the recognition and enforcement procedure should be according to the law of the requested State.\textsuperscript{42}

\section{8.5 \hspace{1em} INDIAN LAW}

India is party to various international conventions\textsuperscript{43} which are helpful in recognition and enforcement of foreign judgement in various issues. However due to no specific universal convention on the issue of cyberspace copyright, the general law relating to recognition and enforcement will be applicable.

\begin{itemize}
\item\textsuperscript{38} \textit{id.}, Article 403.
\item\textsuperscript{39} \textit{id.}, Article 405.
\item\textsuperscript{40} \textit{id.}, Article 406.
\item\textsuperscript{41} \textit{id.}, Article 407.
\item\textsuperscript{42} \textit{id.}, Article 408.
\end{itemize}
8.5.1. National legislation

The Central legislation of Code of Civil Procedure, 1908 (‘CPC’) is applicable in a matter of recognition and enforcement of foreign judgment. This Code is not applicable to Jammu and Kashmir. The Code recognises the following categories of judgment to be enforced:

- Money judgement (including fiscal judgments)
- Specific performance
- Injunctions, subject to the conditions laid down in order XXXIX of CPC i.e., the property is in danger of being damaged or alienated or wrongfully sold in execution of decree.
- Arbitral awards
- Judgement relating to Personal status
- If the damages claimed are for breach of contract, the judgment would be enforceable like any other suit for recovery. It is essentially required in the case of assignment or licence issue of copyright.
- Judgment against the government or against a public officer in respect of any act done by him in his office during the course of his employment in that capacity.

Section 13 and 14 of the Code of Civil Procedure, 1908, lays down the rules relating to recognition and enforcement of foreign judgment. However, Indian courts also recognise the reciprocal agreement under section 44A of the Code of Civil Procedure. It states that:

“Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

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44 Code of Civil Procedure, 1908, Explanation 1 of Section 13 states that “Reciprocating territory” means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification”.

45 *id.*, Explanation 2 of the Section 13 states that “Decree” with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.”
(1) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(2) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.”

Due to this the decrees of superior courts of the United Kingdom and other countries with which India has a reciprocal arrangement have been made enforceable as if they were decrees of Indian courts. However it is required that even for the decree under Section 44A of the CPC requires that it is conclusive under Section 13 of the CPC.\(^\text{46}\)

This section expressly provides for execution of decrees of judgments obtained in foreign court directly without the necessity of filing a suit on the judgment. Before a decree holder seeks to enforce a foreign judgment he should comply with the procedure laid down by the section, i.e.,

- It is obligatory on him to file a certificate from the superior court of the reciprocating territory about the extent, if any, to which the decree has been satisfied or adjusted, and
- He must also file a certified copy of the decree sought to be executed. The said certificate is a condition precedent to the exercise of jurisdiction and failure to enclose such a certificate can entail dismissal of the execution. The execution of a foreign decree in India is done by means of an original petition

\(^{46}\) *Middle East Bank Ltd. v. Rajendra singh Sethia*, AIR 1991 Cal. 335.
and is not similar to cases of transfer of decree for execution although the
decree is executed as a decree passed in India.

In the case of *M.VAL, Quamar v. Tsavliris Salvage (International) Ltd.* the
court held that Section 44A indicates an independent right, conferred on to a foreign
decree holder for enforcement of its decree in India. It is a fresh cause of action and
has no relation with jurisdictional issue. The factum of the passing of the decree and
the assumption of jurisdiction pertaining thereto, do not rally obstruct the full play of
the provision of Section 44A. It gives a new cause of action irrespective of its original
character and as such, it cannot be termed to be emanating from the admiralty
jurisdiction as such. The enforcement claimed is an English decree and the question is
whether it comes within the ambit of Section 44A or not. The decree itself need not
and does not say that the same pertains to an admiralty matter, neither it is required
under Section 44A of the Code. Though, however in the facts of the matter under
consideration, the decree has been passed by the high court of England (a superior
court) in its admiralty jurisdiction, registration in this country, as a decree of a
superior foreign court having reciprocity with this country would by itself be
sufficient to bring it within the ambit of Section 44A. The conferment of jurisdiction
in terms of Section 44A cannot be attributed to any specific jurisdiction but an
independent and an enabling provision being made available to a foreigner in the
matter of enforcement of a foreign decree.\(^{47}\)

A combined reading of Section 13 and 44 A makes it clear that a decree of a
reciprocating territory can be executed through a district court and the judgment
debtor is entitled to contest the execution petition if it can be shown that the judgment
is not conclusive, i.e., it comes within any of the exceptions under Section 13(a) to (f)
of CPC.

The Central Government has in exercise of the powers conferred by
explanation I to Section 44-A C.P.C. has entered into agreement with the United

\(^{47}\) AIR 2000 SC 2826.
Kingdom, Burma, Colony of Aden, Fiji, Singapore, Federation of Malaya, Hong Kong, Trinidad and Tobago, Newzland, Bangladesh, Papua and New Emirates, United Arab Emirates.

In case of *Algemene Bank, Nederland N.V. v. Satish Dayal Choksi*, a Hong Kong court gave a decision not on the points at controversy between the parties, but given exparte on the basis of plaintiff’s pleading and documents tendered by the plaintiff without going into the controversy between the parties, such judgment was held not a judgment on merits of the case; therefore the court refused to grant leave under order XXI, rule 22 for the purpose of executing decree in India.

The mere fact that a cause of action or part thereof arose in a foreign country is not sufficient to confer jurisdiction, from the point of view of private international law. The principle of “effectiveness” and “submission” must be applied to find out whether a foreign country has jurisdiction to pass a decree which would have

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48 Central Government Notifications Nos. 47 to 51, dated the 25th February, 1953, and 1st March, 1953, respectively, published in the Gazette of India. By this notification the High Court in England, the Court of Sessions in Scotland, the High Court in Northern Ireland, the Court of Chancery of the Country Palatine of Lancaster and the Court of Chancery of the Country Palatine of Dar ham are considered as the Superior Courts of that territory. Similarly the Government of Great Britain have extended Part I of the Foreign judgments (Reciprocal Enforcement) Act, 1933 to the territories of the Union of India and the following Courts shall be deemed to be superior courts of the said territories for the purposes of Part I of the said Act: (a) All High Courts and Judicial Commissioners’ Courts. (b) All District Courts, (c) All other courts whose civil jurisdiction is subject to no pecuniary limit provided that the judgment sought to be registered under the said Act is sealed with a seal showing that the jurisdiction of the courts is subject to no pecuniary limits — vide the Reciprocal Enforcement of judgments (India) Order, 1953.

49 vide Government of India Notification No.2 86-36- Judicial, dated 27th March 1939, and Government of Burma Notification No. 141, dated 7th March, 1939. According to these notifications the following courts have been declared to be superior Courts for the purposes of section 44-A: *Burma*: — (I) High Court at Rangoon, (2) All District Courts in Burma.

50 Government of India, Ministry of Law, Notification No. S.R.O. 183, dated the 18th January, 1956. The 'reciprocating territory' has been specified by the Central Government as a 'superior court' under Explanation I of section 44-A of the Code.


53 Government of India, Ministry of Law, Notification No. S.R.O. 4, dated the 3rd January, 1956.) The High Court and the Courts of Appeal of the said 'reciprocating territory ' have been specified by the Central Government as 'superior courts' under Explanation I of Section 44-A of the Code.

54 (1963) 2 Mad L.J. 412
“international validity”. There is nothing in the reciprocating agreements between India and the United Kingdom which would make any decree passed by the courts in either country, valid in the other country, where it is not valid form the point of view of private international law.\textsuperscript{55}

8.5.2. General provision of recognition and enforcement of foreign judgment

“Judgment” is defined as the decision given by the judge by way of ‘decree’ or ‘order’.\textsuperscript{56} ‘Decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Further Section 2(14) define ‘order’ as the means of the formal expression of any decision of a civil court which is not decree. Under Section 2(6) “foreign judgment” means the judgement of a foreign court. Foreign court means a court outside India not established under the authority of central government. Therefore, the expression ‘foreign judgment’ means adjudication by a foreign court upon the matter before it. It does not mean a statement by foreign judge of the reasons for his order, since, if that were the meaning of the judgment, Section 13 would not apply to an order where no reasons were given.\textsuperscript{57} In the case of Middle East Bank Ltd. V. Rajendra Singh Sethia,\textsuperscript{58} an exparte decree was given under summary procedure under rule 14 of the Supreme Court of England. No defence was filed. The plaintiff’s evidence was not considered. Court held in the case that, it is not conclusive foreign decree in the context of section 13. It was held not to be executable.

Section 13 of the CPC lays down the fundamental rule as to when the foreign judgment has to be recognised. It provides that:

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

\textsuperscript{55} AIR 1958 All 775  
\textsuperscript{56} Code of civil procedure, 1908, Section 2(9)  
\textsuperscript{57} AIR 1953 Mad 261  
\textsuperscript{58} AIR 1991 Cal. 335
(a) Where it has not been pronounced by a Court of competent jurisdiction;

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

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

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

(e) Where it has been obtained by fraud;

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

Further Section 14 of the CPC the court presume the production of any document to be a certified copy of a foreign judgment and that such judgment was pronounced by a Court of competent jurisdiction. This presumption can be displaced if contrary appears on the record.

Rules laid down in Section 13 and 14 are not merely the rules of procedure, but the rule of substantive law. A foreign judgement cannot be held to be not conclusive in the absence of pleas or proof of material facts bringing the case within the exceptions enumerated in clauses (a) to (f) of Section 13. The Section is not confined to its application to plaintiffs. A defendant is equally entitled to non suit the plaintiff on the basis of a foreign judgement.59

8.5.3. Finality of the foreign judgment

The foreign judgment to be enforced by the Indian courts needs to be final and conclusive in it. It should operate as res judicata where it has been delivered.60

59 AIR 1928 Rang 319
60 Magan Bhai Chotu Bhai v. Mani Ben AIR 1985 Guj. 187
8.5.4. Foreign court must be competent court i.e., proper jurisdiction

Indian court recognises the judgment of the foreign court, if it is competent one in terms of the jurisdiction in the cause. Competency must be in international sense and not merely according to law of the foreign State or the law of the forum in which the court delivering the judgment functions. Competency of jurisdiction of foreign court is to be determined with reference of principles of international law. Unless a foreign court has jurisdiction in the international sense, a judgment delivered by that court would not be recognised or enforceable in India. The true basis of enforcement of a foreign judgment is that the judgment imposes an obligation on the defendant and therefore, there must be connection between him and the forums sufficiently close to make it his duty to perform that obligation. So far the personal action are concerned, competency of jurisdiction must be determined, not by the territorial law of the foreign State, but by the rules of Private International Law. A foreign court has jurisdiction in an international sense in the personal actions in the following cases, (1) where the defendant is a subject of the foreign country in which judgment is obtained, (2) where he is resident there when the action is commenced, (3) where he, in the character of plaintiff, has selected the foreign court in which he is afterwards sued, (4) where he has voluntarily appeared before the court and submitted to the jurisdiction of court, (5) where ha had contracted to submit himself to the foreign forum in which the judgment is obtained. But the case may be otherwise where the non resident foreigner is a subject of, the same sovereign power which legislate, although, even in such a case there must be an express power of territorial legislation conferred by the statute to give rise to the jurisdiction over him.

In case of submission by defendant, the court in the case of Mallappa Yellappa v. Raghvendra Sham Rao listed six categories in which the foreign court may be said to have the jurisdiction:

a) If the defendant is subject of a foreign country;
b) If the defendant is a resident of a foreign country when the action has begun against him;

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61 Shankar Govindan v. Lakshmi Bharati 7 AIR 1974 SC 1764
62 AIR 1974 SC 1764
63 AIR 1938 Bom. 173
c) If the defendant is served with the process while temporarily present within the foreign country;

d) If the defendant in his character as plaintiff in the foreign action has selected the forum where the judgment was given against him;

e) If the defendant has voluntarily appeared before the foreign court; and

f) If the defendant has contacted to submit to the jurisdiction of the foreign court.

The Indian courts have the opinion that if the defendant is not presence within the jurisdiction of the court, the court has no jurisdiction till the defendant submit to the jurisdiction of the court. Once the judgement has given against the defendant in a case where he submits himself to the court cannot later on take the plea that the court had no jurisdiction. Submission must be before the passing of the judgement, not after the passing of the judgement. A judgement which became nullity cannot become valid by reason the submission to the jurisdiction of the court.64

The Madras High Court in the *Ramanthan Chettiar v. Kalimutu Pillai*,65 lays down the circumstances when the foreign courts would have jurisdiction under this Section. The circumstances mentioned are as follow:

a. Where the person is a subject of the foreign country in which the judgement has been obtained against him on prior occasion.

b. Where he is a resident in foreign country when the action has commenced.

c. Where a person selects the foreign court as a forum as taking action in the capacity of a plaintiff, in which forum he is sued later.

d. Where the party own summons voluntarily appears.

e. Where by an agreement a person has contracted to submit himself to the forum in which the judgment is obtained.

In the case of *Y. Narasimha Rao v. Y. Venkata Lakshmi*,66 the Supreme Court in respect of the matrimonial dispute held that only those courts which the act or the

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64 *Narappa Naicken v. Govindaraja Naicken*, ILR (1934) 57 Mad. 824
65 AIR 1914 Mad. 556.
laws under which the parties are married recognises as a court of competent jurisdiction can entertain the matrimonial disputes in this regard unless both parties voluntarily, and unconditionally subject themselves to the jurisdiction of that court.

On many occasion the court has held that that conduct amounts to submission of the defendant to particular jurisdiction. Where in a case a defendant appeared before the court to protest the jurisdiction and when his protest failed he proceeded to defend the case on merit. It was held in the case that his conduct amounted to the submission. Now it is the general principle that if the defendant appears before the court to protest against the assumption of jurisdiction and then starts pleading on merits, then it amounts to submission. But mere intention to submit is not amount to submission. Further a plaintiff who files an action in a foreign court in himself bound by the judgement even if the judgement goes against him/her. It is the general principle of equity that when somebody invokes a jurisdiction, it also amounts to acceptance of jurisdiction if any counter claim of set off is claimed against him or if the defendant brings a counter action against him.67

Where a defendant appeared before the foreign jurisdiction in a suit, but failed to appear later and a decree was passed exparte, he cannot contest jurisdiction.68 Irregularities which do not affect the jurisdiction of the courts do not vitiate a foreign judgement.69 If the decree at the time when it was made was an absolute nullity, it cannot be subsequently and retrospectively clothed with jurisdiction by an application by the judgment debtor to the foreign court to set aside the ex parte decree.70

Based on these decision it is difficult to see how a foreign judgement given by the US court on the basis of long arm jurisdictional rule will be able to enforce in India, if the Indian defendant is in India and is not before the jurisdiction of US court. Neither he has contested the jurisdiction of US court nor did he file any reply to the case.

68 AIR 1937 Mad. 97
69 AIR 1934 Bom. 390
70 AIR 1933 Mad. 393
8.5.5. Judgment impeachable on merits

Section 13(b) categorically lays down the rule that if the foreign judgment is not given on the merit of the case then it cannot be recognised. Foreign judgement cannot be claim conclusiveness unless adjudication is shown to be a judicial consideration of tenability or justness of claim in relation to material on which it is based.71

In the case of Wazir Sahu v. Munsi Das,72 the court held that if the foreign court did not decide on some of the issue, it cannot be considered that the judgment was not on merit if a trial is held, evidence is taken, arguments are addressed and then the judgment is rendered, then such a judgment is on the merit, even though the defendant is absent. The court in the case of O.P Sharma v. Laal Gherilal,73 stated in clear terms that:

“An exparte judgment cannot be said to be not on merit. It may be or may not be. It is not the presence or the absence of defendant which can really condition the quality of a judgment as to its having been given on merits or not. What really a matter is whether the procedure according to which suit has been decreed requires the court to determine the truth or falsity of the contentions raised. Where it so requires and the court applies its mind to the contentions raised on either side, then the adjudications are on the merits.”

Further the Court in the above case laid down the test of judgment on merit. It held that to judge that a judgement of a foreign court may successfully pass the test of having been given on merits, such a judgement must not have been given either as a matter of penalty or as a matter of mere form. What really matters is whether the procedure according to which the suit has been decreed requires the court to determine the truth or falsity of the contentions raised on either side, there cannot but be a judgement on merits. Where the procedure, however, does not so require and a decree can be entered in favour of the plaintiff merely because the defendant has

71 ILR (1966) Mad. 18
72 AIR 1941 Pat. 109
73 AIR 1962 Raj. 231
failed to appear and the judgement is given in default, or where he has failed to apply for leave to defend, or where he has applied for leave to defend, or where he has applied for leave to defend, and such leave is refused, then such a judgement cannot be held to have been given on the merits within the meaning of the section 13(b). A decree passed in a suit brought under the provisions of Order 37, CPC without going into the merits of the case cannot be held to be a judgement on the merits of the case.\textsuperscript{74}

There is no judgement on the merits of the case when the defence was struck out without investigation and judgement was given in favour of the plaintiff.\textsuperscript{75}

Where the defence was filed by the defendant before Hong Kong court but the judgement was given exparte on the basis of plaintiff’s pleadings and documents tendered by him without going into controversy between the parties. Since the defendant did not appear at the time of hearing of suit to defend the claim, it is not judgement on merits.\textsuperscript{76}

The onus to prove non service of summons and fraud is on the judgement debtor. When there is an acknowledgement in the form of a letter, of the summons, it is not fraud and judgement although apparently in absentum is valid and binding. A decree of a foreign court, even if passed exparte will be binding on the parties thereto and will be conclusive under section 13 if evidence thereto and will be conclusive under section 13 if evidence was taken and the decision was given by the foreign court on a consideration of the evidence. But an exparte foreign decree passed in a summary manner under certain special procedure without going into the merits of the case or taking evidence, held not to be conclusive under section 13(b) and cannot be executed in India or where the foreign judgement is not given on the examination of the points at controversy between the parties and seems to have been given exparte on the pleadings and documents of the plaintiff without going into the controversy

\textsuperscript{74} id.
\textsuperscript{75} ILR 40 All 270
\textsuperscript{76} A.B.N. NV v. S.D. Choksi, AIR 1990 Bom 170
between the parties, as the defendant was then not present, held it was not a judgement on merits. Therefore, it was held not to be conclusive.\textsuperscript{77}

To say that a decree has been regularly is completely different from saying that the decree has been passed on merits. An ex parte decree passed without consideration of merits may be decree passed regularly, if permitted by the rules of that court. Such a decree would be valid in that country in which it is passed unless set aside by the court of appeal. However, even though it may be a valid and enforceable decree in that country, it would not be enforced in India if it has not been passed on merits. Therefore, for a decision on the question whether a decree has been passed on merits or not, the presumption under section 114 of the Evidence Act would be of no help.\textsuperscript{78}

\textbf{8.5.6. Judgement on incorrect view of law}

If the decision of the foreign courts is contrary to international law, then the foreign courts judgement will not be recognised. In the case of copyright the origin and development of the concept has been from 1887 onwards due to the various international conventions as Berne Convention, Rome, TRIPs, WCT, WPPT etc. These conventions from time to time have laid down the laws relating to copyright internationally. Member countries have legislated there laws on the basis of the convention. Therefore if the foreign judgement is against any incorrect application of the national law or international law, then it cannot be accepted. in Indian context in copyright issue India is not party to internet treatise i.e., WCT and WPPT, though majority of countries are party to the convention. Therefore any judgement given by the foreign court applying these foreign convention if violates the fundamentals of Indian copyright law where the judgement has to be enforced then it is difficult to enforce.

\textbf{8.5.7. Judgment against Nature justice}

Justice is the ultimate objective and requirement out of any given case. Without proper and natural justice a judgment is vague and against law. Therefore

\textsuperscript{77} Middle East Bank Ltd. v. Rajendra Singh, AIR 1991 Cal. 335
\textsuperscript{78} International Woollen Maills v. Standard wool (UK) Ltd. AIR 2001 SC 2134
before a foreign judgment is enforced in India the CPC gives the option to parties to set aside the foreign judgment if it is not according to the nature justice.

A foreign judgement of a competent court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured, correctness of the judgment in law on evidence is not predicted as a condition for recognition of its conclusiveness by the municipal court. Neither the foreign substantive law, nor even the procedural law of the trial court be same or similar as in the municipal court. A judgment will not be conclusive however if the proceeding in which it was obtained is opposed to natural justice. The words of the statute make it clear that to exclude a judgement under cl. (d) from the rule of conclusiveness the procedure must be opposed to natural justice.\(^79\)

A foreign judgement cannot be challenged on the ground of mistake. The appropriate forum where it could have been challenged on the mistake was by way of review or appeal. Section 13 lays down the grounds on which judgment can be assailed and mistake as to merits is not considered as one of such grounds on which a foreign judgement can be assailed and mistake as to merits is not considered as one of such grounds. It cannot be said that because there is an error of calculation, the proceedings in which that judgment was obtained were opposed to natural justice.\(^80\)

The supreme court observed in one case that “it is extremely difficult to fix with precision the exact cases in which the contravention of any rule of procedure is sufficiently serious to justify a refusal of recognition or enforcement of a foreign judgment and it is difficult to trace a definite gradations of injustice so as to reach a definite point at which it deserves to be called the negation of natural justice”.\(^81\)

The court acknowledged the difficulty in defining the scope of the natural justice, but stressed that when the issue is related to foreign judgment natural justice merely relates to the alleged irregularities in the procedure adopted by the rendering court and has nothing to do with the merits of the case. If the proceeding is in

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\(^{79}\) AIR 1963 SC 1  
\(^{80}\) AIR 1957 Madh Bh. 74  
\(^{81}\) Sankar Govindan v. Lakshmi Bharati AIR 1974 SC 1764.
accordance with the practice of the foreign court but that practice is not considered in accordance with the natural justice, the Indian court cannot consider them to be conclusive.\textsuperscript{82}

Considering the practice of the courts in India three grounds are mostly taken into considerations as determining factors for the principle of natural justice in respect of foreign judgement;

- If the defendant was not served with any notice of the proceedings; or
- If the defendant was not given adequate opportunity to present the case; or
- If the judge was personally interested in the subject matter of the suit.\textsuperscript{83}

Where a judgement is passed by a court composed of persons who have an interest in the judgement and its result, it would be contrary to natural justice. Bias on part of judge cannot be inferred from the fact that he suggested that possibility of compromise of the dispute between the parties to the suit be explored.\textsuperscript{84}

\textbf{8.5.8. Judgement vitiated by fraud}

Section 13 of the Code specifically lays down that a judgement that a judgement of foreign court if obtained by fraud will not be entertained in the India court. Supreme court have observed in the \textit{Sankaran and Laxshmi} case that an action to set aside a judgement cannot be brought on the ground that it has been decided wrongly, namely, that on the merits the decision was one which should not have been rendered, but it can be set aside if the court was imposed upon or tricked into giving the judgement. In the case of \textit{Satya v. Teja},\textsuperscript{85} the court refused to recognise the foreign judgement of the Navada court relating to divorce decree on the ground of fraudulent misrepresentation of domicile and residence issue of the parties. Under the section

\begin{itemize}
\item \textsuperscript{83} AIR 1963 SC 1
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} 1975 2 SCR 1971; AIR 1975 SC 105.
\end{itemize}
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13(e) CPC, the foreign judgement is open to challenge on the ground of fraud. Fraud as to the merits of the respondent’s case may be ignored. But the fraud as to the jurisdiction of the particular court is a vital consideration in the recognition of the decree passed by the court.\(^{86}\) A judgement in absence of wife in favour of wife in a foreign country without the wife submitting to the jurisdiction of that foreign court, can be challenged in India on the ground of fraud or on the ground it was obtained by false representation about a jurisdiction fact.\(^{87}\)

Merely because a plaintiff obtains a decree upon the evidence which is believed by the court, but which is in fact is not true, the decree is not obtained by fraud within Section 13(e), there must be fraud connected with the procedure in the suit itself.\(^{88}\)

8.5.9. Judgement sustaining claim founded on breach of Indian law

Where a claim in an English court is not based on the law as prevailing in India, and the plaintiff, rightly or wrongly alleges that the parties are governed not by the Indian law, but the English law and the English court accepts that plea, no objection can be taken to its judgement under section 13(f), CPC, on the ground that it sustains a claim under based on a violation of the law of India.\(^{89}\)

8.6. CONCLUSION

Recognition and enforcement of foreign judgement relating to cyberspace copyright has to clarify the same test which are applicable for the traditional case laws. Almost the grounds applicable to refuse the foreign judgements are same everywhere. It is the interpretation of those grounds which create these problems for example the jurisdiction requirement of the Japanese court are different then the Indian courts. Therefore, harmonising or universalising the law relating to foreign judgement will to a great extent reduce the anomalies of the issue resulting in recognition and enforcement of foreign judgement more often.

\(^{86}\) id.

\(^{87}\) id.

\(^{88}\) (1941) 1 MLJ 140

\(^{89}\) AIR 1952 Cal. 508