State of Gujarat

Vs

Vora Fiddali Badruddin Mithibarwala

Civil Appeals Nos. 182 - 186 of 1963

(M. Hidayatullah, K. Subha Rao, J. C. Shah JJ)

30.01.1964

JUDGMENT

AYYANGAR J. –

In this batch of five analogous appeals, by special leave, the main question for determination is whether the rights which were in controversy between the parties in the courts below could be enforced by the Municipal courts; or in other words, whether or not "Act of State" pleaded by the State of Gujarat is an effective answer to the claims made by the respective respondents to the rights over forests claimed by them in the suits giving rise to these appeals.

Vora Fiddali Badruddin Mithibarwala is the respondent in Civil Appeals Nos. 182 and 184 of 1963. Vora Hakimuddin Tayabali Amthaniwala is the respondent in Civil Appeal No. 183 of 1963. Mehta Kantilal Chandulal is the respondent in Civil Appeal No. 185 of 1963, and Pathan Abbaskhan Ahmedkhan is the respondent in Civil Appeal No. 186 of 1963. In all these Appeals the State of Gujarat is the appellant.

The course these litigations have taken in the courts below may briefly be stated as follows : The respondents in Civil Appeal No. 182 of 1963, is the assignee of the rights of one Vora Hatimbhai Badruddin and was brought on record as plaintiff during the pendency of the suit in the trial court, namely, the court of the Civil Judge (Senior Decision) at Godhra, being Civil suit No. 115 of 1950, for an injunction and ancillary reliefs to restrain the appellant and its officers from interfering with the plaintiff's alleged rights to cut and carry away timber etc., from the Gotimada jungle, rasing his rights under a contract dated August 21, 1948, for a period of three years on payment of a consideration of Rs. 9,501 to the Jagirdar of the village, Thakore Sardar Singh Gajesingh. Civil Suit No. 134 of 1950, giving rise to Civil Appeal No. 184 of 1963, was also instituted by the same plaintiff who claimed by virtue of an assignment of the rights under a similar contract in respect of another forest in village Nanirath for a period of four years, the consideration being the cash payment of Rs. 9,501. Civil Suit No. 106 of 1951, giving rise to Civil Appeal No. 183 of 1963, was instituted by Vora Harikmuddin Tayyabali Amthaniwalla. His claim was based on an agreement with the Jagirdar, dated December 7, 1948, for a period of four years for a consideration of Rs. 6,501 in respect of the forest in village Rathda. All these three suits, in which the reliefs claimed were similar, were tried together and disposed of by a common judgment, delivered by the trial court on January 3, 1956. All the suits were dismissed. The Court took the view that the rights of the plaintiffs, such as they were, could not be enforced by the courts. Civil Appeal No. 185 of 1963 arises out of Suit No. 80 of 1953, filed by Mehta Kantilal Chandulal. He owned the Inami villages

Lalekapur and Narsingpur and alleged that he had given a contract for cutting the trees in his villages for a consideration of Rs. 11,000 on May 29, 1948, for a period of four years, and that his transferee had been prevented by the State from exercising those rights. He also prayed for a similar injunction, as in the other suits. This suit was also dismissed by the trial court by its judgment, dated March 23, 1956. The last of the suits is Suit No. 90 of 1955, giving rise to Civil Appeal 186 of 1963. The plaintiff had claimed to have obtained similar right of felling trees in the forest belonging to the Jagirdar of Mayalapad on August 16, 1948 for Rs. 1,191 for a period of three years. This suit was decreed by a judgment dated August 6, 1956. The unsuccessful plaintiffs filed four appeals to the District Judge, Panch Mahals, at Godra, being appeals Nos. 17, 18, 19 and 48 of 1956. All the appeals were heard together and, by a common judgment, were dismissed on February 28, 1957, the judgment of the trial court being confirmed. The 5th appeal, being appeal No. 74 of 1956, was filed by the State. The appeal was allowed by a separate judgment, dated September 30, 1957, dismissing the suit. The plaintiffs-respondents filed five second appeals, being Second Appeals Nos. 105, 106, 107, 112 and 193 of 1960 in the High Court of Gujarat. The appeals were heard together and were allowed on January 24, 1961 with the result that the suits were decreed and the appellant was restrained by an injunction from interfering with the plaintiff's enjoyment of the rights in the forests, as claimed by them. As the State failed to obtain the necessary certificate of fitness from the High Court, it moved this Court and obtained special leave to appeal. And that is how these appeals have come up to this Court. These appeals were first heard by a Bench of five Judges, and it was directed that the matter be placed for hearing by a larger Bench, as the Bench was of the opinion that the decision of this Court in Virendra Singh v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415) required reconsideration. That is how these appeals have been placed before this special Bench.

Before dealing with the questions that arise for determination in these appeals, it is necessary and convenient at this stage to set out the course of events leading up to the institution of the suits aforesaid, giving rise to these appeals. The several villages, the forest rights in which are in dispute in these cases, formed part of the State of Sant. The steps in the transition of this State under its ruler who was designated the Maharana into an integral part of the territory of the Union of India conformed to the usual pattern. With the lapse of the paramountcy of the British Government on the enactment of the India Independence Act, the ruler achieved complete sovereignty. Soon thereafter by an instrument of accession executed by the ruler, the State acceded to the Dominion of India so as to vest in the latter power in relation to 3 subjects - Defence, External Affairs and Communications. On March 19, 1948 the ruler entered into a merger agreement with the Governor-General of India by which "with a view to integrate the territory with the Province of Bombay at as early a date as possible", the full and exclusive authority and powers in relation to the administration of the State were ceded to the Dominion Government. The agreement was to take effect from June 10, 1948. It is necessary to set out two of the Articles of this Agreement. Article 1 ran thus :

> "1. The Maharana of Sant hereby cedes to the Dominion Government full exclusive authority, jurisdiction and powers for and in relation to the governance of the State and agrees to transfer the administration of the State to the Dominion Government on the 10th day of June, 1948 (hereinafter referred to as "the said day").

And from the said day the Dominion Government will be competent to exercise the said powers, authority and jurisdiction in such manner and through such agency as it may think fit."

Under Article 3 of the agreement, the ruler agreed to furnish to the Dominion Government before October 1, 1948 a list of all his private properties over which he was, under the terms of the agreement, to retain full ownership and enjoyment.

After this agreement came in force on June 10, 1948, the Central Government delegated its functions to the Bombay Government by virtue of the powers vested in it by the Extra-Provincial Jurisdiction Act, 1947. Subsequently, Shri V. P. Menon, Secretary in the Minister of State, wrote a letter to the Maharana of Sant on October 1, 1948 (Ex. 194). This letter was entitled a "Letter of Guarantee" and was to be treated as supplementary to the Agreement of Merger dated March 19, 1948. Amongst other matters, it provided by cl. 7 :

> "No order passed or action taken by you before the date of making over the administration to the Dominion Government will be questioned unless the order was passed or action taken after the 1st day of April, 1948, and it is considered by the Government of India to be palpably unjust or unreasonable. The decision of the Government of India in their respect will be final."

In view of the forthcoming integration of the territory of Indian State into the Dominion of India, the Government of India Act, 1935, was amended and s. 290-A was inserted. In exercise of the powers conferred by that section, the Governor-General of India promulgated the State Merger (Governor Provinces) Order, 1949, on July 27, 1949 which came into force on August 1, 1949. As a result of that order the integration of Indian States, including the Sant State with that of the province of Bombay, was completed with effect from that date, namely August 1, 1949.

In the meantime, the ruler of the Sant State passed or issued "a resolution" or Tharao on March 12, 1948, which has given rise to the present series of litigations. Under this "instrument" marked as Ex. 192, to use a neutral expression in view of the controversy as to its nature, called Tharao, an order was passed by the Maharana of Sant State whose terms will be referred to later and discussed in greater detail, granting forest rights to holders of certain specified tenures. The holders of such tenures in the Sant State entered into a number of agreements with this parties, parting with their rights in the forest timber, etc., for a specified period, in consideration of cash payments made by those third parties to the holders of the tenures. It is not necessary to set out in detail all those agreements; it is enough to mention, by way of a sample the agreement dated August 21, 1948 (Ex. 175) whereby the tenure-holder granted as briefly adverted to earlier to Vohra Hatimbhai Badruddin Mithiborwala the right to cut and remove timber and firewood from the forest of Mouja Gothimada for a consideration of Rs. 9,501 for a period of three years. The written agreement contains quite a number of clauses which it is not necessary to set out for the purposes of this case. After the aforesaid grants, correspondence started between the grantors and the grantees on the one hand, and the State Forest Department on the other. When the District Forest Officer was informed about the transactions aforesaid, and the grantees applied for authorisation to remove timber etc., the Forest Authorities ordered that no export outside would be permitted, pending receipt of orders from Government. They also required an undertaking from the purchaser that he would abide by the decision and orders passed by the Government. Thereupon the grantor, Thakur Sardar Singh Gaje Singh gave an undertaking to abide by the decision and orders of the Government of Bombay in respect of the Gotimada forests "rights over which were conferred on me by Santrampur State Government on March 12, 1948 in their resolution No. G. 371, dated March 12, 1948." The Divisional Forest Officer, by his order dated January 10, 1949, passed an order under the provisions of r. 4 of the Rules under s. 41 of the Indian Forest Act authorising the grantee to remove forest produce like timber firewood and charcoal from Gothimada forest.

This was followed by a memorandum by the Conservator of Forests North Western Circle of the Bombay State by which the Divisional Forest Officers were directed to continue to issue authorisations to contractors of Jagirdars who had obtained rights over the forests in the Sant State

under the Tharao of the ruler, dated March 12, 1948. He however, pointed out that until the question of the rights of the grantees over private forests was finally settled by the Government an undertaking should be taken from the persons concerned that they would abide by the orders passed by the Government in respect of their rights. This, as stated already had been obtained by the District Officers even earlier. On July 8, 1949, the Government of Bombay passed an order in which they stated "Government considers that the order passed by the ruler of the Sant State under his No. 371, dated March 12, 1948, transferring forest rights to all the Jagirdars of the Jagir villages, are mala fide and that they should be cancelled....." This decision or order was, however, not communicated to the Jagirdars or their contractors though effect was given to it by the Forest Authorities by stopping all further fellings. Some time thereafter the respondents issued notices under s. 80 of the Civil Procedure Code to the Government of Bombay seeking respect for their rights under the Tharao of March, 1948 and after waiting for two months filed the suits out of which these appeals arise. By the written statements which they filed, the Government of Bombay raised principally the defence that the act of the ruler in passing the Tharao was not binding on them as the successor State and that they in exercise of their sovereign authority, had cancelled the concession as unreasonable and mala fide by their order, dated July 8, 1949, already referred. It might be mentioned that after the suit was instituted and while it was pending before the trial judge a formal resolution of the Government of Bombay was passed and published on the 6th of February, 1953, in which they set out the legal position that the rights acquired under the Tharao were not enforceable as against the Bombay Government as the successor State unless those rights were recognised and that as on the other hand the same had been specifically repudiated, the Jagirdars and their contractors had no title which they could enforce against the Government.

We have already narrated the course of the litigations and this would be the convenient stage at which to indicate the grounds on which the learned Judges of the High Court have upheld the claims of the plaintiffs who are the respondents in the several appeals before us. There were two principle points that were urged on their behalf before the learned Judges. The first was that the Tharao of March 12, 1948, was in truth and substance a 'law', a legislative act of the rule of Sant, which was continued under Art. 372 of the Constitution and that in consequence the rights obtained by the grantees thereunder could not be abrogated or set at naught by a mere executive order which the Government resolution of February, 1953, undoubtedly was. This submission was rejected by the Court holding that the Tharao was merely a grant originating in an administrative or executive order of the ruler. The other contention was that through the agreement of merger by which the integration of the Sant State with the Dominion of India brought about an "act of state" and that accordingly, no rights based on the agreement of merger, dated March 19, 1948, or in the supplementary letter, dated October 1, 1948, could be asserted or enforced in the Municipal Courts of the successor State unless the same were recognised by Government still cl. 7 of the letter of Shri V. P. Menon, dated October 1, 1948, to the ruler could be referred to and relied on for the purpose of drawing an inference that the right of the Government to repudiate the grant by the ruler had been waived. This submission was accepted and it was on this reasoning that the learned Judges have decreed the suits of the several plaintiffs.

It is the correctness of these two conclusions that are being challenged before us, the first by the respondents and the other by the appellant State. Arising from the submissions of the learned Attorney-General the points that require examination are as to the legal effect of the accession, integration and merger of the Sant State in the Indian Union, on the rights that the plaintiffs acquired under the Tharao, dated March 12, 1948 and secondly whether the provisions in s. 299 of the Government of India Act, 1935, or those contained in Part III of the Constitution affect the nature or enforceability of those rights. The questions to be considered under the first head in

particular are :-

> (a) Whether the rights acquired under the previous ruler are enforceable against the Governments of the Union and the States without those rights being recognised by the appropriate Government.
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> (b) What is the effect of the letter of the Government of India, dated October 1, 1948, on the right of the Government to refuse to recognise a grant under the Tharao.
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> (c) What is the effect of the Government's communication to the Chief Conservator of Forests dated July 8, 1949 and of the resolution of Government of February, 1953.

Under the second head, besides the constitutional guarantees protecting rights to property contained in the Government of India Act and the Constitution, the effect in the first instance of s. 5 of the Government of India Act, 1935, of the acceding States becoming part of the Dominion of India and later of the manner in which the Constitution of India was framed.

The other question that requires consideration is whether the Tharao dated March 12, 1948 is merely a grant originating in an executive order or is it a law which is continued in operation by Art. 372 of the Constitution.

In Virendra Singh's case ((1955) 1 S.C.R. 41) this Court held that even in the basis that the merger of the Indian States in the Indian Union and the treaties by which that was accomplished were acts of State, still by reason of the manner in which the Constitution of India was brought into being and because of the provisions which it contained, in particular those guaranteeing property rights of its citizens, the acquired rights of the inhabitants of the Indian States quoad their rulers could not, after the Constitution, be annulled or abrogated by arbitrary executive action on the part of the Union or State Governments. The learned Judges thus assumed as correct the rule of Public International Law relevant to that context expounded by the Privy Council in a number of decisions rendered on appeals from the Indian High Courts. For this reason we consider that it would be convenient for a proper appreciation of the points now in controversy to premise the discussion by briefly setting out the principles underlying these decisions of the Privy Council, reserving their detailed examination to a later stage. These principles have been tersely summarised and the ratio of the rule explained by Lord Dunedin in Vajesinghji v. Secretary of State for India etc. (51 IA 357) in a passage which has been often quoted in later cases on the subject and we consider that it would be sufficient if we extract it. The learned Lord said :

> "When a territory is acquired by a sovereign state for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants could enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties."

This has been accepted as expressing the constitutional law of the United Kingdom and the same has been applied not merely to claims or titles which were sought to be enforced against the Indian Government but also in other parts of the British Empire - See Cook v. Spring ((1899) A.C. 572). This was the law laid down and given effect to by the Privy Council until India attained independence.

Virendra Singh v. State of Uttar Pradesh ((1955) 1 S.C.R. 415), however, struck a different note particularly as regards the matters covered by the sentences we have given in italics in Lord Dunedin's exposition of the law, and to this decision we shall immediately turn. The facts of the case were briefly these : On January 5, 1948, the ruler of Sarila granted the village Rigwara to the petitioners who moved this Court while on the 28th of January, 1948, the ruler of Charkari granted certain other villages to the same petitioners. As the rights of the petitioners were sought to be nullified by an order of the Government of Uttar Pradesh they filed a petition under Art. 32 of the Constitution praying that the order of the Government of Uttar Pradesh revoking the grants in their favour be declared void and for consequential reliefs.

A few more facts in regard to the constitutional history of those two States is necessary to be stated to appreciate some of the matters which figured in the decision in Virendra Singh's case ((1955) 1 S.C.R. 415). After the date of the grant in favour of the petitioners 35 States in Bundelkhand and Bhagalkhand, including Charkari and Sarila agreed to unite themselves into a State to be called the United State of Vindhya Pradesh. While this Union was in existence, certain officials of this Government interfered with the rights of the petitioners but the Government of the United State of Vindhya Pradesh issued orders directing the officers to abstain from such interference. Subsequently the rulers of the 35 States dissolved their Union and ceded to the Government of Indian Dominion all their powers and jurisdiction and the Dominion constituted the area into a Chief Commissioner's province for the purpose of administration, but the four villages granted to the petitioners were, however, detached from the centrally administered State and absorbed into Uttar Pradesh. On August 29, 1952, the Governor of Uttar Pradesh revoked the grants made in favour of the petitioners. The question before the Court was whether this order of revocation of the grants made by the former rulers was justiciable in courts and if justiciable, valid.

The judgment of the Court was delivered by Bose J. The learned Judge after stating the question arising for decision as being "whether the Union Government had the right and the power to revoke these grants as an act of State ?", pointed out that jurists had held divergent views on this matter. At one extreme, he said, was the view expressed by the Privy Council in a series of cases to which reference was made and as summarising their effect the passage from the judgment of Lord Dunedin we have extracted already was cited. At the other extreme was the view of Marshall C.J., in United States v. Percheman (32 U.S. 51 at pp. 86-87) from which he quoted the following :

> "It may not be unworthy of remark that it is very unusual, even in case of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be out-raged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; by their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory ? ..... A cession of territory is never understood to be a cession of the

> property belonging to the inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

After referring to a few other decisions of the English Courts the learned Judge proceeded :

> "We do not intend to discuss any of this because, in our opinion, none of these decisions has any bearing on the problem which confronts us, namely, the impact of the Constitution on the peoples and territories which joined the Indian Union and brought the Constitution into being.....
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> Now it is undoubted that the accessions and the acceptance of them by the Dominion of India were acts of State into whose competency no municipal court would enquire; nor any Court in India, after the Constitution, accepted jurisdiction to settle any dispute arising out of them because of Article 363 and the proviso to Article 131; all they can do is to register the fact of accession..... But what then; Whether the Privy Council view is correct or that put forward by Chief Justice Marshall in its broadest outlines is more proper, all authorities are agreed that it is within the competence of the new sovereign to accord recognition to existing rights in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them and these laws can, and indeed when the occasion arise must, be examined and interpreted by the municipal courts of the absorbing State."

The learned Judge then went on to point out that the title of the petitioners to the disputed villages had not been repudiated upto January 26, 1950. Because of the non-exercise of the right to repudiate till that date, the petitioners were admittedly in de facto possession of the villages and the learned Judge adverted to the circumstance that those possessory rights could have been asserted and enforced against all persons except the rulers who granted the lands, and except possibly the succeeding State. Considering it unnecessary to pronounce whether these rights could be enforced against the rulers as well as the Dominion of India as the succeeding sovereign, he observed that as those rights were factually in existence at the date of the Constitution and as by that date the subjects of the rulers of Charkari and Sarila had become the subjects of the Union, there could be no question of the Union Government claiming to exercise an "act of State" operating to deprive the petitioners of their property following in this respect the well-known decisions of Walker v. Baird ((1892) A.C. 491) and Johnstone v. Pedlar ((1921) 2 A.C. 262). He further explained that "the Constitution by reason of the authority derived from and conferred by the peoples of this land blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State now seeks to uphold."

The passage extracted and indeed the entire judgment is replete with a description of the poetry of India's constitutional evolution as an unified State during the most momentous period of her history from the Declaration of Independence on August 15, 1947, to the coming into force of the Constitution on January 26, 1950 and of the saga of the march of the subjects of the former Indian princes from being subjects of an autocratic ruler to a modern democatic set up in which they are

full-fledged citizens of India, in language at once picturesque and of authentic eloquence. We should not be understood to minimise in any manner the political significance of the events described or underrate their importance, content or meaning if we differ somewhat from certain of the conclusions drawn on matters which are relevant for the purposes of the points arising for decision in these appeals.

Pausing here we ought to point out that several decisions of this Court subsequent to Virendra Singh's case ((1955) 1 S.C.R. 415) of which it is sufficient to refer to M/s. Dalmia Dadri Cement Co. Ltd. v. The Commissioner of Income Tax ((1959) S.C.R. 729), Jagannath Agrawala v. State of Orissa ((1962) 1 S.C.R. 205), Promod Chandra Deb v. The State of Orissa ((1962) 1 Supp. S.C.R. 405) and State of Saurashtra v. Jamadar Mohamad Abdulla ((1962) 3 S.C.R. 970) have proceeded on the acceptance of the constitutional doctrine enunciated by the Privy Council. We shall be referring to them later, but before doing so it is necessary to set out certain matters which are not in controversy.

The native Indian rulers were undoubtedly sovereign in the territories under their jurisdiction and they parted with their sovereignty in stages, firstly on accession, then on integration and finally by what has been felicitously termed in the White Paper on Indian States as 'unionization' i.e., by State territory becoming part and parcel of the territory of the Union of India which meant the complete extinction of their separate existence and individual sovereignty and of their States as separate political units. Proceeding next to deal with Virendra Singh's case ((1955) 1 S.C.R. 415) a close analysis of the reasoning underlying the decision discloses the following as its ratio :

> (1) There were two schools of thought as regards the effect of a change in sovereignty in respect of the enforceability of the rights of private individuals against the succeeding sovereign. At one end of the scale were the decisions of the Privy Council which proceeded on the acceptance of the principle, that rights enforceable against the previous ruler or sovereign ceased to be enforceable by the Municipal Courts of the succeeding sovereign unless and until a competent authority or organ of the succeeding sovereign recognised those rights. The passage in the judgment of Lord Dunedin in Vajesingji's case (51 I.A. 357) was typical of this view. On the other hand, there was another and, if one might say so, an opposite view expressed in the decisions of the Supreme Court of the United States of which the classic exposition by Chief Justice Marshall in Percheman's case (32 U.S. 51 at pp. 86-87) was typical, that the proper and just rule of Public International Law which should be given effect to by municipal courts was that the changes in sovereignty over a territory did not or should not have any effect on the rights of the private individuals even as regards the enforceability of their claims as against the State and that it was the obligation certainly moral, if not also legal, of the succeeding sovereign to give effect to such rights previously acquired by grants from the previous sovereign. After pointing out these divergent views the learned Judges, in Virendra Singh's case ((1955) 1 S.C.R. 415), considered it unnecessary to express their opinion as regards the correctness or acceptability of either view, but proceeded, however, on the assumption that the constitutional doctrine as enunciated by the Privy Council appealed to the facts of the case before them.
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> (2) Starting from the position that the petitioners obtained a good title to the villages granted to them by the rulers of Sarila and Charkari, they proceeded to analyse the nature of the title which they had under the grants. As a result of this examination

they arrived at the conclusion that even on the basis of the decisions of the Privy Council, their title was only voidable at the option of the succeeding sovereign. They recognised that the changes that took place in the constitutional position of the State of Charkari and Sarila undoubtedly brought in a change in the sovereignty of that territory and hold that the changes thus brought about including the treaties which marked the transition were "Acts of State" and that the interpretation or enforcement of rights under the treaties was outside the jurisdiction of municipal courts. The petitioners, they held, could not, therefore, obtain any advantage by reliance on any provision in the treaty safeguarding their rights, for apart from the treaties being "Acts of State" they were engagements between two sovereign States and enforceable between them at the instance of the high contracting parties through diplomatic channels and not by recourse to municipal courts, and the petitioners not even being parties to the treaties could not obviously claim any right to enforce them. In this connection the terms of Art. 363 of the Constitution which contained an express embargo on the enforcement by the municipal courts of the provisions of these treaties were adverted to as reinforcing this position.

(3) If guarantees contained in the treaties be put aside, the next question to be considered was whether the Governments which emerged as a result of the constitution, were competent to avoid or repudiate the titles obtained by the petitioners under the previous ruler by an "Act of State". They answered this question in the negative for four reasons :

(i) The constitution emerged as a result of the conjoint action of the subjects of the former Indian rulers and the people of former British India. When as a result of this joint effort the Constitution was brought into existence there was no question of conquest or cession so as to attract those doctrines of Public International Law relating to the effects of rights arising out of changes in sovereignty brought about by conquest, cession, treaty etc.

(ii) The subjects of the former India rulers because, when the Constitution emerged, Indian citizens, and as against its own subject or citizens there was no question of any "Act or State" by any Indian Government.

(iii) Even if the previous rulers had vested in them autocratic powers to revoke grants made by them in favour of their subjects, the Government of the Union and the States which were functioning under a Constitution which contained fundamental rights guaranteeing protection of property rights against arbitrary executive action could not claim to exercise those arbitrary powers which they might have inherited from the previous rulers, and

(iv) The petitioners had at the commencement of the Constitution a possessory title to the property granted to them and had also a right at that date, to continue in possession unless and until their title which was voidable was extinguished by repudiation by the Governments which were established by the Constitution. These proprietary rights were, however, protected by Arts. 19(1)(g) and 31(1) of the Constitution and so the petitioners could not be deprived of their proprietary rights except by competent legislation enacted after the commencement of the Constitution.

We shall now proceed to examine the above reasoning of the learned Judges. Reserving for later consideration the arguments addressed to us regarding the divergent views of judges, jurists and writers on Public International Law on the topic of the enforceability of the rights derived from previous sovereigns against a succeeding sovereign on a change of sovereignty, we shall proceed on the same lines as in Virendra Singh's case ((1955) 1 S.C.R. 415) viz., on the acceptance of the rule as enunciated in the decisions of the Privy Council.

It is necessary, first to understand the precise scope and implications of these decisions and of the law explained in them. The earliest of these usually referred to in this connection is Secretary of State for Indian v. Kamachee Boye Sahiba ((1859) 7 Moo. I.A. 476-13 Moo. P.C. 22) which was concerned with the justiciability in municipal courts of a seizure by the East India Company of not merely the Raj but even of the private properties of the Raja of Tanjore. The Privy Council held in a judgment delivered by Lord Kingston that as the seizure had been made by the Company as a sovereign power the municipal courts "had no means of forming or the right of expressing if they had formed any opinion of the propriety or the justice of that act." That is, however, a different aspect of that is termed 'Act of State' from what is strictly relevant to the facts before us. That decision was referred to with approval by the Privy Council in a case from India - Secretary of State for India in Council v. Bai Rajbai (42 I.A. 229) where the point in controversy was somewhat akin to those in the present appeals. The question at issue before the Privy Council was whether the respondent was entitled to the continued ownership and possession of a village called Charodi in the province of Gujarat. The respondent's title to the village was ultimately based on rights claimed to have been granted by the Gaekwar of Baroda. The territory in which the village was situated was ceded by the Gaekwar to the British Government in 1817. The claim of the respondent to full ownership of the property was not recognised by the Indian Government after the cession and Government held that the respondent had no more than a leasehold interest. The question before the Privy Council was whether the respondent was entitled to assert in municipal courts rights more extensive than what had been recognised by the authorities. Dealing with this Lord Atkinson delivering the judgment of the Board stated :

> ".....It is essential to consider what was the precise relation in which the kasbatis (respondents) stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new sovereign, of which they were thereafter possessed. The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course, this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these antecession rights of the kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for enquiry in this case. This principle is well-established, though it scarcely seems to have been kept steadily in view in the lower courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of Secretary of State for India v. Kamachee

> Boye Sahiba ((1859) 7 Moo. I.A. (476) decided in the year 1859, and Cook v. Sprigg (1899) A.C. 572) decided in the year 1899."

This passage would appear to indicate that the effect of the change of sovereignty is not to treat rights previously enforceable against the former ruler as only voidable at the instance of the succeeding sovereign, but to effect a complete destruction of those rights until by recognition or by legislation of the succeeding sovereign the same is obtained by the previous grantee. A question very similar to Bai Rajbais case (42 I.A. 229) arose in Vajesingji's case (51 I.A. 357) where the statement of the law as explained by Lord Atkinson was approved and Lord Dunedin, as already stated, conveyed the same idea when he said :

> "Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers recognised. Such rights as he had under the rule of predecessors avail him nothing."

It need hardly be stated that this passage, just like that extracted from Lord Atkinson, is wholly inconsistent with the theory that an inhabitant of a territory in which there has been a change of sovereignty carries with him a voidable title to property which inheres in him until by some positive act of the new sovereign he is divested of that right.

Coming nearer to the present times we have the decision in Secretary of State v. Rustam Khan (68 I.A. 109) which related to the enforceability of the right to certain land claimed to have been acquired under the Khan of Kalat against the British Government after the cession by the Khan of the territory which included the villages in which the lands of the respondent were situate. For the appellant the plea raised was 'Act of State' and the decisions of the Board in Bai Rajbai's case (42 I.A. 229) and Vijayesingji's case (51 I.A. 357) were relied on. Among the submissions made to the Board on behalf of the respondent we would refer to two as of some relevance to the points under consideration in these appeals. The two contentions were : (1) that a mere change in sovereignty was not to be presumed to disturb the rights of private owners, and the terms of the cession by which full sovereignty was transferred were to be construed as passing only public property - relying for this proposition on Amodu Tijani v. Secretary Southern Nigeria ((1921) 2 A.C. 399), (2) that the effect of a change in sovereignty in regard to title to land which had been perfected under a previous sovereign was different from that in regard to personal obligations. For the latter proposition support was sought on the observations of Lord Alverstone C.J. in West Rand Central Gold Mining Co. v. Rex ((1905) 2 K.B. 391) reading :

> "It must not be forgotten that the obligation of conquering States with regard to private property and private individuals, particularly land to which title had already been perfected before the conqueror annexation are altogether different from the obligations which arise in respect of personal rights by contract."

We have referred to these arguments and particularly to the citation of these two decisions, because they are usually referred to in connection with a suggestion that even according to the British view rights of private individuals to land and interests in relation to land continue to be enforceable unaffected by changes in sovereignty.

Lord Atkinson who delivered the judgment of the Board pointed out that the cession of the territory by the Khan constituted a complete transfer of all sovereignty to the British Government, stated :

> "On the legal position that arises in such circumstances there is a wealth of weight authority."

After referring in detail to the earlier decisions of the Board in Kamachee Boye ((1859) 7 Moo. I.A. 476-13 Moo. P.C. 22), Cook v. Sprigg ((1899) A.C. 572), Bai Raj Bai (42 I.A. 229) and Vijayesingji, (51 I.A. 357) applied them to the facts and held that as the title which was asserted had not been recognised by the British Government; allowed the appeal and directed the dismissal of the suit of the respondents. If the Privy Council decisions lay down the law correctly and we are applying that law, the fact that it is land or immovable property which is claimed or as regards which the right is asserted makes no difference for the application of the principle.

The last decision to be referred to in this context is that reported as Asrar Ahmed v. Durgah Committee, Ajmer (A.I.R. 1947 P.C. 1) where Lord Simonds said :

> "From this it follows that the rights, which the inhabitants of that State enjoyed against its former rulers, availed them nothing against the British Government and could not be asserted in the Courts established by that Government except so far as they had been recognised by the new sovereign power. Recognition may be by legislation or by agreement express or implied. This well-established rule of law, for which reference may be made to 42 I.A. 229 at p. 237 and 51 I.A. 357 at p. 360, appears to their Lordships to be peculiarly applicable to an office, to which material benefits appertain and which, so far the records show, had consistency been regarded as within the disposition of the sovereign power."

As we have already pointed out, these decisions of the Privy Council have been referred to and followed by this Court in Dalmia Dadri Cement Co. ((1959) S.C.R. 729) and the other decisions already referred. The statement of the law therefore in Virendra's case ((1955) 1 S.C.R. 415) that if the doctrine of Public International Law enunciated by the Privy Council were applied, the petitioners in that case had a voidable title, which inhered in them even after the change of sovereignty, is not seen to be correct. If the view expressed by the Privy Council was to be adopted there is no escape from the conclusion, that the grantees under the previous rulers did not carry with them, on a change of sovereignty, as subjects of the succeeding sovereign any inchoate rights as against the new sovereign, but their rights in so far as enforceability against the new sovereign was concerned sprang into existence only on recognition express or implied by the duly constituted competent authorities of the succeeding sovereign, apart from legislation.

Pausing here we might observe that this error on the part of the learned Judges in appreciating the ratio of the judgments of the Privy Council necessarily led them to assume that the petitioners before them had certain rights which they continued to enjoy even after the change of sovereignty and which were protected by the guarantees contained in Arts. 19 and 31 of the Constitution.

The next step in the reasoning of the learned Judges was based on the fact that the Constitution was framed not merely by the people inhabiting the Provinces of India but as a result of their conjoint action along with the subjects of the former Indian rulers. From this the inference was drawn that those rules of Public International Law which recognised the rights of a successor State to refuse to be bound by obligations incurred by or enforceable against the predecessor State had no application to the change in sovereignty brought about when the Union of India was brought into existence. This was on the theory that for that doctrine to operate there must be a cession or transfer of territory by one ruler to another and that where the people of the entire subcontinent by their united

action brought into existence a new sovereign State there was no question of transfer of territory from one sovereign to another to afford scope for the application of the rule of Public Inter__national Law. With the greatest respect to the learned Judges, we feel constrained to differ. That a new sovereign emerged on the unification of India by the merger or absorption of the Indian States with the Provinces of British India cannot be questioned and that this was by the process of the sovereignty of the rulers of the former Indian States being extinguished cannot be disputed either. We are here not concerned with whether India as an International person has undergone any change, vis-a-vis in its relationship with other States or in the International Organisations but in a more limited and, so to speak, domestic sphere. The territories under the rulers of the former Indian Princes undoubtedly passed from one sovereign to another when as a result of the 'unionisation' by the Government of India, they became integral parts first of the Dominion of India and later of the Union of India. A transfer of territory from under one sovereign to another may be effected in a variety of ways - conquest, annexation, by cession under a treaty after a war or without a war, by revolution by emancipation of subject peoples and by territorial restlements. These changes possess one common feature viz., the one sovereign cases to rule a territory and another takes its place. For the application of the rules which have been evolved in connection with the problems arising from such succession, little turns for the purpose of British Constitutional Law on either the manner in which the change of sovereignty was brought about or whether the absorption was partial or complete, complete in the sense of a total extinction of the previous sovereignty of the absorbed State, leaving no trace of survival after the merger. In passing we might mention that, in fact, it was in most cases the rulers of the Indian States who effected the merger and who on behalf of their State and their subjects participated by themselves or through their representatives in the deliberations which brought into existence the Constitution, and the legal and political unity of India. If, then, as a result of the absorption there was a State succession, its consequences have to be judged by tests or principles similar to those by which State succession is brought about by other means. We cannot, therefore, agree that the manner in which the Indian States ceased to exist or in which the Constitution and with it the complete political unification of the territory of India was brought about negatives the applicability of rules which govern the enforceability of rights against a succeeding sovereign on State succession.

The point next to be considered is whether the fact that the subjects of the former Indian rulers became, after the Constitution, citizens and subjects of the Indian Union precludes the Indian Government from refusing recognition to titles which such persons could have enforced against their previous rulers on the well-accepted principle that "there can be no act of State against its own subject." The application of this principle last mentioned of which Walker v. Baird ((1892) A.C. 491) and Johnstone v. Pedlar ((1921) 2 A.C. 262) are classic examples, is intimately bound up with the question as to the precise nature of the action taken by a succeeding State, when it refuses to accord recognition to the right of a former inhabitant of the territory of an earlier sovereign and enforceable against the predecessor.

If the true position in law were that a positive action is necessary to be taken by the succeeding sovereign before it interferes with the pre-existing rights of the subjects of the former ruler and that the action this taken is really a continuance of the act of the State by which the territory of the former ruler became transferred to the new sovereign, it is possible that the rule that there can be no act of State by the Government against its own subjects might have some application. But if, on the other hand, the true theory were, that on the extinction of the sovereignty of the previous ruler over the territory ceded or surrendered, there is an extinction ipso jure of the rights enforceable against the State and that it is a really a new right that springs into existence in recognition by the succeeding sovereign, it would be manifest that the refusal of the succeeding sovereign to recognise

pre-existing rights could in no sense by an act of State. No doubt, that refusal is in the exercise of sovereign power but by such exercise it neither annihilates nor affects any enforceable right which its subjects had against it. We consider, therefore, that if the doctrine of Public International Law expounded by the Privy Council were held applicable to the termination of the rights arising on the change of sovereignty in India, as the learned Judges in Virendra Singh's case ((1955) 1 S.C.R. 415) did, the power of the Government of India as at present constituted to refuse to recognise titles originating in executive grants by former Indian rulers cannot be negatived by resort to the rule of law laid down in Walker v. Baird ((1892) A.C. 491) and Johnstone v. Pedlar ((1921) 2 A.C. 262).

The next proposition of law which underlies the decision in Virendra Singh's case ((1955) 1 S.C.R. 415) is that the arbitrary and absolute powers which the former Indian rulers possessed to revoke grant made by them did not survive the change in sovereignty brought about by the Constitution, when as a result of the setting up of a democratic polity informed by justice and the rule of law, the right to exercise any arbitrary power was abandoned and was no longer available for revoking the grants made by the former rulers. If the theory of Public International Law which was explained and given effect to by the decisions of the Privy Council rested on the doctrine that the powers of the succeeding sovereign to recognise or not to recognise grants by the preceding sovereign or to repudiate them was based on the rights of the previous ruler so to revoke or repudiate, the argument would have considerable force. The juristic basis of the theory underlying the Privy Council decisions is that with the extinction of the previous sovereign the rights theretofore exercisable by the subjects of that sovereign were likewise extinguished and that without recognition which is really tantamount to a fresh grant by the new sovereign, no title enforceable in the municipal courts of the succeeding sovereign came into being. If this letter be the correct juristic approach, and that is what the decisions of the Privy Council lay down as we have shown by the extracts we have made of the relevant passages in Bai Rajbai's (42 I.A. 229) and in Vajeysinghji's (51 I.A. 357) case, then it matters not whether the earlier grant was by an absolute ruler who could revoke his grant or by a ruler of a different type who could not or even if he could, had renounced his rights to revoke by unilateral executive action. In either case, where the question at issue is whether the right could be enforced against the succeeding sovereign in its courts, nothing turns on the power of the preceding ruler to derogate from his grant; for it is not by virtue of any power derived from the previous sovereign that the succeeding sovereign claims the right not to recognise the earlier rights or grants but as an incident of its own sovereignty and sovereign power. In the circumstances, the existence of the arbitrary powers of the native Indian rulers and its absence in the Governments under the Constitution is not relevant, nor the fact that these were not inherited by and did not devolve on the Governments of the Union and the States functioning under the Constitution.

The last of the steps in the reasoning underlying Virendra Singh's case ((1955) 1 S.C.R. 415) proceeds on the basis that the petitioners had brought with them from their previous rulers into the India Union certain rights in the property granted of them, enforceable against the Government in regard to which they were entitled to the protection of Arts. 19 and 31. This question has to be approached from two points of view arising from the two stages through which the territory of the former India rulers became part of the territory of India under the Constitution. The first stage is concerned with the effect of the changes which took place from the accession of the States to the Dominion of India followed by the merger agreement executed by the rulers all of which were governed by the provisions of the Government of India Act, 1935 as it stood from time and the second stage with the complete 'unionization' of these territory so as to from part of an unified polity, the Union of India.

So far as the first stage is concerned, there was certainly a transfer of sovereignty over the territory

of the former Indian rulers to the Government of India for the purposes of the exercise by the latter of sovereignty with plenary powers of administration. Sections 290A and 190B were introduced into the Government of India Act for enabling the administration by the Dominion Government of the territories of the acceding States which under s. 5 of that Act became part of the Dominion of India. At this stage the powers of the Government of India for the administration of the acceding territories were exercised under the Extra Provincial Jurisdiction Act (Act XLVII of 1947) which used the phraseology 'areas outside Provinces which were acquired by the Central Government by treaty, agreement, grant, usage, sufferance or other lawful means'. It may be mentioned that under orders made by virtue of powers conferred by the Extra Provincial Jurisdiction Act all laws theretofore in force prevailing in the territories which were being administered under that Act were continued in force. Later by an order issued under s. 290A of the Government of India Act, known as the States Merger Order 1949, laws in operation in the merger States, were continued until repealed or modified. If in that situation the law as to acquired rights enforceable against the successor State as enunciated by the Privy Council applied, all grants which rested solely on executive action could acquire vitality for being enforced against the administration by the Government of India or its delegates only if those rights were recognised; for there was here a true case of State succession - transfer of territory by one sovereign to another and without the complication arising from the fact that the rulers or the people of the various Indian States participating in the making of the Constitution which the people of India gave to themselves. We have already explained that if the view of the Privy Council as to the effect of a change in sovereignty were accepted, it unmistakably points to their being no survival of any vestige of rights on the extinction of the sovereignty of the previous rules and to the emergence of any right only by the action express or implied of the new sovereign. If this principle were applied, there would have been no rights of property vesting in the grantee which he could assert against the new ruler. No doubt, if the grantees were in possession they would have a right to retain their possession against private trespassers but that is not the question with which we are here concerned, for what is now under consideration is the capacity of the these grantees to assert rights as against the Government which is totally different from their right to possession as to the rest of the world. Digressing a little it may be pointed out that s. 299 of the Government of India Act, 1935 as well as Arts. 19 and 31 which are referred to in this connection deal exclusively with the inference with proprietary rights by the State and have nothing to do with rights inter se between the grantee and his fellow subjects or citizens.

If, therefore, we are correct in our understanding of the decisions of the Privy Council that on a change of sovereignty no scintilla of right inhered in the grantee quoad his right to assert or enforce his rights under the grants against the rulers survived the change of sovereignty, the guarantee against deprivation of property contained in s. 299 of the Government of India Act, 1935, availed him nothing, for when the succeeding sovereign refused to recognise the rights obtained by him under the previous sovereign its action deprived him of no right to property; because he brought with him no rights from the previous ruler which he would assert against the new sovereign.

The position, therefore, reduces itself to this : Just previous to the Constitution the grantee had no right of property enforceable against the State and in regard to which, therefore, he could invoke the protection of Arts. 19 and 31 of the Constitution. The coming into force of the Constitution could not, therefore, make any difference; for the Constitution does not create rights in property but only protected rights which otherwise existed. It is necessary to add that if the learned Judges in Virendra Singh's case ((1955) 1 S.C.R. 415) were right in their understanding of the Privy Council decision to mean that a grantee under the previous ruler had a voidable title which he continued to possess and enjoy until by action of the succeeding ruler the same was revoked or repudiated, they might

also be right in their conclusion that such title as the grantees had could not be extinguished by the executive action of the Union or of the State Governments because of the guarantee of the right to property contained in Art. 19 and 31. But, if as we have shown, the decisions of the Privy Council do not lend support to such a view, the conclusion in Virendra Singh's case ((1955) 1 S.C.R. 415) as regards this last proposition also cannot be correct.

This takes us to the consideration of the question which was raised by Mr. Purshottam Tricumdass submitting to us that we should discard the theory of Public International Law which underlies the decisions of the Privy Council but that we should accept and give effect to what might be termed the American view as formulated by Chief Justice Marshall in U.S. v. Percheman (32 U.S. 51 at pp. 86-87) which was approved and applied in the later decisions of the American Supreme Court to which also he drew our attention. Learned Counsel submitted that this Court was not bound by the decisions of the Privy Council and was free to adopt the more rational, just and human doctrine which found expression in these American decisions. In this connection his thesis was that the doctrines evolved by the Privy Council were conditioned by Britain being an Imperialist and expansionist power at the date when they originated and were applied and that while these might have been suited to the regime of a colonial power, they were wholly out of place in the set up of this country and with the type of Constitution under which it functions.

Having considered this matter carefully we are clearly of the opinion that there is no justification or reason to discard the British view as regards the jurisdiction of municipal courts to enforce rights against succeeding sovereigns on a change of sovereignty. In the first place, Percheman's case (32 U.S. 51 at pp. 86-87) itself came before the courts for ascertaining the proper construction of the treaty under which Florida was surrendered to the United States by Spain under the Florida treaty dated February 22, 1819, on the terms of which the respondent contended that his title to the property claimed by him had been recognised and confirmed. The place of a treaty entered into by the United States and the provisions contained in it, in the Constitutional Law of the United States, we shall be referring to later, but that apart the Florida treaty was followed by an Act of Congress of 1828 entitled "an Act supplementary to the several Acts providing for the settlement of confirmation of private land claims in Florida." Under the terms of this Act of the Congress, Commissioners were set up to investigate claims by private individuals to lands and in cases where the validity of a claim set up was not upheld by the Commissioner, provision was made for resort to courts for resolving the dispute. There was, therefore, no scope for invoking the British rule of the lack of jurisdiction of municipal courts to adjudicate on unrecognised titles to property, even if such a doctrine was applicable and the only point in controversy was as to the interpretation of the clauses of the treaty relative to the titles which were recognised because on any view of the law if the treaty and the Act of Congress confirmed the respondent's title, the same was enforceable in the municipal courts of the United States.

Before passing on from this decision it is necessary to bear in mind the difference in constitutional law prevailing in the United States and in India as regards the effect of treaties and the provisions contained therein. Art. 6 cl. (2) of the United States Constitution reads :

> #"6. .....##
>
> (2) All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding."

Willoughby explains (Constitution of the United States Vol. 1, 548) the object and effect of this provision thus :

> ".....the primary purpose of this provision, (Art. VI cl. (2) .....was to make indubitable the supremacy of treaties over State Statutory or constitutional provisions.....it has, from the beginning been held that treaties, so far as they are self-executory, operate in the United States, by virtue of this constitutional provision, to create municipal law which the courts are called upon to recognise and apply."

In the United Kingdom and in India the position is entirely different. A treaty is, in British jurisprudence, treated merely as a contract between two States and does not become a part of the law of the land unless by an express Act of the Legislature. A treaty does not confer rights or obligations between the State and its subjects or as between subjects, such rights can be conferred only by an enactment of the Legislature. As explained by Lord Atkin in Attorney General of Canada v. Attorney General of Ontraio (1937 A.C. 326 at p. 347) :

> "Unlike some other countries the stipulations of treaty duly ratified do not within the Empire, by virtue of the treaty alone have the force of law."

It was in recognition of this constitutional position that s. 106 of the Government of India Act, 1935 was enacted. Its terms are in substance re-enacted in Art. 253 of the Constitution which reads :

> "253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

and to reinforce this position we have Art. 363 by which municipal courts are deprived of jurisdiction to enforce any rights arising from certain treaties. It would be apparent that in the context of the different constitutional position regarding treaties in the two countries, the rule of law which was enunciated by the American Supreme Court, cannot automatically be applied here. For in ultimate analysis the court in Percheman's case (32 U.S. 51 at pp. 86-87) was giving effect to provisions of the treaty with Spain which was the law of the land, and if the treaty provisions were different, these again would have been enforced by the courts. We are making this observation not to minimise the importance of the doctrine of Public International Law explained by Chief Justice Marshall, but to point out that the decision must be understood in the setting of the provisions of the treaty with Spain and the articles of the American Constitution.

As indicated earlier, we are not insensible to the position that apart from the place of treaties in American Constitutional Law what Marshall C.J., expounded was a doctrine of Public International Law which he considered it was necessary; just and proper for succeeding States to observe in their dealings with the rights acquired by private individuals under predecessor sovereigns. We shall now proceed to deal with the question whether we should discard the rule as enunciated in the decisions of the Privy Council and adopt that which was formulated in Percheman's case (32 U.S. 51 at pp. 86-87).

There are several reasons why we are unable to accept C.J. Marshall's exposition in Percheman's case (32 U.S. 51 at pp. 86-87) as laying down a law which has to be given effect to by municipal

courts in this country. In the first place, it could not be said that the broad terms in which Marshall C.J., stated the doctrine that every private rights derived from a predecessor sovereign ought to continue to be enforceable against a successor sovereign and that a change in sovereignty makes no difference to the enforceability of private rights, be it against other individuals or the succeeding State, has been in that absolute form accepted as valid by jurists and writers on Public International Law. Even in treaties in Public International Law in which the most extended scope has been afforded to the enforceability of acquired rights against a successor State two limitations have always been recognised : (1) that the origin of the right should be bona fide and not one designed to injure the economic interests of the successor State, and (2) that the right should not be a political concession.

Next, jurists and even the Permanent Court of International Justice have drawn a marked distinction between what might be termed the theory of the law and the enforceability of these rights and in municipal courts. C.C. Hyde in his treatise on Public International Law (Vol. 1 p. 433) after referring to the decision in Percheman's case (32 U.S. 51 at pp. 86-87) and those which followed it adds :

> "Acknowledgement of the principle that a change of sovereignty does not in itself serve to impair rights of private property validly acquired in areas subjected to a change, does not, of course, touch the question whether the new sovereign is obliged to respect those rights when vested in the nationals of foreign States, such as those of its predecessor."

Similarly George Schwarzenberger in his International Law (Vol. 1 p. 83) after referring to a passage in the decision of the Permanent Court of International Justice in the case of German Settler in Poland reading :

> "Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice"

adds that though the Permanent Court of International Justice negatively stated that private rights acquired under existing law do not cease on a change of sovereignty, the Court did not expressly pronounce on the question whether in the absence of legislation to the contrary on the part of Poland, she was bound by International Law to consider German Civil Law as valid in the ceded territories. The doctrine of act of State evolved by English Courts is one purely of municipal law. It denies to such a Court jurisdiction to enquire into the consequences of acts which are inseparable from an extension of its sovereignty. That doctrine was, however, not intended to deny any rule of international law.

Next we might examine the juristic concept underlying the American view, putting aside for the moment what one might call authority. There has been at one time a school of thought among writers on Public International Law which has described the process of State succession as if it were a transmission of sovereignty bringing in for this purpose the analogy of an heir in private law clothing the successor with the totality of the rights and obligations qua all inhabitants without exception or modification. This theory has now been discarded because of the realisation that there

could be no analogy between individuals and States, nor could the theory be sustained in the face of the circumstance that it does not accord with practice, which after all is one of the basic foundations of the rules of Public International Law. It is hardly necessary to add that there is here no inconsistency with the comity of nations. Nor could it be maintained that the theory is just, because it would force upon the successor State obligations which might have owed their birth to political considerations which would not survive the predecessor State. Besides, it must not be forgotten that when a successor State exercises its sovereignty even over territory which has passed to it from a preceding ruler, it does not do so as a representative of or by delegation from the latter - as in the case of the heir in Private Law, but as a sovereign of the territory deriving authority from its own constitution and set up. It is true that Public International Law might lay on the successor State duties with respect to the acquired territory and to the rights of the inhabitants thereof but those must be compatible with its undoubted sovereignty. It is in recognition of such a position that successor States give effect to law which regulate rights inter se between the subjects which theretofore applied, save in so far as either its constitution or its legislation had made other provision. We are, however, here concerned with rights possessed by individuals in the predecessor's territory enforceable against the previous rulers and even as regards these we are concerned with a very limited range of rights - rights arising out of grants of immovable property or concessions of rights in relation thereto and enforceable against the predecessor State. We made this reservation because in the Dalmia Dadri Cement case ((1959) S.C.R. 729) which dealt with the continued enforceability of a concession regarding the levy of income-tax, even Bose J. agreed that such rights did not survive and in a separate judgment confined the operation of the principle that he enunciated in Virendra Singh's case ((1955) 1 S.C.R. 415) to rights of immovable property.

If the theory that rights and duties or rather the bundle of them pass ipso jure from the predecessor to the successor State is discarded and at the same time it is recognised that International Law and justice which underlies that body of law might impose some obligations which the successor State should respect, two questions arise : First what are the obligations which International Law might impose ? and secondly, whether these obligations which are not the creatures of municipal law, might give rise to claims enforceable in municipal courts.

It is impossible to lay down exact rules as to the interests which are protected by a consensus of opinion as acquired rights. So much, at least, is clear that to receive the protection of International Law the interest must have been properly vested in the sense that it must not have been voidable at the instance of the predecessor State and bona fide and legally acquired. Neither the comity of nations, nor any rule of International Law can be invoked to prevent a sovereign State from safeguarding its national economy and taking steps to protect it from abuse. On the one side the principles of acquired rights demands that the interest of the private individual be not abrogated and on the other side the public interest of the successor State has to be considered. It is this conflict between the public and private aspects that hinders the laying down of hard and fast rules.

As has been pointed out by O'Connell in his Treatise on the Law of State Succession, the problems posed by State succession in International Law are notably different in character from those of municipal law though they arise at a different plane, but there is no necessary reason why the one system should not draw on the doctrine or concepts formulated and found to be adequate within the other system. The principle of universal succession based on analogy from the civil law was essentially juristic in character, but the analogy was wrong and the practice of States was not consonant with the theory. The rejection of this doctrine led to the assumption that solutions are to be found on experience alone. The choice of the appropriate theory by writers was coloured by their standpoint and their legal experience. In theory, therefore, we must have regard both to past

experience and the necessities of the present and while on the one hand not being unduly restrictive, ought not on the other become so doctrinaire as to deprive the State of the opinion not to recognise even mala fide transactions.

Looked at from this point of view the British practice that has prevailed in this country has not proved in actual practice to lead to injustice, but has proceeded on a just balance between the acquired rights of the private individual and the economic interests of the community, and therefore there is nothing in it so out of tune with notions of propriety or justice to call for its rejection.

It is undoubted that the British doctrine was part of the jurisprudence and the constitutional practice that prevailed in pre-Constitution India. Most certainly it does not need to be stated that the British Parliament when it enacted the Government of India Act as the constitutional framework by which this country should be governed, could not have had in contemplation any other rule by which the rights of the inhabitants newly brought into the political set up by other territories becoming part of India. With this historical background it would not be a violent presumption if we assume that the framers of the Constitution should also be taken to have proceeded on the basis of the acceptance of this doctrine and this state of the law, unless one found some provision or indication in the Constitution repugnant to its continuance. As already pointed out, the position of treaties vis-a-vis municipal law was not changed. On the other hand, by Art. 363 an embargo was laid in express terms on municipal courts giving effect to the provisions of treaties with rulers of Indian States. This, in our opinion is a clear indicating that the Constitution-makers intended no departure from the Constitutional doctrine that was theretofore accepted as law. It would, of course, be different if the provisions of any treaty became embodied in subsequent legislation; then they would be enforced as part of the law of the land.

It is also not to be assumed that the Constitution-markers were oblivious of the need for continuity of the law when the Indian States were absorbed and a change in sovereignty took place. By Art. 372 of the Constitution all the laws which were in force in these States just as in British India without any distinction were continued until they were altered or repealed by competent legislation. It is only necessary to point out that in the interval between the merger of these States and the coming into force of the Constitution, there were other provisions to which we have already adverted which continued the laws which obtained in these territories till Art. 372 could be availed of. There was thus no legal vacuum or hiatus created so far as laws were concerned and it is only where the right sought to be enforced was created not by the laws of the previous sovereign but merely as a result of an administrative order that we have the problem to be solved in these appeals. If the definition of law in Art. 366(10) were as that in Art. 12 so as to include even executive orders every right, however, created would have been continued. But the Constitution-makers decided otherwise and preferred to continue only laws as distinguished from administration orders.

Next we have the circumstance that the doctrine enunciated in the decisions of the Privy Council have been accepted as correct and thus applicable equally in post-Constitution India in a series of decisions of this Court commencing from Dalmia Dadri Cement Co. ((1959) S.C.R. 729) and unless compelling reasons are found for holding that all these were wrongly decided, it would be neither proper or even open for us to depart from these precedents, and as explained earlier, there are none.

Lastly, as we have already noticed, even in the case of Virendra Singh ((1955) 1 S.C.R. 415), though the divergent views of the jurists on this question of Public International Law were set out the court did not express any decisive opinion in favour of accepting the observations in Percheman's case (32 U.S. at pp. 86-87) as proper to be applied by the municipal courts in India. In

the face of these circumstances we would not be justified in departing from the decisions of the Privy Council which have been accepted and applied by this Court. These decision both of the Privy Council as well as the earlier ones of this Court were reviewed and the propositions laid down in them were examined and summarised by this Court in Promod Chandra Deb and Ors. v. The State of Orissa and Ors. ((1962) 1 Supp. S.C.R. 405) as laying down the following propositions :

> "(1) 'Act of State' is the taking over of sovereign power by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise, and may be said to have taken place on a particular date, if there is a proclamation or other public declaration of such taking over.
>
> (2) But the taking over full sovereign powers may be spread over a number of years, as a result of a historical process.
>
> (3) Sovereign power, including the right to legislate for that territory and to administer it, may be acquired without the territory itself merging in the new State, as illustrated in the case of Dattatraya Krishna Rao Kane v. Secretary of State for India in Council ((1930) L.R. 57 I.A. 318).
>
> (4) Where the territory has not become a part of the State the necessary authority to legislate in respect of that territory may be obtained by a legislation of the nature of Foreign Jurisdiction Act.
>
> (5) As an act of State derives its authority not from a municipal law but from ultra-legal or supra-legal means, Municipal Courts have no power to examine the propriety or legality of an act which comes within the ambit of 'Act of State.'
>
> (6) Whether the Act of State has reference to public rights or to private rights, the result is the same, namely, that it is beyond the jurisdiction of Municipal Courts to investigate the rights and wrongs of the transaction and to pronounce upon them and, that therefore, such a Court cannot enforce its decisions, if any. It may be that the presumption is that the pre-existing laws of the newly acquired territory continue, and that according to ordinary principles of International Law private property of the citizens is respected by the new sovereign, but Municipal Courts have no jurisdiction to enforce such international obligations.
>
> (7) Similarly, by virtue of the treaty by which the new territory has been acquired it may have been stipulated that the pre-cession rights of old inhabitants shall be respected, but such stipulations cannot be enforce by individual citizens because they are no parties to those stipulations.
>
> (8) The Municipal Courts recognised by the new sovereign have the power and the jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise.
>
> (9) Such an agreement or recognition may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights by the new sovereign. Hence, the Municipal Courts have the jurisdiction to find out whether the new sovereign has or has not recognised or acknowledged the rights in question, either expressly or by implication, as aforesaid.

> (10) In any controversy as to the existence of the right claimed against the new sovereign, the burden of proof lies on the claimant to establish that the new sovereign had recognised or acknowledged the right in question."

We consider this summary succinctly expressed the rule to be applied in this country as regards the enforceability against the Governments in Indian of private rights originating in executive or administrative orders of the former Indian rulers.

The next matter to be considered is the correctness of the view expressed by the High Court, that even though the treaty be an Act of State, and the merger agreement executed by the ruler a document on which no rights enforceable in municipal courts could be based, still cl. (7) of the letter of Shri V. P. Menon dated October 1, 1948 could be referred to and relied upon for founding an argument that the Government waived their right to repudiate the grant made by the previous ruler. We consider that the submission of the learned Attorney-General that the learned Judges were in error in this respect is well-founded. If the treaty or its provisions cannot be looked at to spell out any right, as the learned Judges themselves concede, the use to which they have put the provisions of cl. (7) - that the Government would not re-examine grants made earlier than April 1, 1948, is virtually the same though called by another name. We can see no sensible distinction between reliance on the provisions of the treaty as pointing to a recognition by the Government of rights claimed and reliance on it for the purpose of establishing that Government had waived their right not to recognise such rights. In substance, they are the same though the nomenclature employed is different.

In support of the reasoning on which this distinction was accepted the learned Judges have placed reliance on the approach to this question in Virendra Singh's case ((1955) 1 S.C.R. 415). We have discussed this matter fully in the earlier part of this judgment and there is no need to repeat it. The learned Judges have further referred to and relied on a decision of this Court in Bholanath v. The State of Saurashtra (A.I.R. 1954 S.C. 680) and certain observations contained in it. We do not agree that the observations in the decision, though couched somewhat widely could properly be understood in the manner in which the learned Judges have done. The question that arose in the case was whether the condition of service of a person originally employed as an officer of one State continued govern his services after that State became merged in the Government of Saurashtra. The condition of service in controversy was as to the age at which an officer had to retire on superannuation. By an enactment of the ruler of Wadhwan State this was, in the case of officers like the appellant before this Court, fixed at 60. An order by the Government of Saurashtra retiring him after he reached the age of 55 against his will, gave rise to the suit from which the proceedings before this Court arose. There was controversy in the Courts below as to whether the law embodying the service conditions was competently enacted by the Wadhwan State. But this contention was not persisted in this court, and the court recorded a finding that the terms of service of the appellant were regulated by a law which was competently enacted and that the law was continued by Art. 372 in the Saurashtra State. On that finding there could really be no defence to the appellant's claim. The decision in favour of the appellant was rested on the ground that the law of the Wadhwan State was continued by express provisions contained, first, in statutes of the Saurashtra State and, again, by Art. 372 of the Constitution when the latter merged in the Dominion of India. On this it followed that without a valid change in the law the rights of the appellant could not be restricted. In stating this position, however, the following words were used :

> "The Covenant (between the ruler of the Wadhwan State and the State of Saurashtra) could be looked at to see whether the new sovereign had waived his rights to ignore

rights give under the laws of the former sovereign."

We do not understand this passage to mean that the covenant which under Art. 363 could itself not be looked at for founding any right, could be used indirectly for inferring that rights were recognised, without anything more. The true position appears to us to be that where the new sovereign assumes jurisdiction and it does some Act and there is ambiguity as to whether the same amounts to a recognition of a pre-existing right or not, the covenant and the treaty might be looked at in order to ascertain the intention and purpose of that equivocal act, but beyond this the covenant and the treaty cannot by themselves be used either as a recognition pure and simple or, as the learned Judges of the High court have held, as waiver of a right to repudiate the pre-existing rights. It is needless to point out that since the enforceability of the rights against the succeeding sovereign springs into existence only on recognition by the sovereign, there is no question of a waiver of the right to repudiate. The expression 'right to repudiate' in this context is a misnomer and there could be no question of a waiver of such right.

This, however, does not conclude the matter, for we have still to deal with the question whether the grant by the ruler of the Sant State which was embodied in a 'resolution' of his was a "law" or was merely an executive or administrative order. Learned Counsel for the respondent submitted to us that the grant under the Tharav No. 371 dated March 12, 1948 was not a grant by executive power but was in truth and substance a law which was continued by Art. 372 of the Constitution and which, therefore, could be undone only by legislation and not by any executive fiat as has been done in the present case and in this connection relied strongly on the decisions of this Court in Madhaorao Phalke v. The State of Madhya Bharat ((1961) 1 S.C.R. 957) and in Promod Chandra Deb and Ors. v. The State of Orissa and Ors. ((1962) 1 Supp. S.C.R. 405). Both in the trial Court as well as before the High Court the cases had proceeded on the footing that the ruler of the Sant State was an absolute monarch with no constitutional limitations upon his authority, and it was not suggested that this was incorrect. He was the supreme legislature as well as the supreme head of the executive so that his orders however issued would be effective and would govern and regulate the affairs of the State including the rights of the citizens; (vide Ameer-un-nissa Begum v. Mahboob Begum (A.I.R. 1955 S.C. 352) and Director of Endowments, Government of Hyderabad v. Akram Ali (A.I.R. 1956 S.C. 60). We should, however, hasten to point out that though in the case of such absolute monarchs the distinction between the administrative action under their executive power and laws passed by them as the supreme legislature of the State, possess no deference as regards their effectiveness, still the distinction between the two is of vital important for the purpose of determining their continued efficacy after the coming into force of the Constitution. Under Art. 372 of the Constitution - "all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority". The expression "existing law" is defined in Art. 366(10) :

> "Existing law means any law, Ordinance, Order bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature, authority or person having power to make such a law, Ordinance, Order, bye-law, rule or regulation."

This definition would include only laws passed by a competent authority as well as rules, bye-laws and regulations made by virtue of statutory power. It would therefore not include administrative orders which are traceable not to any law made by the Legislature but derive their force from executive authority and made either for the convenience of the administration or for the benefit of

individuals, though the power to make laws as well as these orders was vested in the same authority - the absolute ruler. What survives the Constitution and is continued by Art. 372 are those laws which could trance their origin to the exercise of legislative power.

The problem next is to discover that which is "law" from that which is merely an executive order and this is by no means an easy one to solve. In the case of some States where there are rules which prescribe particular forms which the laws have to or generally take or where laws as distinguished from executive orders are issued bearing a defined nomenclature, there is not much difficulty. But the cases which have come up before this Court have shown that this is by no means the universal rule. In the case of the Sant State with which we are concerned it was not suggested that there was any particular formality or process which had to be observed in the promulgation of laws or any particular form which laws had to take or took or that they went by any particular nomenclature to distinguish them from executive or administrative orders. We have, therefore, to consider whether from the nature of the instrument is contents and its general effect - whether the Tharav dated March 12, 1948 constitutes a law within Art. 366(10) and is therefore continued by Art. 372 or whether it is merely an executive grant or administrative order which might confer rights but which without recognition by the Union or State Government cannot be enforced in the municipal courts of this country.

We shall therefore proceed to consider the terms of the Tharav and for this purpose it would be convenient to set it out in full.

It is headed 'Tharav Order' by Maharana, Santrampur State dated March 12, 1948. It was explained to us that the expression of 'Tharav' meant a resolution. The text of this resolution or order by the Maharana is as follows :

> "The Jivak, Patavat Inami, Chakariyat, Dharmada villages in Sant State are being given (granted) to Jagirdars and the holders of the said villages are not given rights over forests. Hence after considering the complaints of certain Jagirs, they are being given full rights and authority over the forests in the villages under their vahivat. So, they should manage the vahivat of the forest according to the policy and administration of the State. Orders in this regard to be issued.

Sd/- in English Maharana, Santrampur State."##

There are a few matters to which it is necessary to advert in this document : The first of them is that it is not a grant to any individual, that is, treating him as an individual or as one of a number of individuals or to a group treating them merely as separate individuals, but to the holders of five specified tenures in the State - Jivak, Patavat, Inami, Chakariyat and Dharmada villages. Next, it states that the rights in the forests of the villages of the several kinds of tenure-holders are being given to them in response to the representations made in regard to the villages in the possession and enjoyment of the Jagirdars as regards this matter. Lastly, the tenure-holders were directed to manage and administer the forest according to the policy and administration of the State. The learned Judges of the High Court have treated the 'Tharav' as merely an administrative order treating it as if consisted of as many grants of forest rights to the tenure-holders as there were such holders and this was the view that was stressed upon us strongly by the learned Attorney-General. We are, however, not impressed by this argument. We have no evidence as regards the creation of the several tenures referred to in the Tharav to base any conclusion as flowing from the original grant. No doubt, there is on record the translation of the grant of the village of Gothimada dated 1867, but from this it does

not follow that everyone of the grants comprised in the five tenures specified was of this pattern. We consider that the 'Tharav' is more consistent with its being a law effecting an alteration in the tenures of the five classes of Jagirdars by expanding the range of the beneficial enjoyment to the forests lying within the boundaries of the villages which had already been granted to them. In this light, the 'Tharav' would not be an administrative order in any sense but would partake of the character of legislation by which an alteration was effected in the scope and content of the tenures referred to. This aspect is reinforced by the reference to the complaints of the tenure-holders whose grievance apparently was that though villages had been granted to them for their enjoyment under the several tenures, they were not permitted any rights in the forests within their villages. It was not thus a case of an individual grant but the yielding by the ruler to the claims of these large group of Jagirdars who requested that their rights should be extended. Lastly, the manner of the enjoyment was specified as having to be in accordance with the policy and administration in the State. It is obvious that there must have been some rules which have the force of law as regards the administration of these forests and the enjoyment by the Jagirdars was made subject to the observance of these laws.

We, therefore, consider that the 'Tharav' dated March 12, 1948 satisfies the requirement of a "law" within Art. 366(10), and in consequence, the executive orders of the Government of Bombay by which the forest rights of the plaintiffs were sought to be denied were illegal and void.

The result is that we agree with the learned Judges that the plaintiffs were entitled to succeed, though for different reasons, and we direct that the appeals should be dismissed. The appellant will pay the costs of the respondents - one set of hearing fees.

SUBBA RAO J. - I have has the advantage of going through the judgment of my learned brother, Rajagopala Ayyangar J. I agree with him that Ex. 192 is law and that it continued in force after the making of the Constitution. This conclusion would be enough to dispose of the appeals. But, Rajagopala Ayyangar J., further expressed his disagreement with the unanimous view propounded by this Court in Virendra Singh v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415). As I regret my inability to share his view, I shall state the reasons for my agreement with the decision in Virendra Singh's case.

As the question raised is common to all the appeals, it is enough if I take up Civil Appeal No. 182 of 1963 for consideration. The facts necessary to appreciate the alternative contention may now be briefly stated. In the year 1947, the then ruler of the Sant State made a grant of the village Gotimada to the predecessor-in-interest of Thakor Sardarsingh Gajesing. On August 15, 1947, India obtained independence. Under s. 7 of the Indian Independence Act, 1947, the suzerainty of the British Crown over the Indian States lapsed, with the result the Sant State became a full sovereign State. On March 12, 1948, the Maharana of Sant State issued an order conferring full rights over forests to the holders of villages in the State, which included the said Gotimada village. On March 19, 1948, there was an agreement, described as the Merger Agreement entered into between the Maharana of Sant State and the Dominion Government of India where under the Maharana ceded to the Dominion Government full exclusive authority, jurisdiction and power for and in relation to the governance of the Sant State and agreed to transfer the administration of the Sant State to the Dominion Government on June 10, 1948. It was also agreed that as from June 10, 1948, the Dominion Government would be competent to exercise full and exclusive authority, jurisdiction and powers for and in relation to the governance of the Sant State in such manner and through such agency as it might think fit. Under the other articles of the said agreement certain personal rights and privileges of the Maharana were preserved. After the merger, under s. 3 of the Extra Provincial Jurisdiction Act, 1947, the Government of India delegated the administration of the Sant State to the State of

Bombay. From October 1, 1949, under the States' Merger (Governor's Provinces) Order 1949, the said State became part of the State of Bombay; that is to say, from June 10, 1948 to October 1, 1949 the Bombay State administered the Sant State as a delegatee of the Dominion of India, and thereafter the State became merger with the State of Bombay. The Sant State, therefore, became part of the Dominion of India on June 10, 1948 and thereafter the citizens of that State became the citizens of the Dominion of India. On August 21, 1948 the respondent entered into a contract with Thakor Sardarsing Gajesing for cutting of the trees in the forest of village Gotimada. On October 1, 1948 i.e., 4 months after the merger and more than a month after the said contract, Shri V. P. Menon, Secretary to the Government of India, Ministry of States, wrote a letter to the Maharana of Sant State expressly declaring that no order passed or action taken by the Maharana before the date of making over the administration to the Dominion Government would be questioned unless the order was passed or action taken after the 1st day of April 1948, and if considered by the Government of India to be palpably unjust or unreasonable. By that letter it was also guaranteed that, among others, "the enjoyment of ownership" of jagirs, grants etc., existing on April 1, 1948 would be respected. A combined reading of the paragraphs of this letter makes it clear that the Dominion of India declared in clear and unambiguous terms that no grants made or orders issued by the Maharana before April 1, 1948 would be questioned by it. It may be mentioned that in the last paragraph of this letter it was stated that the contents of the letter would be regarded as part of the Merger Agreement entered into by the Maharana with the Governor-General of India. It may be recalled that this letter was written months after the merger and after the citizens of the extinct State became the citizens of the absorbing State. The effect of the last paragraph of the said letter will be considered in due course.

On July 8, 1949 the Government of Bombay sent a communication to the Commissioner, Northern Division, stating that the Government considered that the order passed by the ruler of Sant State on March 12, 1948 transferring forest rights to all the Jagirdars of the Jagir villages was mala fide and that it should be cancelled. It was suggested that the Commissioner should do some other preliminary acts before taking further action in the matter. It would be seen from this communication that the order was not actually cancelled, but there was some correspondence in respect of that matter and that it was not even communicated to the jagirdars. There was obstruction by the forest officers when the contractor was cutting the trees, but after some correspondence he was permitted to cut the trees, on an undertaking that he would abide by the decision of the Government. On February 6, 1963 the Government of Bombay passed a resolution after receiving a report from the Forest Settlement Officer specially appointed by it to investigate the rights of jagirdars. It was stated in the resolution that the Tharav issued by the ruler of Sant State in 1948 was mala fide and, therefore, not binding on the Government. Thereafter, it scrutinized the claims of jagirdars to forests in 74 villages in the erstwhile Sant State and recognized their rights in some of the villages. So far as Gotimada village is concerned, it was stated that the question of forest rights in the said village was still under the consideration of the Government and necessary order in that behalf would be issued in due course. It is clear that till 1953 the Government did not refuse to recognize the title of the Jagirdars to forests; indeed, in the case of Gotimada village no final order was made even on that date. On these facts, the question that arises is whether the respondent would be entitled to a permanent injunction issued by the High Court restraining the appellant from interfering with his right to cut trees in Gotimada village.

The argument of the learned Attorney-General, so far as it is relevant to the question which I propose to deal with, runs as follows : After the merger of the Sant State with the Dominion of India the jagirdar had no title to the forests against the Dominion of India unless it recognized such a right, and that, as in the instant case the said Government did not recognize such a right, he or his

assignees could not maintain any action against the State on the basis of his title to the said forests. He conceded that on the basis of the finding of the High Court that the Dominion of India did not repudiate the title of the jagirdar to the forests till after the Constitution came into force, the decision of this Court in Virendra Singh v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415) is against him. But he contended that it was not correctly decided and indeed its binding force was weakened by later decisions of this Court. As the correctness of the decision in Virendra Singh's case ((1955) 1 S.C.R. 415) is questioned, it is necessary to consider the scope of that decision in some detail and also to ascertain whether later decisions of this Court had in any way weakened its authority. The facts in that cast were as follows. The petitioners in that case were granted in January, 1948, Jagirs and Muafis by the Ruler of Sarila State in one village and by the Ruler of Charkhari State in three villages. In March, 1948, a Union of 35 States, including the States of Sarila and Charkhari, was formed into the United States of Vindhya Pradesh. The Vindhya Pradesh Government confirmed these grants in December, 1948, when its Revenue Officers interfered with them questioning their validity. The integration of the Stated however did not work well and the same 35 Rulers entered into an agreement in December 1949, and dissolve the newly created State as from January 1, 1950, each Ruler acceding to the Government of India all authority and jurisdiction in relation to the Government of that State. After the Constitution came into force, the Government of Uttar Pradesh in constitution with the Government of India revoked the grant of Jagirs and Muafis in four of the villages. On an application filed by the petitioners under Art. 32(2) of the Constitution, this Court issued a writ against the State. From the said facts it would be seen that the grants were made to the petitioners before the merger, and it was held that the Government had no right to revoke the said grants after the Constitution came into force. Bose J., speaking for the Court, elaborately considered the doctrine of "Act of State" in the light of English and American decisions and the opinions of jurists of International Law and came to the following conclusion :

> "We think it is clear on a review of these authorities that whichever view be taken, that of the Privy Council and the House of Lords, or that of Chief Justice Marshall, these petitioners, who were in de facto possession of the disputed lands, had rights in them which they could have enforced up to 26th January, 1950, in the Dominion Courts against all persons except possibly the Rulers who granted the land and except possibly the State. We do not by any means intend to suggest that they would not have enforced them against the Rulers and the Dominion of India as well, but for reasons which we shall presently disclose it is not necessary to enter into that particular controversy. It is enough for the purpose of this case to hold that the petitioners had, at any rate, the rights defined above."

Pausing here it will be noticed that this Court did not express a final opinion on the question whether the petitioners could have enforced their title to the property against the Rulers before the Constitution came into force, but it had definitely held that the petitioners had title to the property against all persons except the Rulers. On the basis of that finding Bose J., proceeded to consider the impact of the Constitution on the said finding. The learned Judge observed :

> "But however that may be, there is no question of conquest or cession here. The new Republic was born on 26th January, 1950, and all derived their rights of citizenship from the same source and from the same moment of time; so also, at the same instant and for the same reason, all territory within its boundaries became the territory of India. There is, as it were from the point of view of the new State, Unity of Possession, Unity of Interest, Unity of Title and Unity of Time."

Then the learned Judge proceeded to state :

> "All the citizens of India, whether residing in States or Provinces, will enjoy the same fundamental rights and the same legal remedies to enforce them."

This decision struck a new and refreshing note. It pleaded for a departure from imperialistic traditions and to adopt the American traditions, which are in consonance with the realities of the situation created by our Constitution. It gave new orientation to the doctrine of the act of State to reflect the modern liberal thought embodied in our Constitution. It held that citizens of a ceding State have a title to their property against all except possibly the ruler. Though it inclined to go further and hold that the change of sovereignty does not affect the title of the citizens of the ceding State even against the new sovereign, it did not think fit to decide that question finally, as it found ample justification to sustain the title of the petitioners therein against the sovereign under our Constitution. It pointed out that the concept of ceding and absorbing States is foreign to our Constitution and that all the people of India, to whichever part of the country they might have belonged, through their representatives, framed the Constitution recognizing the fundamental rights of a citizen to hold property and not to be deprived of it save by authority of law. In that view it held that the title of the petitioners in that case to their property was protected by the Constitution. This is a unanimous and considered decision of five learned Judges of this Court. I shall not obviously differ from this view unless there are compelling reasons to do so. I find none.

I shall now proceed to consider whether the subsequent decisions of this Court threw any doubt on the correctness of the decision in regard to the following two respects on which it had given a firm decision : (1) The citizen of a ceding State does not lose his title to immovable property but continues to have a right thereto against all except possibly the absorbing State; and (2) on the making of the Constitution, his title thereto became indefeasible even against the absorbing State.

Where a company entered into an agreement with the erstwhile State of Jind whereunder it had to pay income-tax only at concessional rates, it was held in M/s. Dalmia Dadri Cement Co. Ltd. v. The Commissioner of Income-tax ((1959) S.C.R. 720) that, after the said State merged with the Union of India, the latter was not bound by the contractual obligations of the ceding State on the basis of the principle that the treaty between the two sovereigns was an act of State and the clauses of that treaty were not enforceable. In Jagannath Agarwala v. State of Orissa ((1962) 1, S.C.R. 205) it was held that after Mayurbhanj State had merged with the Province of Orissa the two money claims of the appellant against the Maharaja of Mayurbhanj State were not enforceable against the Orissa State on the ground that the Act of State did not come to an end till the claims made by the appellant were rejected and, therefore, municipal courts had no jurisdiction in the matter. Where the petitioners held Khor Posh grants from the Rulers of Talcher, Bamra and Kalahandi under the respective State laws it was held in Promod Chandra Deb v. The State of Orissa ((1962) Supp. (1) S.C.R. 405) that the laws continued to have legal force after the merger of the said States with the Union of India. Where the Nawab of Junagadh State made grants of property before he fled the State, it was held in State of Saurashtra v. Jamadar Mohamad Abdullah ((1962) 3 S.C.R. 970) that the cancellation of the said grants by the Regional Commissioner, who assumed charge of the administration of the State before the said State was integrated with the United States of Saurashtra, was an act of State.

The question now raised did not arise for consideration in those cases. This Court accepted the English doctrine of Act of State and acted on the principle that till the right of an erstwhile citizen of a ceding State was recognized by the absorbing State, he has no enforceable right against the State. The scope and extent of the title to immovable property of a citizen of a ceding State was not

examined in those decisions. Nor the impact of the Constitution on such rights was considered therein. In M/s. Dalmia Dadri Cement Co. Ltd. v. The Commissioner of Income-tax ((1959) S.C.R. 720) the following observations are found at p. 741, which may have some bearing on the first aspect of the question :

> "It is also well-established that in the new set-up these residents do not carry with them the rights which they possessed as subjects of the ex-sovereign, and that as subjects of the new sovereign, they have only such rights as are granted or recognized by him."

This observation is couched in wide terms. But this Court was not concerned in that case with the distinction between pre-existing title of a citizen of a ceding State to his property against all and that against the State. Indeed, Bose J., in his dissenting judgment, made it clear that they were only concerned in that case with the contractual obligation of the erstwhile sovereign and that they were not dealing with the question of the title of the citizens to immovable property. That the judgment had also nothing to do with the second aspect was made clear by the following observations of Venkatarama Aiyar J., who expressed the majority view, at p. 749 :

> "This argument assumes that there were in existence at the date when the Constitution came into force, some rights in the petitioner which are capable of being protected by Art. 19(1)(f). But in the view which we have taken that the concessions under cl. (23) of Ex. A came to an end when Ordinance No. 1 of S. 2005 was promulgated, the petitioner had no rights subsisting on the date of the Constitution and therefore there was nothing on which the guarantees enacted in Art. 19(1)(f) could operate."

These observations indicate that this Court did not go back on the decision in Virendra Singh's case ((1955) 1 S.C.R. 415, 433, 437) indeed, it rejected the argument based on that decision on the ground that the appellant lost his rights if any, under a pre-Constitutional valid Ordinance. In State of Saurashtra v. Jamadar Mohamad Abdulla ((1962) 3 S.C.R. 970), Mudholkar J., speaking for himself and for Sarkar J., expressed the view on the question of impact of s. 299(1) of the Constitution Act of 1935 on the title to immovable property of a citizen of a ceding State thus, at p. 1001 :

> ".....before the respondents could claim the benefit of s. 299(1) of the Constitution Act, 1935, they had to establish that on November 9, 1947, or thereafter they possessed legally enforceable rights with respect to the properties in question as against the Dominion of India. They could establish this only by showing that their pre-existing rights, such as they were recognized by the Dominion of India. If they could not establish this fact, then it must be held that they did not possess any legally enforceable rights against the Dominion of India, and, therefore, s. 299(1) of the Constitution Act, 1935, avails them nothing. As already stated s. 299(1) did not enlarge anyone's right to property but only protected the one which a person already had. Any right to property which in its very nature is not legally enforceable was clearly incapable of being protected by that section."

The same view was rested by the learned Judge in Promod Chandra Deb v. The State of Orissa ((1962) Supp. 1 S.C.R. 405). It may be stated that the said question did not arise for consideration in either of those two decisions, for in the former the cancellation of the order issued by the Ruler of

the ceding State was made before the merger and in the latter, the Court held that the laws whereunder the grants were made continued to have legal force after the merger of the concerned States with the Dominion of India. It may be pointed out that Das J., in the earlier decision and Sinha C.J., in the later decision, who delivered the leading judgments in those cases, had specifically left open that question. It may, therefore, be stated without contradiction that in none of the decisions of this Court that were given subsequent to Virendra Singh's case ((1955) 1 S.C.R. 415) the correctness of that decision was doubted. Indeed, in the latest two decisions, the principle was sought to be extended to a situation arising under the Government of India Act, but the majority of the learned Judges left open the question, though two of the learned Judges constituting the Bench expressed their view against such an extension. On the findings, I have accepted, the said question does not arise for consideration in this case and I do not propose to express my opinion thereon.

If that be the position, is there any jurisdiction for this Court to refuse to follow the decision in Virendra Singh's case ((1955) 1 S.C.R. 415). In my view, the said decision is not only correct, but is also in accord with the progressive trend of modern international law. After all, an act of State is an arbitrary act not based on law, but on the modern version of "might is right". It is an act outside the law. In the primitive society when a tribe conquered another tribe, the properties of the vanquished were at the mercy of the conqueror. The successful army used to pillage, plunder and commit acts of arson and rape. When society progressed, the doctrine of Act of State was evolved, which really was a civilized version of the primitive acts of pillage and plunder of the properties of the conquered tribe. But the further progress of civilization brought about by custom and agreement factual recognition of pre-existing rights of the people of the conquered State. There were two different lines of approach - one adopted by imperialistic nations and the other by others who were not. That divergence was reflected in English and American Courts. All the jurists of international law recognise the continuity of title to immovable property of the erstwhile citizens of ceding State after the sovereignty changed over to the absorbing State. In A Manual of International Law by Georg Schwargenberger, 4th Edn., Vol. 1, at p. 81 the learned author says :

> "Private rights acquired under the law of the ceding State are not automatically affected by the cession. They must be respected by the cessionary State."

A more emphatic statement is found in The Law of State Succession by O'Connell. Under the heading "The Doctrine of Acquired Rights" the learned authority author points out, at pp. 78-79 :

> ".....only sovereignty and its incidents expired with the personality of a State. The relationships of the inhabitants one to another, and their rights of property were recognized to remain undisturbed."

He observes at p. 104 :

> "The doctrine of acquired rights is perhaps one of the few principles firmly established in the law of State succession, and the one which admits of least dispute."

In Hyde's International Law, second revised edition, Vol. 1, at p. 433, the following extract from the Sixth Advisory Opinion of September 10, 1923 of the Court of International Justice is quoted :

> "Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be

> maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice....."

In Oppenheim's International Law, 8th edition, Vol. 1 the same legal position is re-stated at p. 571 thus :

> "It must be specially mentioned that, as far as the law of Nations is concerned, the subjugating State does not acquire the private property of the inhabitants of the annexed territory. Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects - it may even confiscate their private property, since a sovereign State can do what it likes with its subjects; but subjugation itself does not by International Law affect private property."

Starke in his book, An Introduction to International Law 5th edn., observes, at p. 274 :

> "Such of these rights as have crystallised into vested or acquired rights must be respected by the successor State, more especially where the former municipal law of the predecessor State has continued to operate, as though to guarantee the sanctity of the rights."

Much to the same effect the relevant statement of international law is found in Briggs' The Law of Nations, 2nd edn. It may, therefore, be held that so far as title to immovable property is concerned the doctrine of international law has become crystallised and thereunder the change of sovereignty does not affect the title of the erstwhile citizens of the ceding State to their property.

In America the said principle of International Law has been accepted without any qualification. Chief Justice John Marshall of the United States Supreme Court has succinctly stated the American legal position in United States v. Percheman ((1833) 32 U.S. 51 at 86, 87) thus :

> "The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory ? ..... A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The session of a territory by its name from one sovereign to another, conveying the compound idea of surrendering, at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

This principle has been accepted and followed by the American Courts in other decisions. But it is said that the view of the American Courts is really based upon the circumstance that international treaties are part of the supreme law of the land.

Article VI of the Constitution of the United States declares that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges

in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding. Chief Justice Marshall in Foster v. Neilson ((1829) 2 Pet. 253) said :

> "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."

A treaty in America may be deemed to be a law of the land; but the American view is not solely based on treaties. In the American Insurance Co. and the Ocean Insurance Co. v. Bales of Cotton ((1828) 7 L.Ed. 511), Chief Justice Marshall clearly recorded the view of the American Courts thus :

> "On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change."

Again the learned Chief Justice in Charles Dehault v. The United States ((1835) 9 L.Ed. 117, 131) expressly pointed out the existence of the said rights apart from any treaty. He observed :

> "Independent of treaty stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property."

Therefore, the distinction sought to be made may perhaps have some relevance, if in a particular treaty there is a specific term that the United States shall recognize the acquired rights of a citizen of a ceding State, but none if the treaty does not contain such a covenant. The American decisions, therefore, cannot be distinguished on this narrow ground; they have recognized the doctrine of International Law and inter-woven it in the texture of the American municipal law.

The Courts in England have developed the doctrine of act of State which, in the words of Stephen, means "An act injurious to the person or property of some person who is not at the time of that act a subject of Her Majesty; which act is done by a representative of Her Majesty's authority, and is either sanctioned or subsequently ratified by Her Majesty." A treaty whereunder a sovereign territory is ceded is held to be an act of State, for it is not done under colour of any title but in exercise of a sovereign power. Has the law of England denied the doctrine of acquired rights so well-settled in International Law ?

In Vajesingji Joravarsingji v. Secretary of State for India in Council (51 I.A. 357, 360), the Judicial Committee summarized the law on the subject thus :

> "When a territory is acquired by a sovereign State for the first time that is an act of State ..... Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties.....".

The sentence in the said passage, namely, "such rights as he had under the rule of predecessors avail him nothing", cannot be, in the context in which it appears, interpreted as a denial of the doctrine of

acquired rights evolved by International Law, but it only refers to the question of enforceability of such an acquired right in a municipal court. The same view has been expressed in a number of English decision. Therefore, the law in England is that the municipal courts cannot enforce the acquired rights of the erstwhile citizens of the ceding State against the absorbing State unless the said State has recognized or acknowledged their title. This Court accepted the English doctrine of act of State in a series of decisions noticed by me earlier. What does the word "recognize" signify ? It means "to admit, to acknowledge, something existing before." By recognition the absorbing State does not create or confer a new title, but only confirms a pre-existing one. It follows that till the title is recognized by the absorbing State, it is not binding on that State. An exhaustive exposition of this branch of law is found in Promod Chandra Dab's case ((1962) Supp. (1) S.C.R. 405). I am bound by that decision. O'Connell in The law of State Succession brings out the impact of the doctrine of act of State on that of acquired rights under International Law, at p. 88, thus :

> "The doctrine of act of State is one of English municipal law. It merely denies an English Court jurisdiction to inquire into the consequences of Acts of the British Government which are inseparable from the extension of its sovereignty. The court is not entitled to ask if such acts are 'just or unjust, politic or impolitic' or what legal rights and duties have been carried over in the change of sovereignty. The doctrine is not intended, however, to deny a rule of International Law."

In the words of the same author, the fact that a right cannot be enforced does not mean that it does not exist. Non-recognition by the absorbing State does not divest title, but only makes it unenforceable against the State in municipal courts.

The result of the discussion may be summarized thus : the doctrine of acquired rights, at any rate in regard to immovable property, has become crystallized in International Law. Under the said law the title of a citizen of a ceding State is preserved and not lost by cession. The change of sovereignty does not affect his title. The municipal law of different countries vary in the matter of its enforceability against the State. As the title exists, it must be held that even in those countries, which accepted the doctrine of act of State and the right of a sovereign to repudiate the title, the title is good against all except the State. Before the Constitution came into force the State did not repudiate the title. When the Constitution of India came into force the respondent and persons similarly situated who had title to immovable property in the Sant State had a title to the said property and were in actual possession thereof. They had title to the property except against the State and they had, at any rate, possessory title therein. The Constitution in Art. 31(1) declares that no person shall be deprived of his property save by authority of law. That is, the Constitution recognized the title of the citizens of the erstwhile State of Sant, and issued an injunction against the sovereign created by it not to interfere with that right except in accordance with law. A recognition by the supreme law of the land must be in a higher position than that of an executive authority of a conquering State. I would, therefore, hold that the title to immovable property of the respondent was recognized by the Constitution itself and therefore, necessarily by the sovereign which is bound by it. I, therefore, respectfully hold that Virendra Singh's case ((1955) 1 S.C.R. 415) has been correctly decided.

Apart from the recognition of the title of the respondent by the Constitution, in this case, the letter written by the Government of India, dated October 1, 1948, clearly recognized the title of persons situated in the position of the respondent to their properties. But the learned Attorney-General contends that the letter shall be regarded as part of the merger agreement and therefore its terms cannot be relied upon for the purpose of recognition of the respondent's title or of evidence of the

Government's waiver of its right to repudiate the respondent's title. It is true that in the concluding portion of the letter it is stated that the contents of the letter will be regarded as part of the merger agreement. But the merger had already taken place on June 10, 1948 and this letter was written on October 1, 1948. It does not appear from that letter that the Maharana of Sant State, who ceased to be the Ruler except in name for certain privileges, was a party to it. This letter, therefore, can at best be treated as one of the acts of the Government of India implementing the terms of the merger agreement. It cannot, therefore, be said to be a part of the merger agreement. If it was not, by calling it so it did not become one. At the time the letter was sent all the citizens of the erstwhile Sant State had become the citizens of India. The letter contains a clear statement in paragraphs 5 and 7 thereof that enjoyment of ownership of jagirs, grant etc. existing on April 1, 1948 were guaranteed and that any order passed or action taken by the Ruler before the said date would not be questioned. This is a clear recognition of the property rights of the respondent and similar others. It is necessary, therefore, to express my opinion on the question whether, even if the said letter formed part of the merger agreement, any recital therein can be relied upon as evidence of recognition of pre-existing titles by the absorbing State or waiver of its sovereign right to repudiate the said titles.

For the aforesaid reasons I agree that the appeal should be dismissed with costs.

For the same reasons Civil Appeal No. 183 to 186 of 1963 are also dismissed with costs.

HIDAYATULLAH J. - These appeals by the State of Gujarat impugn a common judgment of the High Court of Gujarat sated January 24, 1961. The respondents were plaintiffs in five suits for declaration of rights in forests and for permanent injunction against interference with those rights by the State. All suits except one were dismissed by the Court of first instance. The District Judge on appeal ordered the dismissal of that suit also and dismissed the appeals of the plaintiffs in the order suits. The plaintiffs then appealed to the High Court and by the judgment under appeal, all appeals were allowed and the suits were decreed. The State Government has now appealed to this court by special leave.

The forests in respect of which the declaration and injunction were sought are situated in the former State of Santrampur (also called Sant State). Santrampur was an Indian State and the Ruler attained independence and sovereignty on August 15, 1947 on the ceasing of the paramountcy of the British Crown. The Ruler at first ceded his sovereignty on three subjects to the Government of India but on March 19, 1948, ceded the territory of the State to the Government of India by an agreement which came into force from June 10, 1948. The Central Government, by virtue of powers vested in it by the Extra-Provincial Jurisdiction Act, 1947, delegated its functions to the Provincial Government of Bombay and on June 2, 1948, the Administration of the Indian States Order was passed and it was applied to Sant State from June 10, 1948. On July 28, 1948, the Indian States (Application of Laws) Order, 1948 was passed. Certain enactments in force in the Province of Bombay were extended to Sant State and then under the State' Merger (Governor's Provinces) Order, 1949, Sant State became a part of the Province of Bombay from August 1, 1949. On October 1, 1948, a letter of guarantee was written to the Ruler by Mr. V. P. Menon in which it was stated as follows :

#".....##

7. No order passed or action taken by you before the date of making over the administration to the Dominion Government will be questioned unless the order was passed or action taken after the 1st day of April, 1948, and it is considered by the Government of India to be palpably unjust or reasonable. The decision of the Government of India in this respect will be final."

It was added that the letter would be read as part of the original Merger agreement.

A week before ceding the territories of his State, the Ruler of Sant made a Tharao or Thavan order as follows :

"Order

> 3. Ta. Mu. Outward Register No. 371. The Jivak, Patayat, Inami, Chakariyat, Dharmada villages in Sant State are being given (granted) to Jagirdars and the holders of the said villages are not given rights over forests. Hence after considering the complaints of certain Jagirs, they are being given full rights and authority over the forests in the villages under their vahivat. So, they should manage the vahivat of the forest according to the policy and administration of the State. Orders in this regard to be issued
>
> # Sd. In English. Maharana, Sant State."##

The former grants which were made in favour of the jagirdars and holders of the villages have not been produced, but they were probably like the grant of village Gothimada dated December 1, 1857, which was to the following effect :

#".....##

You have to do the vahivat (management) of the land situate within the permanent boundaries of the outskirts of the villages in four directions. This village has been granted for the appropriation and enjoyment of the income thereto except in respect of civil and criminal matters. So you must behave in the State in accordance with the custom and usage and practice of other Thakarati villages of the State.

If any person of the village is ordered in regard to any work or matter then you should not in any way interfere therein but produce the said person as per order.

You have to act and behave according to the said clauses and should remain with integrity and honesty and loyal to the State.

Dated : 1-12-1867 A.D.S.Y. 1929 Magsar.

Sudu 5."

After the Tharao was issued on March 12, 1948, some of the Thakores executed contracts in favour of the plaintiffs between May 1948 and 1950. The agreements which were made with the contractors are on the file of the appeals. The Thakores and the contractors then began to take forest produced but they were stopped in April 1949. The present five suits were then filed. Four of the suits were instituted by the contractors and the fifth by one of the Thakores in the capacity as inamdar.

After merger, a question arose whether these contracts should be approved or not. On January 1949, on the application of one of the Thakores, an order was passed by the Divisional Forests Officer. It was as follows :

Gothimada village of Santrampur State. Application of the owner requesting to grant authorization to the Contractor and states that he has no objection if the authorization is issued. Is the authorization up to Lunawada and Signally only, time-limit up to 31-3-1949. No export outside to be permitted, pending receipt of order from Government. Written undertaking to be taken from the purchaser that he will abide by the decision and orders passed by Government and then the authorization handed over. Send copy to F.O. Lunawada."

Similar orders were passed in respect of other villages and undertakings were taken from the Thakores and the contractors. A sample is quoted here -

> "UNDERTAKING :
>
> I, Thakore Sardarsingh Gajesingh hereby give an undertaking to abide by the decision and orders passed by the Government of Bombay in respect of Gothimada forests, rights over which were conferred on me by Santrampur State Government on 12-3-48 in their resolution No. G. 371 dated 12-3-48.

Authorization Nos. 111, 112 of 1948-49, in respect of village in Santrampur State issued by the Divisional Forest Officer, Integrated States Division, Devgad Baria in favour of Mr. Hatimbhai Badruddin is subject to the above undertaking.

Dated 1-2-49.

Sd. in Gujarathi."##

The Conservator of Forests, North Western Circle also issued a memorandum on January 18, 1949 stating :

#".....##

However, to safeguard the Government interest written undertaking should be taken from the Jahagirdars, Inamdars of person or persons concerned that he or they would abide by the decision or orders passed by the Bombay Government in respect of such private forests, when the question of rights over such private forests is finally settled."

When the undertakings were furnished, passes were issued to the contractors. In April 1949, however, the work of all the contractors was stopped and on July 8, 1949, Government sent a communique to the Collector of Panch Mahals repudiating the Tharao of March 12, 1948. In this letter it was stated as follows :

> "Reference your memorandum No. ADM (P) 50-A-II, dated 24th May, 1949, Government considers that the order passed by the Ruler of the Sant State under his No. 371, dated 12th March, 1948 transferring forest rights to all the jagirdars of the jagir village, are mala fide and that they should be cancelled. Before, however, taking further action in the matter, please ascertain whether the possession of the forests in question is with Government or has gone to the Jagirdars. If the possession is still with Government please ask the Officer of the Forest Department to retain the same and to refuse to issue passes, etc. to private contractors and purchasers.
>
> # By order of the Governor of Bombay. Sd/-".##

It appears that this was not communicated to the contractors of the Thakores. On June 29, 1951, the Government of Bombay passed a resolution that the Maharana's order would not be given effect to. Another resolution was passed on February 6, 1953 as follows :

On the even of the merger of the Sant State in the State of Bombay, the Ruler of that State issued Tharav No. 371 on 12th March, 1948, under which Jiwai, Patawat, Inami, Chakriat and Dharmada Jagirdars and inamdars were given full forest rights over the villages in their charge. The Government of Bombay, after considering the implication of the Tharav, decided that the order was mala fide and cancelled it on 8th July, 1949 vide Government Letter, Revenue Department No. 2103-M49 dated the 8th July, 1949. By the time these orders were issued, the free growth in the Jagiri forests concerned was already sold by some of the Jagirdars and the trees cut. Further cutting of trees and export of trees cut was however stopped by the Forest Department after receipt of the orders of 8th July, 1949. On representation being made to Government, Government, however, agreed to allow to release the material felled from the forest under dispute, pending decision on the settlement of forest rights, subject to the condition that the contractor furnished two sureties solvent for the material removed or deposited with the Divisional Forest Officer certain amount per wagon load of material. The power of the material was also asked to give a written undertaking that he would abide by the ultimate decision of Government.

#.....##

5. Government is, however, pleased to examine individual cases of Jagirdars and inamdars irrespective of the Tharav of 1948, on the basis of the Forest Settlement Officer's Report and other considerations.

7. The question of forest rights in the following villages is still under consideration of Government and necessary orders in that behalf will be issued in due course :-

(1) Nanirath. (2) Gothimada. (3) Rathada.

#....."##

Before this the suits we are dealing with were filed. The contention of the plaintiffs was that the Merger agreement of March 1948 was not an Act of State, because it was preceded by surrender by the Ruler of sovereignty in respect of three subjects. This contention was not accepted in the High Court and has not been raised here. The next contention was that the Tharao or order of March 12, 1948 was a legislative act and as all the old laws of the State were to continue to be in force except as modified by the Indian States (Application of Laws) Order, 1948, the Tharao could be revoked by the appellant by Legislative authority only and not by an executive act. The High Court did not accept this contention, because according to the High Court, the Tharao was not a piece of legislation, but was a grant by the Ruler. The third contention was that the Central Government through Mr. V. P. Menon has undertaken not to question any order or action taken before 1st April, 1948, and that this created a bar to the repudiation of the order of the Maharana dated March 12, 1948. This contention was not accepted by the High Court. The High Court held that the letter formed a part of an Agreement which could only be enforced by the High Contracting Parties, if at all, but not by any other person, and in any event, municipal courts had no authority to enforce the

agreement. The High Court relied upon Art. 363 of the Constitution and the decisions of this Court.

The High Court, however, accepted the contention of the plaintiffs, that it was open to the succeeding sovereign to waive or relinquish its right to repudiate the actions of the previous Ruler and to acknowledge either expressly or impliedly the rights conferred on the subjects of the previous Ruler and that this had been done in this case. They referred to the permission which had been given by the officers of the Forest Department to the plaintiffs in this suit to cut and carry away the timber and regarded the letter of Mr. V. P. Menon as evidence of waiver and relinquishment. They held on the authority of Virendra Singh and Others v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415) and Bholanath J. Thakar v. State of Saurashtra (A.I.R. (1954) S.C. 680) and the judgment of the Bombay High Court in Bhojrajji v. Saurashtra State (61 Bom. L.R. 20) that the Government must, in these circumstances, be held to have waived or relinquished its rights to enforce the Act of State against the plaintiffs.

On behalf of the appellant, it is urged (a) that the Act of State continued till the resolutions were passed and there was no waiver or relinquishment in favour of the appellants, and (b) that the action of the subordinate officers of the Forest Department did not bind Government and the respondents cannot take advantage of the letter of Mr. V. P. Menon. On behalf of the respondents, in addition to meeting the above arguments, it is contended that the Tharao was a law and could only be revoked by another law. It is further argued that after the Merger, s. 299(1) of the Government of India Act, 1935 which read "No person shall be deprived of his property in British India save by authority of law" protected the respondents and this protection became absolute on January 26, 1950, by reason of Art. 31 of the Constitution. As the resolutions in question were passed after the commencement of the Constitution, it is urged that they cannot affect the rights of the respondents who came under the protection of Art. 31 of the Constitution. It is contended that in any case, the Act of State could not operate against the citizens of the State which the respondents became on the Merger or on the inauguration of the Constitution. It is also argued on behalf of the respondents on the authority of a case of the Permanent Court of International Justice and certain cases of the Supreme Court of the United Stated that the Act of State should not interfere with rights in property held from a former Ruler.

The appellant contends in reply that the Act of State continued, because the contractors, and jagirdars were permitted to work the forests on their furnishing undertakings, and it was only completed against them in April, 1949, when they were asked to stop their work even though the actual order of Government deciding whether to accept the Tharao or not was communicated to them in 1953. It is argued that what was of real consequence was not the decision of the Government but the stoppage of the work. It is also argued that s. 299(1) did not protect the respondents against the Act of State and that as there was no State succession on January 26, 1950, the original Act of State did not come to an end. It is also pointed out that this Court has not accepted the rule of International Law referred to in Virendra Singh's case ((1955) 1 S.C.R. 415) and has instead acted on the doctrine of Act of State as interpreted by the Courts in England. I shall deal with these points in brief, because most of them have been decided against the respondents in the High Court on the basis of earlier rulings of this Court.

To begin with, this Court has interpreted the integration of Indian States with the Dominion of India as an Act of State and has applied the law relating to an Act of State as laid down by the Privy Council in a long series of cases beginning with Secretary of State in Council for India v. Kamachee Boye Saheba ((1859) 13 Moore P.C. 22) and ending with Secretary of State v. Sardar Rustam Khan and Other ((1941) 68 I.A. 109). The cases on this point need not be cited. Reference may be made

to M/s. Dalmia Dadri Cement Co. Ltd. v. Commissioner of Income-tax ((1959) S.C.R. 729), The State of Saurashtra v. Menon Haji Ismali Haji ((1960) 1 S.C.R. 537), Jaganath Agarwala v. State of Orissa ((1962) 1 S.C.R. 205) and State of Saurashtra v. Jamadar Mohamed Abdulla and Others ((1962) 3 S.C.R. 970). In these cases of this Court, it has been laid down that the essence of an Act of State is an arbitrary exercise of sovereign power on principles which are paramount to the Municipal Law, against an alien and the exercise of the power is neither intended nor purports to be legally founded. A defence that the injury is by an Act of State does not seek justification for the Act by reference to any law, but questions the jurisdiction of the court to decide upon the legality or justice of the action. The Act of State comes to an end only when the new sovereign recognises either expressly or impliedly the rights of the aliens. It does not come to an end by any action of subordinate officers who have no authority to bind the new sovereign. Till recognition, either express or implied, is granted by the new sovereign, the Act of State continues.

If we apply these tests (rightly applied in the High Court), we reach the result that the Government of Bombay and the Central Government could refuse to recognise the rights created on the eve of the Merger by the Tharao of the Maharana and to say that it was not acceptable to them and therefore not binding on them. Such action may be harsh or unfair; but the Municipal Courts cannot declare it to be so, because unless the rights are irrevocably recognised earlier the Municipal Courts have no jurisdiction to pronounce upon the legality or the justness of the action. It is for this reason that the respondents pleaded in the High Court that there was a waiver or relinquishment of the Act of State in their favour. Relinquishment and waiver were again relied upon by the respondents before us and they refer to two circumstances from which an inference about waiver or relinquishment can be raised. The first is cl. 7 of the letter of Mr. V. P. Menon quoted above and the second is the conduct of the officers of the Forest Department in allowing the contractors and the jagirdars to work the forest in accordance with the Tharao of the Maharana. Cl. 7 of a similar letter of guarantee was considered by this Court in Maharaj Umeg Singh and Others v. The state of Bombay and Others ((1955) 2 S.C.R. 164). In that case also arguments were the same as here. It was then contended that the Ruler's agreement with the Government ensure for the benefit of the subjects even if they were not parties to the agreement. It was then pointed out on behalf of the Government that the agreement, if any, could not be sought to be enforced by persons who were not parties to it. This Court observed :

> "We do not feel called upon to pronounce upon the validity or otherwise of these contentions also for the simple reason that the petitioners would be out of Court either way. If they were deemed to be parties to the agreements of merger and letters of guarantee they would be faced with the bar to the maintainability of the petitions under Article 363 of the Constitution which lays down that neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of the Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India ..... was a party. If on the other hand they were deemed not to have been parties to the same they would not be the contracting parties and would certainly not be able to enforce these obligations."

It would, therefore, appear that the present respondents who were not parties to the Merger agreement or to the letter written by Mr. Menon which was made expressly a part of the Agreement cannot take advantage of cl. 7. If they were parties, Art. 363 would bar such a plea.

It is next contended that the Act of State had come to an end after the Government of India Act, 1935 was applied to the State and the State because a part of the territories of the Government of India. This argument was raised to claim the benefit of s. 299(1) of the Government of India Act 1935. The interference with the rights in forests conferred by the Tharao and the agreements with the contractors based on the Tharao took place in April, 1949. It was contended that on June 10, 1948, the subjects of Sant State became Indian citizens and they were protected by s. 299(1). The Officers of the Forest Department did not unconditionally allow the forests to be worked. They made it clear to the contractors and the jagirdars that what they were doing was not final and that Government was going to decide about the Tharao and the contracts later. No doubt, the forests were allowed to be worked, but an undertaking was obtained from each contractor and jagirdar. This showed that the officers of the Forest Department did not attempt to bind the Government, even if they could. It is true that the order of Government to stop work was not communicated to the contractors and the jagirdars but the working of the forests was as a matter of fact stopped much earlier and the learned Attorney-General is right in pointing out that it was all that mattered. This action of the officers was later approved by Government when it decided that it would not allow any rights to flow from the Tharao and the contracts. In other words, while Government was considering the matter, the officers of the Forest Department tentatively allowed the forests to be worked but in no manner to bring the Act of State to an end. The Act of State could only come to an end if Government recognised the rights flowing from the Tharao. That, Government never did. There was thus no recognition of the Tharao or the rights flowing from it at any time. It was pointed out by this Court in Aggarwala's case ((1962) 1 S.C.R. 205) that Government may take time to consider and delay does not militate against the Act of State. In that case also the decision of Government was taken after the coming into force of the Constitution. This Court pointed out, agreeing with Vaje Singhji Jorawar Singh v. Secretary of State for India ((1924) L.R. 51 I.A 357) that enquiries may continue for some time without any inference of waiver or relinquishment. No doubt, in Bholanath Thaker's case (A.I.R. (1954) S.C. 680) and in Virendra Singh's case ((1955) 1 S.C.R. 415) waiver or relinquishment was inferred from the conduct of Government. Such an inference may legitimately be raised where Government, after having accepted the rights, attempts to go back upon such acceptance. There must, however, be a clear indication, either expressly or by implication, that Government has, in fact, accepted the rights. In the present case, the subordinate officers of the Forest Department allowed the forests to be worked, making it quite clear that Government was considering the matter and took undertakings from the respondents that they would abide by the decision of Government. Government passed an order declining to accept the Tharao. The order so passed was not communicated to the respondents but later it was reiterated as a resolution which was communicated.

To avoid this result, there are two arguments upon which the respondents rely and they are the main contentions in these appeals. The respondents seek support for the judgment by challenging the decision on some of the points decided against them. The first is that the Tharao was a law which could only be rescinded by another law. In this connection, the respondents rely upon the observations made by this Court in Madhaorao Phalke v. The State of Madhya Bharat ((1961) 1 S.C.R. 957, 964). These observations were based upon the earlier case in Ameer-un-nissa Begum and Others v. Mehboob Begum and Others (A.I.R. 1955 S.C. 352). In these cases, it was pointed out that the distinction between legislative, executive and judicial acts of an absolute Ruler (such as the Indian Rulers were) was apt to disappear when the source of authority was the sovereign. These observations are sought to be applied here. In the past also these observations were invoked on occasion. In so far as the subjects of the Ruler were concerned, they were bound to obey not only laws but any orders of the Ruler, whether executive or judicial. For them they did not exist any

difference because each emanation of the will of the sovereign required equal obedience from them. But it does not mean that the Rule acted legislatively all the time and never judicially or executively. If this was the meaning of the observations of this Court, then in Phalke's case ((1961) 1 S.C.R. 957, 964) it would not have been necessary to insist that in determining whether there was a law which bound the succeeding sovereign, the character, content and purpose of the declared will must be independently considered. In Ameer-un-nissa's case, (A.I.R. 1955 S.C. 352) this Court was concerned. With a Firman of the Nizam and that was one of the accepted modes of making laws in Hyderabad State. In Phalke's case ((1961) 1 S.C.R. 957, 964), this Court was concerned with Kalambandis which were held by this Court to be laws binding upon the subsequent Government unless repealed or replaced by other law. The Kalambandis were so regarded partly because the Maharana had himself laid down that Kalambandis issued by him were to be regarded as law, and partly because the Kalambandis created a tenure which carried with it pensions. The pensions were grants but the manner of enjoyment of the pensions was determined by the rules of tenure provided in the Kalambandis also bearing upon succession and devolution. These cases were distinguished in more recent cases when the observations were sought to be extended to others which were clearly not legislative and reference may be made to Maharaja Shree Umaid Mills Ltd. v. Union of India and Others (A.I.R. 1963 S.C. 953) and The Bengal Nagpur Cotton Mills Ltd. v. The Board of Revenue, Madhya Pradesh and Others (A.I.R. 1964 S.C. 888). It was pointed out in these two cases that the observations in Ameer-un-nissa's case (A.I.R. 1955 S.C. 352) Phalke's case ((1961) 1 S.C.R. 957, 964) could not be read as indicating that everything that the Maharaja said or ordered was a law. In the latter case, this Court pointed out that a proper law would be one which was made in accordance with the traditional mode of making laws in the territory or in accordance with some procedure which was expressly devised for the occasion. It was pointed out that law is the result of a legislative process and the result must be intended to bind as a rule of conduct; it must not for example be a contract or a grant or a gift etc.

Viewed from this angle, it is quite obvious that the Tharao was not a law. It was a grant made to the jagirdars mentioned in the Tharao. It is contended that it is made applicable to persons belonging to five different tenures and that the 'management' of the forests was to be done according to the policy and administration of the State. No doubt, the Tharao is applicable to a large number of persons enjoying different tenures but it is stated therein that orders were to be issued individually to all of them. The Tharao was issued only 8 days before the Merger. It is surprising that the Maharaja thought of the complaints of the grantees on the eve of the Merger. The fact that the Maharana's Tharao was passed to benefit a large number of persons en bloc does not make it any the more a law if it did not possess any of the indicia of a law. The respondents would not admit that if it had been addressed to individuals, it would have changed its character from a law to a grant. This fact makes no difference to its character, content and purpose. Further, the original grant of which the Tharao became a part was also a grant. One such grant has been quoted above. The word "Vahivat" does show that the grant was for management but in this context, it means more than management. It was customary to use this word in conferring rights which were liable to be resumed. These grants did give rights to the grantees but did not lay down any rule of conduct. It may be pointed out that in Umeg Singh's case ((1955) 2 S.C.R. 164) it was contended that cl. 5 of the letter of Mr. Menon prevented legislation and it was then held that the grants were not legislative measures of the Maharaja and did not bar the making of laws to set the grant at naught. In that case also there was a Tharao in dispute. The Tharao cannot, therefore, be treated as a law at all. It is a grant and as a grant it was open to the new sovereign not to recognise it.

It was contended that in any event, after the commencement of the Government of India Act, 1935, the respondents had the protection of s. 299(1). This point was raised but was left open by the

majority in Jamadar's case ((1962) 3 S.C.R. 970) to which we have already referred. On that occasion, Sarkar and Mudholkar JJ. in a separate judgment held that s. 299(1) did not afford any protection. The learned Judges pointed out that s. 299(1) did not add to the rights of persons but protected such rights as existed. If on the Merger of the territories of the Indian Rulers with those of the Government of India, there was Act of State and if as held by this Court in the cases to which reference has already been made it was open to the Government of India to decide whether or not to recognise certain rights, the Government of India could do so. In that event, s. 299(1) did not come into play because it could only come into play after the rights were recognised. The Act of State continued because Government was taking time to consider whether to accept the Tharao or not and while the decision was being reached, there was a second change inasmuch as the present Constitution was passed. It is contended that there was a lapse of the original Act of State because of a State succession on January 26, 1950, and as this was before the Resolutions of 1951 and 1953, the respondents were protected.

The first question to consider is whether there took place in 1950 a State succession. State succession takes place either in law or in fact. It takes place in law when there is a juridical substitution of one State for another. It takes place in fact when there is (a) annexation (e.g. Algiers by France (1831) or South African Republic by Great Britain (1901)) or (b) cession (e.g. the Ionian Islands by Britain to Greece (1864) or territory to Poland by Germany) or (c) fusion of one State with another (e.g. Fusion of Serbia with croat etc. to form Yugoslavia) or (d) entry into a federal Union (e.g. Hawaii in U.S.A.) or (e) partition (e.g. India and Pakistan) or (f) separation of secession (e.g. U.S.A. from Britain). It will be seen that on the 26th January, 1950, there was no succession in fact because none of these events took place. As Oppenheim defined "succession" -

> "A succession of International Persons occurs when one or more International Persons take the place of another International Person in consequence of certain changes in the latter's position International Law, 5th edn. p. 151."

In this sense, though the people of India gave themselves a Constitution, there was no State succession in so far as the people of Sant State were concerned. For them the State succession was over sometime before. No doubt, when the Dominion of India became a sovereign Democratic Republic, there was a breaking away from the British Crown, but that was a State succession in a different field. We are not concerned with the secession of India from the British Crown, but with State succession between Sant State and India, and there was no second succession in 1950. Whatever had happened had already happened in 1948 when Sant State merged with the Dominion of India. The Act of State which began in 1948 could continue uninterrupted even beyond 1950 and it did not lapse or get replaced by another Act of State. The Constitution no doubt guaranteed the rights of citizens after 1950 but these rights granted by the Ruler were not recognised even before 1950 and the Constitution gave its support to those rights which were extent on January 26, 1950.

It only remains to consider the argument of Mr. Purushotham based on the view of Chief Justice John Marshall, of the Supreme Court of the United States expressed in U.S. v. Percheman (32 U.S. 51 at 86, 87) followed by Cardozo J. in 1937 in Shapleigh v. Mier (299 U.S. 468 at 470). It was there laid down that private ownership is not disturbed by changes in sovereignty and that according to the modern usage of nations a cession of territory is not understood to be cession of the property of the inhabitants. These two cases were referred to in the judgment of Bose J. in Virendra Singh's case ((1955) 1 S.C.R. 415) who pointed out that these principles were also reflected in the Sixth Advisory Opinion of September 10, 1923 of the Permanent Court of International Justice. Mr. Purushotham cited other cases where the Supreme Court of the United States had considered

obligations which old Spanish and Maxican treaties and created. It was argued that this represents the modern and progressive view and we were asked to revise the entire law of Act of State as understood in India during the past 100 years and particularly the last dozen years.

The principle on which this Court has acted in the past few years has been amply indicated earlier in this judgment. It may be summarized in the words of Fletcher Moulton, L.J. in Salaman v. Secretary of State for India ((1906) 1 K.B. 613) :

> "An Act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied on as being an act of State, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of State, and what was its nature and extent".

The Courts in England have also acted on the further principle which may be shortly stated in the words of Lord McNair (International Law Opinions (1956) Vol. 1. P. 1129; See also O'Connel - B.Y.B. (1950) P. 93) :

> "The term 'Act of State' is used, not only narrowly to describe the defence explained above, but also, perhaps somehow loosely, to denote a rule which is wider and more fundamental, namely, that 'those acts of the Crown which are done under the prerogative in the sphere of foreign affairs' (sometimes called 'Acts of State' or 'Matters of State'); for instance, the making of peace and war, the annexation or abandonment of territory, the recognition of a new State or the new Government of an old State, etc., cannot form the basis of an action brought against the Crown, or its agents or servants, by any person British or alien, or by any foreign State, in British Municipal Tribunals. Such acts are not justiciable in British Courts, at the suit either of British subjects or of aliens; they may form the subject of political action in Parliament or, when the interests of foreign States or their nationals are involved, of diplomatic protest or of any international judicial process that may be available".

We are not concerned with the obligations created by treaty which according to the opinions of some writers 'run with the land' and bind the territory. Other writers, as pointed out by Lord McNair in his Law of Treaties by Keith in his Theory of State Succession and Crandall in Treaties, Their Making and Enforcement, hold that on cession, the treaties are abrogated automatically. Such a view was taken by the United Kingdom and United States when Algiers was annexed by France and by the former when South Africa was annexed by Great Britain and by the United States when Korea was annexed by Japan in 1910. (See Mervyn Jones B.Y.B. (1947) P. 360; Dr. C. W. Jenks B.Y.B. (1952 P. 105). On the other hand, the treaties of the annexing or cessionary State are held to apply to the new territories. These are treaties with other States which is not the case here. Where is the treaty here ? The rights conferred by the Ruler were not the result of a treaty. Nor can the Merger agreement be exalted to the position of a treaty. There is no treaty involved here. Even if it were possible to hold that there was a treaty between the Ruler and the Central Government, there is no power in the Municipal Courts in India to pronounce upon the Agreement as the subject is outside their jurisdiction by reason of Art. 363. This distinguishes the jurisdiction and power of the Supreme Court of the United States in which consideration of treaties is included. The bar of our Constitution also precludes the consideration whether these agreements can be said to be of the

nature of treaties.

As regards the principles of International Law, it may be pointed out that after the Report of the Transvaal Concessions Commission and Professor Keith's theories in his book, the attention of the world communities has indeed been drawn to the preservation of economic concessions and acquired rights by the annexing or cessionary State. When the India Islands were ceded to Greece the Law Officers (Sir Robert Phillimore was one of them) advised :

> "Both according to the principles of International Law and the practice of all civilised States, ceded territories pass, cum onere to the new sovereign."

(Opinion of 15th August, 1863, F.O. 83/2287.)

McNair International Opinions Vol. 1 p. 156.

Similar advice was given on the occasion of annexation of Peruvian territory by Chile (1884), of Madagascar by France (1896), cession of Cuba and the Philipines by Spain (1898). McNair ibid pp. 157 et seq. Again at the annexation of the Bore Republics between 1900 and 1909 what should be the attitude of Britain led to domestic controversy. The legal advisor to the High Commissioner advised that responsibilities arising from obligations incurred by the South African Republic and Orange Free State could be repudiated but the Law Officers in England reported that a Government annexing territory annexed it subject, speaking generally, to such legal obligations as have been incurred by the previously exiting Government. The obligations included concessionary contracts but the Law Officers added a rider that "the duty to observe such contracts cannot be enforced in a municipal court; it rests merely on the recognition of International Law of what is equitable upon the acquisition of property of the conquered State" (see opinion of 30th November, 1900, F.O. quoted by B.Y.B. 1950 at p. 105).

The Transvaal Concessions Commission made its report in April 1901. The report said inter alia :

> "After annexation, it has been said, the people change their allegiance, but their relations to each other and their rights of property remain undisturbed; and property includes rights which lie in contract. Concessions of the nature of those which are the subject of enquiry present examples of mixed public and private rights : they probably continue to exist after annexation until abrogated by the annexing State, and as a matter of practice in modern times, where treaties have been made on cession of territory, have often been maintained by agreement."

The Commission, however said that no rule of International Law compelled this but added that the best modern opinion favoured that such rights should be respected. The distinction between what is a rule of law and what is a rule of ethics was criticised : see Westlake in (1901) 17 Law Quarterly Review p. 395. However, Prof. Keith gave support to the view. The report of the Commission was considerably influenced by the opinion in Cook v. Sprigg (1899) A.C. 572) International experts, however, in drafting the terms of settlement of the first Balkan War accepted a new formula in 1920 by which the cessionary State was treated as subrogated in all rights and changes. These opinions were put to test in some cases before the Permanent Court of International Justice in connection with the Jaffa Concessions and the case of the German Settlers Case. In the former, the Court decided, for technical reasons, that it had no jurisdiction but added that "if Protocol XII left intact the general principles of subrogation," the administration of Palestine was bound to recognise the

Jaffa Concessions "in consequence of the general principles of International Law." In the case of Settlers of German origin in territory ceded by Germany to Poland and German interest in Upper Silesia case (P.C.I.J. series B No. 6 and series A No. 7), the doctrine of acquired rights was accepted, in respect of private rights. The term "acquired rights" has not received a consistent meaning in this connection. It is not the notion of ius quaesitum which was the result of juristic activity following upon the social contract theory. In International Law, it has different meanings. At one extreme is the view that it must be "a grant to an individual of rights under municipal law which touch public interest" and at the other end "every economic concession" is held included. Of course even International Law does not recognise a universal succession. The term "economic concessions" must involve a contract between the State or a public authority on the one hand and a concessionaire on the other and must also involve an investment of capital by the latter for erection of public works or exploitation in the public sector. Such cases are the Mavromma is case, Lighthouses case, Lighthouses in Crete and Samos case (P.C.I.J. Series A No. 5 and Series A B No. 62 and 71). Cases of mere private rights without any corresponding benefit to the public are not regarded as concessions but there are two cases in which it has been ruled that private rights must be respected. They are the case of Poland mentioned above. Most of the cases deal with Concessions in which there are reciprocal advantages.

All this recognition is still in the diplomatic field. It has never gone beyond political consideration except in the United States. The cases of the United States are mostly to be found in 2-12 Peters and the leading case is U.S. v. Percheman (7. Pet. 61). Occasionally the question of concessionary rights has been considered in the Courts in England : but of that latter. In U.S. v. Percheman (7. Pet. 61), Chief Justice John Marshall observed :

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession to territory ? ..... A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

These words of Chief Justice Marshall have been quoted in legal opinions and have influenced international opinion. The question has been raised that we must accept this as the exposition of the law to be applied by municipal courts here.

The doctrine in the United States is not unlimited. Limitation were pointed out by Chief Justice John Marshall himself in the case of Foster v. Nielson ((1829) 2 Pet. 253). That case involved the effect

upon private land titles of a phrase in an Article of a treaty with Spain. That phrase was "shall be ratified and confirmed to those in possession". It was, as the Chief Justice said, in the "language of contract" and it requested legislative implementation before titles could be claimed. This has led to a differentiation between self-executing treaties and non-self-executing treaties. Says Chief Justice Marshall :-

> "A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign powers of the respective parties to the instrument.
>
> In the United State a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract - when either of the parties engages to perform a particular act - the treaty addresses itself to the political, not the Judicial Department; and the Legislature must execute the contract before it can become a rule for the Court."

In India, the position is different. Article 253 enables legislation to be made to implement international treaties. This means that the law would bring the treaty in the field of municipal law. The matter was considered in one case Birma v. The State (A.I.R. (1951) Raj. 127), where the High Court declared :

> "Treaties which are a part of international law do not form part of the law of the land unless expressly made so by the legislative authority".

This accords with what has been said by me but the judgment seems to suggest that treaties which do not affect private rights also require legislative implementation. This is not quite accurate, because it is not necessary that all treaties must be made a part of municipal law. I agree with Alexander in "International Law in India" in International and Comparative Law Quarterly (1952) p. 289 at p. 295. Preuss (Michigan Law Review (1953) p. 1123 n. 15) calls it a rare example of a treaty which was not enforced without legislative sanction. The only other example he gives is Re Arrow River and Tributaries Slide and Boom Co. Ltd. (1932) 2 B.L.R. 250. see B.Y.B. (1953) 30, pp. 202, 203.

The precedent of the United States cannot be useful because it has been held by the Supreme Court of the United States that, although the Courts have no power to question the validity of the Act of State, they can consider its effect. See U.S. v. Percheman (7. Pet. 61) at p. 86 and that the enunciation of treaties must be accepted by Courts, Clark v. Allen (331 U.S. 503). Our practice and Constitution shows that there are limitations upon the powers of Courts in matters of treaties and Courts cannot step in where only political departments can act. The power of the Courts is further limited when the right is claimed against the political exercise of the power of the State.

Again, the right claimed here is not even a concessionary right such as he has received the support of international writers. It is more of the nature of a gift by the ruler at the expense of the State. It lacks bona fides which is one of the thing to look for. There is no treaty involved and whatever guarantee there is, the Constitution precludes the municipal courts from considering. Politically and ethically there might have been some reason to accept and respect such concessions but neither is a

reason for the municipal courts to intervene. The position of the municipal courts according to English Jurisprudence has been noticed in earlier cases. To them may be added the following considerations. In Amodu Tijani v. Secretary, Southern Nigeria ((1921) 2, A.C. 399) it was said :

> "a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners, and the general terms of a cession are prima facie to be constructed accordingly." (p. 407).
>
> Again, in West Rand Central Gold Mining Co. v. Regem ((1905) 2 K.B. 391), it was said :
>
> "It must not be forgotten that the obligations of conquering states with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation are altogether different from the obligations which arise in respect of personal rights by contracts."

The observations in Amodu Tijani's case ((1921) 2, A.C. 399) were cited before the Privy Council in Sardar Rustam Khan's case ((1941) 68 I.A. 109). But Lord Atkin after referring to all cases from Kamachee Boye Saheba ((1859) 13 Moore P.C. 22), referred to the observations of Lord Halsbury in Cook v. Sprigg (1899 A.C. 572).

> "It is well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assume the duties and legal obligations of the former sovereign with respect of such private property within the ceded territory. All that can be properly meant by such a proposition, is that, according to the well understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

Lord Atkin referred in his judgment to Secretary of State v. Bai Rajbai ((1915) L.R. 42 I.A. 229) and Vajje Singh's case ((1924) L.R. 51 I.A. 357) as laying the limits of the jurisdiction of municipal courts. These cases have been applied in several decisions by this Court and the view of the Supreme Court of the United States or the view taken in International Law has not been accepted. It is not that the Courts in England have not been pressed by the rules of International Law as a science. As Westlake pointed out the Nature and Extension of Title by Conquest (op. cit.) :

> "The authorities on the law of England appear to be prepared to pay that homage to international law. We may refer to what was said by Vice-Chancellor Lord Cranworth in King of the Two Sicilies v. Willcox, I Sim. N.S. 327-9, and by Vice-Chancellor Wood in United States of America v. Prioleau, 2 Ham. 563; and to the generality of the proposition laid down by Vice-Chancellor James in United States of America v. Mcrae, L.R. 8. Eq. 75. 'I apprehend it,' he said, 'to be the clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property, of the displaced power, whatever may be the nature or origin of the title of such displaced powers".

But the rule that the Act of State can be questioned in a Municipal Court has been adopted and it has been considered that it is a matter for the political departments of the State. To quote from Cook v. Sprigg ((1899) A.C. 572).

> ".....if there is either an express or a well-understood bargain, between the ceding potentate and the Government to which the cession is made, that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

I do not, therefore, accept the contention that a change of opinion is necessary. Even Bose J., did not decide in Virendra Singh's case ((1955) 1 S.C.R. 415), on the basis of international law or the opinion of the Supreme Court of the United States. In my opinion, these are matters for the political department of the State. However, desirable it may be that solemn guarantees should be respected, we cannot impose our will upon the State, because it is outside our jurisdiction.

For these reasons, I would accept the appeals and would set aside the judgment under appeal and restore the decrees dismissing the suits with costs throughout.

SHAH J. - The Ruler of Sant State had made grants of villages to jagirdars but without right to trees. On March 12, 1948, the Ruler issued an order reciting that the holders of the villages were not given "rights of the forests" and after considering the complaints of certain jagirdars they were given full rights and authority over the forests in the villages under their vahivat. The jagirdars were directed to manage "the forests according to the policy and administration of the State". The respondents claim in these appeals that the rights of the grantees to the forests were not liable to be cancelled by the Dominion of India after the merger of the State of Sant in June 1948, and by executive action the Government of Bombay was not complement to obstruct the exercise of those rights.

Pursuant to the agreement dated March 19, 1948 as from June 1, 1948, the State of Sant merged with the Dominion of India. The sovereignty of the Ruler was thereby extinguished and the subjects of the Sant State became citizens of the Dominion of India. Accession of one State to another is an act of State and the subjects of the former State may, as held in a large number of decisions of the Judicial Committee and of this Court, claim protection of only such rights as the new sovereign recognises as enforceable by the subjects of the former State in him municipal courts. In the Secretary of State in council of India v. Kamachee Boye Saheba (7 Moode's I.A. 476) the jurisdiction of the courts in India to adjudicate upon the validity of the seizure by the East India Company of the territory of Rajah of Tanjore as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir, and that the property of the late Rajah lapsed to the British Government, fell to be determined. The Judicial Committee held that as the seizure was made by the British Government, acting as a sovereign power, through its delegate the East India Company it was an act of State, to inquire into the propriety of which a Municipal Court had no Jurisdiction. Lord Kingsdown observed at p. 529.

> "The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer : Such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

In Vajesingji Joravarsingji v. Secretary of State for India in Council (L.R. 51 I.A. 357) the Board

observed (at p. 360) :

> ".....when a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as, he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulation in the municipal courts. The right to enforce remains only with the high contracting parties."

In Secretary of State v. Sardar Rustam Khan and Others (L.R. 68 I.A. 109) in considering whether the rights of a grantee of certain proprietary rights in lands from the then Khan of Kalat, ceased to be enforceable since the agreement between the Khan and the Agent to the Governor-General in Baluchistan under which the Khan had granted to the British Government a perpetual lease of a part of the Kalat territory, at a quite rent, and had ceded in perpetuity with full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration, it was observed by Lord Atkin delivering the judgment of the Board that :

> ".....in this case the Government of India had the right to recognise or not recognise the existing titles to land. In the case of the lands in suit they decided not to recognize them, and it follows that the plaintiffs have no recourse against the Government in the Municipal Courts."

The rule that cession of territory by one State to another is an act of State and the subjects of the former State may enforce only those rights which the new sovereign recognises has been accepted by this Court in M/s. Dalmia Dadri Cement Co. Ltd. v. The Commissioner of Income-tax ((1959) S.C.R. 729); Jagannath Agarwala v. State of Orissa ((1962) 1 S.C.R. 205); Promod Chandra Deb and Others v. The State of Orissa and Others ((1962) Suppl. 1 S.C.R. 405) and The State of Saurashtra v. Jamadar Mohamad Abdulla and others ((1962) 3 S.C.R. 970), and may be regarded as well settled.

Mr. Purshottam on behalf of the respondents however contended that this rule was a relic of the imperialistic and expansionist philosophy of the British Jurisprudence, which is inconsistent with our Constitutional set-up. Counsel submits that in jurisdictions where truly democratic institutions exist the rule laid down by the Judicial Committee has not been accepted. The rule is, counsel submits, inconsistent with the true spirit of our Constitution, which seeks to eschew all arbitrary authority, and establishes the rule of law by subjecting every executive action to the scrutiny of the courts and to test it in the light of fundamental rights. Counsel says that the true rule should be the one which has been recognized by the Supreme Court of the United States that of the accession of a State to another, private rights of the citizens enforceable against their sovereign are not affected, and may be enforced in the Courts of the new sovereign. In support of this argument Mr. Purshottam relied upon the observations made by Marshall, C.J., in United States v. Percheman ((1833) 32 U.S. 51, at 86, 87) :

> "The people change their allegiance, their relation to their ancient sovereign is

> dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory ?..... A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could consider itself as attending a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound ideal of surrendering, at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and to interfere with private property."

But the rights and their enforceability in the Municipal Courts of a State must depend upon the will of the sovereign. The sovereign is the fountain head of all rights, all laws and all justice within the State and only those rights which are recognised by the sovereign are enforceable in his Courts. The Municipal Courts which derive their authority from their sovereign and administer his laws cannot enforce the rights which the former sovereign whose territory has merged or been seized by the new sovereign recognised but the new sovereign has not, for the right to property of the citizen is only that right which the sovereign recognises.

It may also be observed that the constitutional provisions in the United States are somewhat different. Under the Constitution of the United States each treaty becomes a part of the law of the land, the provisions thereof are justiciable and the covenants enforceable by the Courts. Recognition of the rights of the citizens of the acceding State being the prerogative of the sovereign, if rights be recognized by treaty which by the special rules prevailing in the United States become part of the law of the land, they would be enforceable by the Municipal Courts. Under the rule adopted by this Court, a treaty is a contract between two nations, it creates rights and obligations between the contracting States, but there is no judicial tribunal which is competent to enforce those rights and obligations. The treaties have not the force of law and do not give rise to rights or obligations enforceable by the Municipal Courts as observed by Hyde in his "International Law" vol. 1 p. 433 :

> "Acknowledgement of the principle that a change of sovereignty does not in itself serve to impair rights of private property validly acquired in areas subjected to a change, does not, of course, touch the question whether the new sovereign is obliged to respect those rights when vested in the nationals of foreign States, such as those of its predecessor. Obviously, the basis of any restraint in that regard which the law of nations may be deemed to impose must be sought in another quarter."

The observations made by Marshall C.J., have received repeated recognition in treaties of cession concluded by the United States. But as observed by Lord Halsbury in Cook v. Sprigg ((1899) A.C. 572).

> "It is a well-established principle of law that the transactions of independent States between each other are governed by the others laws than those which Municipal Courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of

> international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

It was then urged that by cl. 7 of the letter of guarantee written by Mr. V. P. Menon on behalf of the Government of India on October 1, 1948, which was to be regarded as expressly stated in that letter, as part of the merger agreement dated March 19, 1948, the Government of India had undertaken to accept all orders passed and actions taken by the Ruler prior to the date of handing over of the administration to the Dominion Government. Clause 7 of the letter is in the following terms :

> "No order passed or action taken by you before the date of making over the administration to the Dominion Government will be questioned unless the order was passed or action taken after the 1st day of April 1948, and it is considered by the Government of India to be palpably unjust or unreasonable. The decision of the Government of India in their respect will be final."

But by virtue of Art. 363 of the Constitution, it is not open to the respondents to enforce the covenants of this agreement in the Municipal Courts : Maharaj Umeg Singh and Others v. The State of Bombay and others ((1955) 2 S.C.R. 164).

It was then urged that the Government of Bombay as delegate of the Dominion of India had recognised the right of the respondents when they were permitted to cut the forests. But the plea of recognition has no force. It is true that some of the forests were permitted to be cut by the contractors under special conditions pending decision of the Government of Bombay. The Conservator of Forests North Western Circle had ordered that the question as to the approval to be given to the agreement dated March 12, 1948, was under the consideration of the Government and that written undertakings should be taken from the jagirdars, inamdars or persons concerned that they would abide by the decision or orders passed by the Bombay Government in respect of such private forests when the question of rights over such private forests will be finally settled. On January 9, 1949, on the application of the jagirdar the Divisional Forests Officer agreed to issue authorisation to the contractor valid upto March 31, 1949, subject to the condition that export outside was not to be permitted pending receipt of the orders by the Government and that a written undertaking was given by the purchase that he would abide by the decision and orders passed by Government. In pursuance of this arrangement undertakings were given by the contractors and the jagirdars agreeing to abide by the decision and the orders to be passed by the Government of Bombay in respect of the forest rights and admitting that the authorization issued by the Divisional Forest Officer was subject to those undertaking. The Forest Officers therefore did not allow the forests to be worked unconditionally. Cutting of trees in the forests by the contractors was permitted subject to certain terms and conditions and on the clear undertaking that the question as to the right and the terms under which they could cut the forests would be decided by the Government.

The Government of Bombay on July 8, 1949, resolved that the order passed by the Ruler of the Sant State dated March 12, 1948, transferring forest rights to holders of the jagirs villages were mala fide and that they should be cancelled, but before taking further action in the matter, the Commissioner should ascertain whether the possession of the forests in question was with the Government or was with the jagirdars. The order proceeded to state : "It the possession is still with Government please ask the Officer of the Forest Department to retain the same and to refuse to issue passes, etc., to private contractors and purchasers". A copy of this order was forwarded to the Forest Officers, Santrampur for information and guidance and it is found endorsed on that order that no transit passes be issued to the jagirdars to whom rights over forests were conceded in March 1948 and all

further felling in such jagir forests should be stopped at once and compliance reported. It is true that the order of the Governor was not directly communicated to the jagirdars or the contractors. But if the conduct of the Forest Officers in permitting cutting of the forests is sought to be relied upon, it would be necessary to take into consideration the orders passed by the Conservator of Forests, North-Western Circle, the undertakings given by the contractors and the jagirdars and the order passed by the Governor of Bombay and the execution of that order by stoppage of the cutting of the forests. It appears that cutting of trees in forest was permitted only upto some time in 1949 and was thereafter stopped altogether by order of the Revenue Department.

The final resolution cancelling the agreement was passed on February 6, 1953. It was recited in the resolution that the Tharav issued by the Ruler in 1948 had been considered by the Government to be mala fide and the same had already been repudiated and it was not binding on the Government of Bombay both by law and under the agreement of integration, in spite of the assurance contained in the collateral letter. It was also recited.

> "Since the Tharav has not been recognised by Government but has been specially repudiated, everything done in pursuance thereof including the contracts entered into after passing of the Tharav, is not valid and, therefore, binding on this Government."

Having regard to the conduct of the Officers of the Government of Bombay and the resolution of the Government, the plea that the Government of Bombay as delegate of the Dominion had renounced its right not to regard itself as bound by the order made by the Ruler of Sant State cannot be sustained.

The next question which falls to be determined is whether the order can be regarded as "law" within the meaning of cl. 4 of the Administration of the Indian States Order, 1948. Clause 4(1) provided :

> "Such provisions, or such parts of provisions
>
> (a) of any law, or
>
> (b) of any notification, order, scheme, rule, form or bye-law issued, made or prescribed under any law, as were in force immediately before the appointed day in any Indian State shall continue in force until altered, repealed or amended by an order, under the Extra Provincial Jurisdiction Act, 1947 (XLVII of 1947) :
>
> Provided that the powers that were exercised by the Ruler of an Indian State in respect of or in relation to such Indian State under any such provisions of law immediately before the appointed day, shall be exercised by the Provincial Government or any officer specially empowered in this behalf by the Provincial Government."

It was urged that the order issued by the Ruler of Sant State was either "law" or an "order made or prescribed under any law" in force immediately before the appointed day and by virtue of cl. 4 of the Administration of the Indian State Order, it must be deemed to have remained in operation and any action taken in contravention thereof by executive action was unjustified. Our attention has not been invited to any statutory provisions relating to forests in the State of Sant, nor does the order dated March 12, 1948, purport to be issued in exercise of any statutory power. On the face of it the order grants certain rights in forests which had not been previously granted to the jagirdars by the Ruler. It is urged that the Ruler of Sant was an absolute Ruler in whom were vested all authority

legislative, executive and judicial, and whatever he did or directed had to be complied with and therefore his actions and directions must be deemed to be "law" within the meaning of cl. 4 of the Administration of the Indian States Order. But the fact that the Ruler of Sant State was an absolute Ruler not bound by any constitutional limitations upon the exercise of his powers does not, in my judgment, invest every exercise of his powers with legislative authority. The functions of a State whether it contains a democratic set-up or is administered by an autocratic sovereign fall into three broad categories - executive, legislative and judicial. The line of demarcation of these functions in an absolute or autocratic form of Government may be thin and may in certain cases not be easily discernible. But on that account it is not possible to infer that every act of an autocratic sovereign has a legislative content or that every direction made by him must be regarded as law. That an act or an order of a sovereign with absolute authority may be enforced and the subjects have no opportunity of getting redress against infringement of their rights in the Municipal Courts of the State will not be decisive of the true character of the functions of the sovereign in the exercise of which the act was done or the order was made. The distinction between functions executive, legislative and judicial vested in one person may not be obliterated, merely because they are in fact exercised or are capable of being exercised indiscriminately.

In the ultimate analysis, the legislative power is the power to make, alter, amend or repeal laws and within certain definite limits to delegate that power. Therefore it is power to lay down a binding rule of conduct. Executive power is the power to execute and enforce the laws, and judicial power is power to ascertain, construe and determine the rights and obligations of the parties before a Tribunal in respect of a transaction on the application of the laws and even in an absolute regime this distinction of the functions prevails. If an order is made during the regime of a sovereign who exercises absolute powers, and it is enforced or executed leaving nothing more to be done thereunder to effectuate it, any discussion of its true character would be an idle exercise. Where however in a set-up in which the rule of law prevails, to support action taken pursuant to an order you have to reach the source of authority in the power of the previous autocratic sovereign, the true nature of the function exercised may become important, when the law of the former State are by express enactment continued by the new sovereign.

The order dated March 12, 1948, conveys to the jagirdars rights which had been previously excluded from the grants. The form of the order is of course not decisive. An important test for determining the character of the sovereign function is whether the order expressly or by clear implication prescribes a rule of conduct governing the subject which may be complied with a sanction demanding compliance therewith. The order dated March 12, 1948, is expressly in the form of a grant of the rights which were not previously granted and does not either expressly or by implication seek to lay down any binding rule of conduct. I am therefore unable to hold that the order issued on March 12, 1948, by the Ruler of Sant State was "law" or an order made under any law within the meaning of cl. 4 of the Administration of the Indian States Order, 1948.

Cases which have come before this Court in which the question as to the binding effect of orders issued by the Rulers of the former Indian States fell to be determined clearly illustrate that principle. In Ameer-un-Nissa Begum and others v. Mahboob Begum and others (A.I.R. (1955) S.C. 352) the question as to the binding character of two 'Firmans' dated February 24, 1949, and September 7, 1949, issued by H.E.H. the Nizam of Hyderabad fell to be determined. The Court in that case observed (at p. 359) :-

> "The 'Firmans' were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law :- nay, they would override all other laws

> which were in conflict with them. So long as a particular 'Firman' held the field, that alone would governor or regulate the rights of the parties concerned, though it could be annulled or modified by a later 'Firman' at any time that the Nizam willed."

The Court declined to consider whether the 'Firmans' were in the nature of "legislative enactment" or "judicial orders" and observed :

> "The Nizam was not only the supreme legislature, he was the fountain of justice as well. When he constituted a new Court, he could, according to ordinary notions, be deemed to have exercised his legislative authority. When again he affirmed or reversed a judicial decision, that may appropriately be described as a judicial act. A rigid line of demarcation, however, between the one and the other other would from the very nature of things be not justified or even possible."

In that case the primary question which the Court had to consider was whether certain 'Firmans' issued by the Nizam could be enforced. It was held that the order may be legislative or judicial in character, but it could not be regarded as executive. It may be noticed that no action was required to be taken after the cessor of the sovereignty of the Nizam, in pursuance of the 'Firmans'. The 'Firmans' had become effective, and titles of the parties stood adjusted in the light of those 'Firmans' during the regime of the Nizam.

In Director of Endowments, Government of Hyderabad v. Akram Ali (A.I.R. 1956 S.C. 60) the effect of a 'Firman' issued by the Nizam on December 30, 1920, directing that the Ecclesiastical Department to supervise a Dargah within the jurisdiction of the Nizam until the rights of the parties were enquired into and adjudicated upon by a civil court fell to be determined. The Court in that case held that the right of Akram Ali who claimed to be hereditary Sajjad Nashin and Mutwalli was subject to the order of the Nizam which had been passed before the Hyderabad State merged with the Union of India and the applicant having no rights it could be enforced at the date of the Constitution and the Courts were incompetent to grant him relief till the rights were determined by the Constitution. The effect of the 'Firman' was to deprive the respondent Akram Ali and all other claimants of all rights to possession pending enquiry into the case. It is clear from the observations made in that judgment that the only decision of the Court was that by the 'Firman' the rights of the Sajjad Nashin and Mutwalli was suspended till determination by the civil court of his right to possession. The 'Firman' was given effect not because it was regarded as the expression of the legislative will but because it had become effective before the Constitution came into effect suspending the rights of the applicant.

In Madhorao Phalke v. The State of Madhya Bharat ((1961) S.C.R. 957) the true character of certain 'Kalambandis' issued by the Rulers of Gwalior fell to be determined. The appellant was the recipient of a hereditary military pension granted by the Ruler of Gwalior to his ancestors in recognition of their military services. The right to receive pension was recognised by the 'Kalambandis' of 1912 and 1935 issued by the Ruler. After the formation of the State of Madhya Bharat under the Constitution, the Government of that State by an executive order terminated the right of the appellant. The 'Kalambandis' though not issued in the form of legislative enactments were issued for the administration of the department relating to the Shiledari units, and the nature of the provisions unambiguously impressed upon them the character of statures or regulations having the force of law. The 'Kalambandis' recognised and conferred hereditary rights : they provided for the adoption of a son by the widow of a deceased Silledar subject to the approval of the State and also for the maintenance of widows out of funds specially set apart for that purpose, and contemplated the

offering of a substitute when a silledar became old or otherwise unfit to render service : they made detailed provisions as to mutation of names after the death of a silledar. They further enacted that the Asami being for the shiledari service it could not be mortgaged for a debt of any banker, and if a decree holder sought to proceed against the amount payable to him, execution had to be carried out in accordance with and in the manner and subject to the limitations prescribed in that behalf. The 'Kalambandis' were not treated as administrative orders issued merely for the purpose of regulating the working of the administrative of the department of irregular forces, and were therefore to be regarded as regulations having all the characteristics of legislative enactments.

In Promod Chandra Deb's case ((1962) Suppl. 1 S.C.R. 405) the true character of certain 'Khor Posh' grants granted by the Rulers of Talcher, Bamra and Kalahandi fell to be determined, in a group of petitions for enforcement of fundamental rights. Out of the four petitions, petition No. 167 of 1958 was dismissed on the group that under an order passed by the Extra Provincial Jurisdiction Act, 1947, a grant made by the Ruler of Bamra in favour of the petitioner was annulled before Bamra became part of the Union of India and the right created by the grant had no that account ceased to exist. In two other petitions Nos. 168 of 1958 and 4 of 1959 it was found by the Court that the maintenance grants in favour of certain members of the family of the Ruler were recognised by the Government of India and the right this recognised was given effect to and payments pursuant thereto were continued for nearly eight years after the merger of the State. This Court held that the State having recognized its obligation to pay the maintenance grants which were agreed to be granted under the statutory law and the custom of the State, the grants could not be annulled by executive action. In the principal writ petition No. 79 of 1957 the grants by the Ruler of Talcher was made subject to the terms and conditions laid down under Order 31 of the Rules and Regulations of the State of Talcher of 1937. These Rules and Regulations of Talcher of 1937 were regarded as the law of the State and it was in accordance with the law that the 'Khor Posh' grants were made by the Ruler. It was held that these grants had the effect of law. Sinha, C.J., delivering the majority judgment of the Court observed (at p. 436) :

> "There is also no doubt that the grant made by the ruler of Talcher in favour of the petitioner continued to be effective until the Merger. The nature and conditions of such grant of Khorposh are governed by the provisions of the laws of that State as embodied in Order 31 of the 'Rules and Regulations of Talcher, 1937'. Under the laws of Talcher, the petitioner had been enjoying his Khorposh rights until the cash grant, as it became converted in 1943-44 as aforesaid, was stopped by the State of Orissa, in April, 1949."

In the view of this Court the terms and conditions, subject to which the grant was made, were on the facts of the case in the nature of legislative acts and not exercise of executive functions. The Court in that case did not purport to lay down that any act done by the Ruler whether it be executive, legislative or judicial must be regarded since the merger of the State as in the exercise of the legislative will of the Ruler and therefore continuing as law.

In a recent judgment of this Court in Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan and others (A.I.R. (1963) S.C. 1638) the 'Firman' issued by the Udaipur Darbar in 1934 relating to the administration of the temple of Sharnathji at Nathdwara, which was expressly declared to be a public temple, and governing the devolution of the right to the management of the temple, and certain incidental matters, fell to be determined. The 'Firman' consisted of four clauses. By the first clause it was declared that according to the law of Udaipur the shrine of Shrinathji had always been and was a religious institution for the followers of the Vaishnava Sampradaya and that all the

property immovable and movable dedicated, offered or presented to or otherwise coming to the deity Shrinathji had always been and was the property of the shrine and that the Tilkayat Maharaj for the time being was merely the custodian manger and trustee of the said property for the shrine. The second clause prescribed the rule of succession and declared that it was regulated by the law of primogeniture, and provided that the Udaipur Darbar had absolute right to depose any Tilkayat Maharaj on the ground that such Tilkayat Maharaj was unfit. The third clause provided for measures to be taken by the Ruler for management of the shrine during the minority of the Tilkayat Maharaj and by the last clause it was provided that in accordance with the law of Udaipur the Maharana had declared Shri Damodarlalji - the then Tilkayat Maharaj - unfit to occupy the Gaddi and had approved of the succession of Goswami Govindlalji to the Gaddi of Tilkayat Maharaj. This 'Firman' declared the character of the trust relating to the Shrinathji temple, laid down rules as to the succession and provided for the management during the minority of the Tilkayat, and declared the right of the State to remove the Tilkayat and for enforcement of that right by declaring that the then Tilkayat was unfit to occupy the Gaddi. This was in substance though not in form exercise of the legislative will of the sovereign. Its operation was not exhausted by its enforcement during the regime of the Maharana of Udaipur. Devolution of the Gaddi, and declaration about the power of the Ruler over the shrine were intended to govern the administration of the shrine for all times. It is true that in that case in paragraph-32 it was observed after referring to Madhorao Phalke's case ((1961) S.C.R. 957), Ameer-un-Nissa Begum's case (A.I.R. (1955) S.C. 352) and the Director of Endowments, Government of Hyderabad's case (A.I.R. 1956 S.C. 60).

> "In the case of an absolute Ruler like the Maharana of Udaipur it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby."

It was not and could not be laid down that all orders issued by an absolute Ruler were legislative in character : it was merely sought to be emphasized that so long as the territory of Udaipur and the shrine were under the sovereignty of the Maharana the distinction between commands legislative and executive was academic, for all orders and commands of the Ruler had to be obeyed alike. But since the merger of the State with the Union of India, the question whether the 'Firman' was a mere executive order or a legislative enactment assumed vital importance. If the command was merely executive unless the rights created thereby were recognized by the Dominion of India they had no validity and no reliance could be placed upon them in the Municipal Courts. If the command was legislative, the laws of the former State having been continued upon merger, the legislative command retained vitality and remained enforceable. In the context in which it occurs the statement set out did not and was not intended to lay down, that there is no distinction between legislative commands and executive orders which have to be enforced after the merger of the State with the Indian Union.

I may refer to decisions which illustrate the distinction between legislative commands and executive orders of the Rulers of the former Indian States. In Maharaja Shree Umaid Mills Ltd. v. Union of India and Others (A.I.R. (1963) S.C. 953) the question whether an agreement between the Ruler of Jodhpur and a limited Company whereby the Ruler agreed to exempt or remit certain duties or royalties and to hold the Company not liable to pay taxes and further gave an assurance to the Company to amend the laws so as to make them consistent with the agreement was not regarded as "law" within the meaning of Art. 372 of the Constitution. In the view of the Court the agreement rested solely on the consent of the parties : it was entirely contractual in nature and had none of the characteristics of law. The Court in that case observed that every order of an absolute Ruler who

combines in himself all functions cannot be treated as "law" irrespective of the nature or character of the order passed. There is, it was observed, a valid distinction between an agreement between two or more parties even if one of the parties is the sovereign Ruler, and the law relating generally to agreements; the former rests on consensus of mind, the latter expresses the will of the sovereign. This case supports the proposition that every act done or order passed by an absolute Ruler of an Indian State cannot have the force of law or be regarded as "law" since the merger of his territory with the Union of India. To have the vitality of law after merger, it must be the expression of the legislative will of the Ruler.

There is yet another judgment of this Court in The Bengal Nagpur Cotton Mills Ltd. v. The Board of Revenue, Madhya Pradesh and Others (A.I.R. 1964 S.C. 888) in which also the question whether an agreement between the Ruler of Rajnandgaon and M/s. Shaw Wallace and Company in connection with the setting up of a textile factory on certain concessional terms in the matter of imposition of octroi duties on important goods fell to be determined. It was observed in that case :

> "It is plain that an agreement of the Ruler expressed in the shape of a contract; cannot be regard as a law. A law must follow the customary forms of law-making and must be expressed as a binding rule of conduct. There is generally as established method for the enactment of laws, and the laws, when enacted, have also a distinct form. It is not every indication of the will of the Ruler, however expressed, which amounts to a law. An indication of the will meant to bind as a rule of conduct and enacted with some formality either traditional or specially devised for the occasion, results in a law but not an agreement to which there are two parties, one of which is the Ruler."

The order of the Ruler of Sant dated March 12, 1948, was not in the form of a legislative enactment. It also did not seek to lay down a course of conduct : it merely purported to transmit certain rights which were till the date of the order vested in the Ruler to the jagirdars who were grantees of the villages. It is difficult to hold that an order merely granting forest rights not in pursuance of any legislative authority, but in exercise of the power of the sovereign in whom the rights were vested, to the jagirdars to whom the villages were granted without forest rights, can be regarded as "law" within the meaning of cl. 4 of the Administration of the Indian States Order, 1948, when the order was not intended to lay down any binding rule of conduct of the grantees and merely purported to convey the rights which till then were vested in the Ruler.

The other question which remains to be determined is whether the respondents are entitled to the protection of s. 299(1) of the Government of India Act, 1935, or Art. 31(1) of the Constitution. Undoubtedly the order which deprives them of the right to cut forest trees which they claimed from the jagirdar who derived them under the grant dated March 12, 1948, from the Ruler of Sant is an executive order. Section 299(1) of the Government of India Act, 1935, protection of which was claimed on the merger of the State of Sant with the Dominion of India provided :

"No person shall be deprived of his property in British India save by authority of law."

The clause conferred protection upon the property rights of persons against any executive action not supported by law. To attract the clause, there must, however, exist a right to property which is sought to be protected. If for reasons which we have already state in considering the first question, the subjects of the acceding State are entitled only to such rights as the new sovereign chooses to recognize, in the absence of any recognition of the rights of the respondents or their predecessor jagirdars, there was no right to property of which protection could be claimed. As held by this Court

in State of Saurashtra v. Jamadar Mohamad Abdulla and others ((1962) 3 S.C.R. 970) orders passed by the Administrator of the State of Junagadh appointed on behalf of the Government of India (which had assumed charge of the administration of the State after the Nawab of Junagadh fled the country) on various dates between November 9, 1947 and January 20, 1949, cancelling grants in favour of certain persons in whose favour the grants had previously been made by the Nawab of Junagadh were not liable to be challenged in suits filed by the grantees in the Civil Courts of the Dominion, on the plea that the properties had been taken away without the authority of law. This Court held that the impugned orders cancelling the grants in favour of the respondents and taking of the properties arose out of and during an act of State and they could not be questioned before Municipal Tribunals, for the orders of cancellation were passed before the change over of de jure sovereignty.

There is no support for the assumption made by the respondents that an act of State arises merely at a fixed point of time when sovereignty is assumed. An act of State may be spread over a period, and does not arise merely on the point of acquisition of sovereign right : see Promod Chandra Deb's case ((1962) Suppl. 1 S.C.R. 405). Nor is the new sovereign required to announce his decision when he assumes or accepts sovereignty over foreign territory, about the rights created by the quondam sovereign, on pain of being held bound by the rights so created. The decision of this Court in Jagannath Agarwalla's case ((1962) 1 S.C.R. 205) pointedly illustrates this principle. The State of Mayurbhanj merged with the Province of Orissa on January 1, 1949, but an order dated June 28, 1952, made by the Board of Revenue acting on behalf of the State of Orissa rejecting the claim made by a person who had entered into an agreement or arrangement with the Maharaja of Mayurbhanj in 1943 was held to be in the course of an act of State, the rejection of the claim being in pursuance of an order issued under s. 4 of the Extra Provincial Jurisdiction Act, 47 of 1947. Therefore till the right to property of the subjects of the former Indian State was recognized by the new sovereign there was no title capable of being enforced in the Courts of the Dominion or the Union.

It was then urged that in any even since the enactment of the Constitution, by executive action a person may not be deprived of his right to property, and this protection applies as much to rights granted by the former Rulers to persons who on merger became citizens of the Dominion of India as to rights of property of other citizens. In substance it is urged that even if there was no recognition of the right to property which was granted by the former sovereign by the Dominion Government, after the enactment of the constitution the right granted by the former Rulers may only be taken away by legislative command and not by executive action. This argument proceeds upon a misconception of the nature of the fundamental right conferred by Art. 31(1) of the Constitution. In terms, the Article confers a right to claim protection against deprivation of property otherwise than by authority of law. A right to property is undoubtedly protected against all actions otherwise than under the authority of law. But the clause postulates a right to property which is protected. It does not purport to invest a person with a right to property which has not been recognized by the Dominion of India or the Union. Even if the right to property was recognized by the Indian State of which the claimant was subject, so long as it is not recognized by the Dominion or the Union it is not enforceable by the Courts in India. On the merger of the State of Sant with the Dominion of India, undoubtedly the respondents became citizens of the Dominion and they were entitled like any other citizen to the protection of the rights which the Dominion recognized.

It has also be to remembered that promulgation of the Constitution did not result in transfer of sovereignty from the Dominion of India to the Union. It was merely change in the form of Government. By the Constitution, the authority of the British Crown over the Dominion was

extinguished, and the sovereignty which was till then rooted in the Crown was since the Constitution came into force derived from the people of India. It is true that whatever vestige of authority which the British Crown had over the Dominion of India, since the Indian Independence Act was thereby extinguished, but there was no cession, conquest occupation or transfer of territory. The new governmental set up was the final step in the process of evolution towards self-government. The fact that it did not owe its authority to an outside agency but was taken by the representatives of the people made no difference in its true character. The continuance of the governmental machinery and of the laws of the Dominion, give a lie to any theory of transmission of sovereignty or of the extinction of the sovereignty of the Dominion, and from its ashes, the springing up of another sovereign as suggested in Virendra Singh and Others v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415) which I will presently examine.

If therefore the respondents had under the Government of India Act, 1935, after the merger not acquired any right to the forests by virtue of any recognition of the Tharav dated March 12, 1948, the promulgation of the Constitution did not invest them with any additional rights which would convert either their claims to the forest rights into property or to enable them to enforce in the Indian Courts such claims not recognized by the State as fundamental right to property. By Art. 31 right to property is protected against all actions save by authority of law. But if there was no right to property, an executive action refusing recognition of a claim to property could not infringe Art. 31 of the Constitution.

In Virendra Singh's case ((1955) 1 S.C.R. 415) this Court held that since the promulgation of the Constitution grants which had been made by the previous Rulers, even if they were not recognized by the Dominion of India or the Union, could not be interfered with except by authority of law. In that case the petitioners were grantees from the Rulers of the States of Sarila and Charkhari of certain villages before those States merged with the Dominion of India. The State originally merged with the Union of Vindhya Pradesh, and the Vindhya Pradesh Government confirmed the grants in December 1948. But the Union of the State of Vindhya Pradesh was dissolved, and the covenanting States separately acceded to the Dominion of India, and surrendered all authority and jurisdiction in relation to the governance of the States and executed instrument called 'The Vindhya Pradesh Merger Agreement'. The States which formed the Vindhya Pradesh were transformed into a Chief Commissioner's Province on January 23, 1950. The grants of the four villages made in favour of the petitioners were revoked in August 1952 by the Government of the State of Uttar Pradesh to which State those villages being enclaves within its territory were transferred. The grantees of the villages then petitioned this Court under Art. 32 of the Constitution challenging the validity of the orders revoking the grant of jagirs and maufis in the four villages as violative of Arts. 31(1) and 19(1)(f) of the Constitution. This Court observed that the properties in question were the properties over which the Rulers had right of disposition at the date of the grants, and the grants were absolute in character and would under any civilised system of law pass an absolute and indefeasible title to the grantees and that assuming that the titles were defeasible at the mere will of the sovereign the fact remained that they were neither resumed by the former Rulers nor confiscated by the Dominion of India as an act of State and upto the 25th of January, 1950, the right and title of the grantees to continue in possession was good and was not interfered with. The Court accordingly held that the Constitution by the authority derived from and conferred by the people of India; destroyed all vestige of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State of Uttar Pradesh in that case was seeking to uphold. It was further observed that the Dominion of India and the States had abandoned their sovereignty and surrendered it to the people of the land who framed the new Constitution of India and as no sovereign can exercise an act of State against its own subjects, the orders of revocation of the grants

were invalid. In my view the conclusion of the Court proceeded upon two assumptions, neither of which was true :

> (i) that the sovereignty of the Dominion of India and of the States was surrendered to the people of India, and in the exercise of the sovereign power the people gave themselves the new Constitution as from January 26, 1950; and
>
> (ii) the petitioners who were in de facto possession of the disputed lands had rights in them which they could have enforced upto 26th January, 1950, in the Dominion Courts against all persons except possibly the State.

These assumptions are not supported by history or by constitutional theory. There is no warrant for holding at the stroke of mid-night of the 25th January, 1950, all our pre-existing political institutions ceased to exist, and in the next moment arose a new set of institutions completely unrelated to the past. The Constituent Assembly which gave form to the Constitution functioned for several years under the old regime, and set up the constitutional machinery on the foundations of the earlier political set up. It did not seek to destroy the past institutions : it raised an edifice on what existed before. The Constituent Assembly moulded no new sovereignty : it merely gave shape to the aspirations of the people, by destroying foreign control and evolving a completely democratic form of government as a republic. The process was not one of destruction, but of evolution.

For reasons already stated it is impossible to hold that what were mere claims to property till the 25th of January, 1950, could be regarded as enforceable against any one. Till the Dominion of India recognised the right, expressly or by implication there was no right to property which the Courts in India could enforce. There is nothing in the Constitution which transformed the claims which till January 25, 1950, had not been recognized into property right rights so as to prevent all further exercise of the act of State, and extinguish the powers of the Union to refuse to recognize the claims.

The order passed in August 1952 revoking the grants by the Rulers of Sarila and Charkhari was in my view in substance an act of State. It is true that there can be no act of State by a sovereign against his own subjects. But the State was seeking to refuse to recognize the claims made by the grantees from the former Rulers, and the fact that the act of State operated to the prejudice of persons who were at the date of refusal of recognition citizens, did not deprive the act of State of either its character or efficacy.

These appeals must therefore be allowed and the suit filed by the respondents dismissed with costs throughout.

RAGHUBAR DAYAL J. –

I agree with the views expressed by my learned brother Ayyangar J., on all the points except in regard to the Tharao dated March 12, 1948, being law.

I agree with brother Hidayatullah J., that this Tharao is not law, and further agree with him in the order proposed.

MUDHOLKAR J. –

This Bench has been constituted for considering whether the reasoning underlying the decision of

this Court in Virendra Singh v. The State of Uttar Pradesh ((1955) 1 S.C.R. 415) that the inhabitants of the India States brought with them, after the merger of those States in the Dominion of India pursuant to agreements entered into by the Rulers of those States, rights to property granted to them by the Rulers of those States, is correct or not. The decision and the various grounds upon which it rests have been carefully examined by my brother Ayyangar J., in his judgment and I am generally in agreement with what he has said. As, however, I take a somewhat different view on some of the matters which arise for consideration in this case this judgment has became necessary.

The facts have been set out fully in the judgment of my learned brother and, therefore, it will be sufficient to mention only such of them as are necessary to elucidate the questions which I propose to deal with. In consequence of two agreements entered into by the former Ruler of Sant State, the territory of that State merged in the Dominion of India as from June 10, 1948. Prior to that date it had acceded to the Dominion of India on three subjects only. This State, along with other ruling States in India, became an independent sovereign State in the year 1947 when the Dominions of India and Pakistan were constituted. By virtue of the powers vested in the Central Government by the Extra Provincial Jurisdiction Act, 1947 it delegated its functions to the Government of Bombay which passed the Indian States (Application of Laws) Order, 1948 on July 28, 1948. In consequence of that Order certain laws in force in the Province of Bombay were extended to the merged territories. By the operation of the Indian States (Merger of Governors Provinces) Order, 1949, the Sant State became part of the Province of Bombay.

The agreement relating to the merger of the State in the Dominion of India was entered into by the Ruler of Sant some time before the date on which the merger became effective. The Ruler of the State passed a Tharao (which is translated as 'Order') on March 12, 1948 in the following terms :-

> "S. Ta. Mu Outward Register No. 371.
>
> The Jivak, Patavat, Inami, Chakariyat, Dharmada villages in Sant State are being given (granted) to Jagirdars and the holders of the said villages are not given rights over forests. Hence after considering the complaints of certain Jagirs, they are being given full rights and authority over the forests in the villages under their vahivat. So, they should manage the vahivat of the forest according to the policy and administration of the State. Orders in this regard to be issued."

Taking advantage of the Tharao several Jagirdars entered into contracts pertaining to the exploitation of the forests in their Jagirs. The respondents in these appeals are some of the forest contractors. The Government of the Province of Bombay through the officers of its Forest Department did not allow the respondents to exercise their rights under the contracts entered into with them by the Jagirdars on the ground that the grant of forest rights by the former Ruler to the Jagirdars was not binding upon the successor Government. Thus being deprived of their right to work the forests the various respondents instituted suits after the coming into force of the Constitution of India. Their claims were opposed by the State of Bombay mainly on the ground that in the absence of recognition, express or implied, by the successor State of rights conferred by the former Ruler on the Jagirdars the respondents could not enforce them in the municipal courts. The suits of the respondents were dismissed by the court of first instance and appeals preferred therefrom by them were dismissed by the District Court. In second appeal, however, the appeals were allowed by the High Court by a common judgment in which reliance is placed largely upon what has been held and said by this Court in Virendra Singh's case ((1955) 1 S.C.R. 415) though a reference has also been made to two other decisions of this Court and some decisions of the Privy

Council.

In the arguments before us it has never been in question that the acquisition of the territory of Sant State by the Dominion of India in pursuance of the Instrument of Accession and Merger Agreement was an act of State. The respondents' contentions were, however, that (1) in point of fact the Government of Bombay, acting through the officers of the forest department had recognised the Jagirdar's rights by permitting the contractors to carry on the work of cutting timber; (2) that though the Government of Bombay subsequently repudiated the Jagirdars' rights that repudiation was of no avail; (3) that the letter sent to the Ruler of Sant State by the Secretary or the States Department, Mr. V. P. Menon, in October, 1948 amounted to a waiver by the Dominion of India of the right of repudiation of the rights of Jagirdars; (4) that after the Jagirdars became the citizens of the Dominion of India there could be no act of State against them; (5) that the doctrine evolved by the Privy Council in its decisions starting from Secretary of State for India v. Kamachee Boye Sahiba ((1859) 13 Moore P.C. 22) and going upto Asrar Ahmed v. Durgah Committee, Ajmer (A.I.R. 1947 P.C. 1) was opposed to the present view on the effect of conquest and cession upon private rights as exemplified in the decisions in United States v. Percheman ((1883) 32 U.S. 51) and that this Court should, therefore, discard the Privy Council's view and adopt the modern view inasmuch as the latter is considered by common consent to be just and fair and finally (6) that the Jagirdars could not be deprived of the forest rights deprived by them from the Ruler of Sant State before the Constitution, without complying with the provisions of s. 299 of the Government of India Act, 1935, and after the coming into force of the Constitution without complying with the provisions of Art. 31 of the Constitution.

I agree with my brother Ayyangar J., that the fact that some officers of the forest department had permitted the respondents to carry on operations in the forests leased out to them by the Jagirdars does not amount to recognition of the right conferred upon the latter by the Tharao of March 12, 1948. In the first place, it was not open to the officers of the forest department to grant recognition to the Jagirdars' rights for the simple reason that the right of grating recognition could be exercised only by the Government acting through its appropriate agency. Moreover the permission which was accorded to the respondents was only tentative and expressly subject to the final decision of the Government on the question of their right under the leases granted by the Jagirdars.

The second contention of the respondents is based upon a misapprehension of the legal position flowing from the long series of decisions of the Privy Council which have been accepted by this Court in several of its decisions and in particular Dalmia Dadri, Cement Co. Ltd. v. The Commissioner of Income-tax ((1959) S.C.R. 729); State of Saurashtra v. Memon Haji Ismail ((1960) 1 S.C.R. 537); Promod Chandra Deb and Ors. v. The state of Orissa and Ors. ((1962) Supp. 1 S.C.R. 405); State of Saurashtra v. Jamadar Mahamad Abdulla and Ors. ((1962) 3 S.C.R. 970). The one decision in which the Privy Council's view is criticised is that of Virendra Singh's case ((1955) 1 S.C.R. 415). The view of the Privy Council has been expressed by Lord Dunedin in Vajesinghji v. Secretary of State for India (51 I.A. 357) in the following passage which has been quoted with approval in several judgments.

> "When a territory is acquired by a sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers,

> recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce those stipulations in the municipal courts. The right to enforce remains only with the high contracting parties."

Thus what is clear beyond doubt is that the rights derived by the inhabitants of the conquered and ceded territory from its former rulers cannot be enforced by them against the new sovereign in the courts of that sovereign unless they have been recognized by the sovereign. The only basis upon which rights of this kind can be enforced in a municipal court would be the fact of its recognition by the new sovereign. A right which cannot on its own strength be enforced against a sovereign in the courts of that sovereign must be deemed to have ceased to exist. It follows therefore that a right which has ceased to exist does not require repudiation.

As regards the argument that the Government has waived its right to withhold recognition, I agree with all that has been said by my brother Ayyangar J. Indeed, if the inhabitants of a ceded territory have ceased to have a right against the new sovereign there is nothing for the sovereign to waive. I also agree with my learned brother that if the letter of the Secretary to the States Department upon which reliance is placed by the respondents is regarded as part of the agreement of merger the municipal courts are precluded by Art. 363 of the Constitution from enforcing any rights arising thereunder.

The argument that there can be no Act of State against its citizens is based upon the supposition that the rights claimed by the Jagirdars from their former Ruler would be available to them against the new sovereign unless they were repudiated and that here, as the resolution of the Government of Bombay dated February 6, 1953 stating that Jagirdars' rights have already been repudiated amounts to an Act of State against persons who had long before this date become the citizens of the Republic of India it was incompetent. As already pointed out, the municipal courts cannot take notice of a right such as this unless it had been recognized expressly or by implication by the new sovereign. No doubt, the Government resolution speaks of repudiation. That in my opinion is only a loose way of conveying that the rights of the Jagirdars have not been recognized. That resolution does no more than set out the final decision of the Government not to give recognition to the Tharao of March 12, 1948 by which the former Ruler of Sant State had conferred certain forest rights on the Jagirdars. Indeed, it is clear from paragraph 3 of that resolution that the Government had expressly borne in mind the legal position that rights claimed under the Tharao gave no title to the inhabitants of Sant State to enforce them in a municipal court and that the right to enforce them remained only with the high contracting parties.

Now as to the argument that this Court should discard the view taken by the Privy Council in Secretary of State for India v. Kamachee Boye Sahiba ((1859) 13 Moore P.C. 22); Secretary of State for India v. Bai Rajbai (42 I.A. 229); Vajesinghji v. Secretary of State for India (51 I.A. 357); Secretary of State v. Sardar Rustom Khan (68 I.A. 109) and Asrar Ahmed's case (A.I.R. 1947 P.C. 1) and adopt the view taken by Chief Justice Marshall in Percheman's case ((1833) 32 U.S. 51). I agree with much which my learned brother has said but would add one thing. It is this. The courts in England have applied the principles of international law upon the view that what is by the common consent of all civilized nations held to be an appropriate rule governing international relations must also be deemed to be a part of the common law of England. Thus English courts have given effect to rules of international law by resorting to a process of incorporation (See International Law - a Text 1962 by Jacobini, p. 32 et seq.). The English courts also recognise the principle that since the

British Parliament is paramount the rules of international law are subject to the right of Parliament to modify or abrogate any of its rules. A municipal court can only enforce the law in force in the State. Therefore, if a rule of international law is abrogated by Parliament it cannot be enforced by the municipal courts of the State and where it is modified by Parliament it can be enforced by the municipal courts subject to the modification. Would the position be different where a particular rule of international law has been incorporated into the common law by decisions of courts ? So far as the municipal courts are concerned that would be the law of the land which alone it has the power and the duty to enforce. Where Parliament does not modify or abrogate a rule of international law which has become part of the common law, is it open to a municipal court to abrogate it or to enforce it in a modified form on the ground that the opinion of civilized States has undergone a change and instead of the old rule a more just and fair rule has been accepted ? Surely the law of a State can only be modified or repealed by a competent legislature of the State and not by international opinion however weighty that opinion may be. Now, a rule of international law on which the several Privy Council decisions as to the effect of conquest or cession on the private rights of the inhabitants of the conquered or ceded territory is founded has become a part of the common law of this country. This is 'law in force' and is saved by Art. 372 of the Constitution. The courts in India are, therefore, bound to enforce that rule and not a rule of international law governing the same matter based upon the principle of state succession which had received the approval of Marshall C.J. and which has also received the approval of several text-book writers, including Hyde (See Hyde International Law, Vol. 1, 2nd ed. p. 431, and Wesley L. Gould - An introduction to International Law pp. 422 - 427). It is true that the International Court of Justice has also stated the law on the point to be the same but that does not alter the position so far as the municipal courts are concerned. If in the light of this our law is regarded as inequitous or a survival of an imperialistic system the remedy lies not with us but with the legislature or with the appropriate Government by granting recognition to the private rights of the inhabitants of a newly acquired territory.

Thus while according to one view there is a State succession in so far as private rights are concerned according to the other which we might say is reflected in our laws, it is not so. Two concepts underlie our law : One is that the inhabitants of acquired territories being with them no rights enforceable against the new sovereign. The other is that the municipal courts have no jurisdiction to enforce any rights claimed by them, even by virtue of the provisions of a treaty or other transaction internationally binding on the new sovereign unless their rights have been recognized by the new sovereign. Municipal courts derive their jurisdiction from the municipal law and not from the laws of nations and a change in the laws of nations brought about by the consent of the nations of the world cannot confer upon a municipal court a jurisdiction which it does not enjoy under the municipal law.

Apart from that the rule cannot be regarded merely as a device of colonial powers for enriching themselves at the expense of the inhabitants of conquered territories and, therefore, an anachronism. It would neither be just nor reasonable to bind the new sovereign by duties and obligations in favour of private parties created by the ex-sovereign from political motives or for the purpose of robbing the new sovereign of the full fruits of his acquisition. No doubt, International Law does not prevent legislation by the new sovereign for the purpose of freeing itself from such duties and obligations but that would be a long and laborious process and may be rendered onerous or by reason of constitutional provisions such as those contained in Part III of our Constitution, even impossible. It would also not be reasonable to regard the new sovereign as being bound by duties and obligations created by the ex-sovereign till such time as the new sovereign was able to show that they were incurred by the ex-sovereign mala fide. It is apparently for such reasons that the law as found by the

Privy Council deprives the grantees under the former ruler completely of their rights as against a new sovereign by making those rights unenforceable in a municipal court. It, however, also envisages the recognition of those rights by the new sovereign. This means that the new sovereign is expected to examine all the grants and find out for himself whether any of the grants are vitiated by mala fides or were against his legitimate interests so that he can give recognition to those grants only which were not vitiated by mala fides or which were not against his interests. That this is how the rule was applied would be clear from what happened in this country when time and again territories were ceded by former India Rulers to the British Government. As an instance of this there was the Inam Enquiry in the middle of the last century as a result of which a very large number of Inams were ultimately recognised by the British Government. That while dealing with the claims of the former grantees in ceded territories used to be examined meticulously would be clear from the facts in Bai Rajbai's case (42 I.A. 229). Such being the actual position I do not think that the rule which has been applied in this country can be regarded to be anachronism or to be inequitous.

In so far as the argument is based on the provisions of s. 299 of the Government of India Act, 1935 and Art. 31 of the Constitution is concerned I would reiterate the view which my brother Sarkar J. and myself have taken in Jamadar Mahamad Abdulla's case ((1962) 3 S.C.R. 970) and Promod Chandra Deb's case ((1962) Supp. 1 S.C.R. 405) which is the same as that expressed by my brother Ayyangar J., and with which my brother Hidayatullah J., has agreed. Adverting to a similar argument advanced by Mr. Pathak in the former case we quoted the following passage from the judgment of Venkatarama Aiyer J., in Dalmia Dadri Cement Co's case ((1959) S.C.R. 729) :-

> "It is also well established that in the new set up these residents do not carry with them the rights which they possessed as subjects of the ex-sovereign and that as subjects of the new sovereign, they have only such rights as are granted or recognised by him."

and a passage from the judgment in Bai Rajbai's case (42 I.A. 229) and then observed :

> "Any right to property which in its very nature is not legally enforceable was clearly incapable of being protected by that section." (pp. 1001-2).

That was a reference to s. 299(1) of the Government of India Act, 1935. In the other case we have observed at p. 499 :-

> "In our opinion s. 299(1) of the Constitution Act of 1935 did not help grantees from the former rulers whose rights had not been recognized by his new sovereign in the matter of establishing their rights in the municipal courts of the new sovereign because that provision only protected such rights as the new citizen had at the moment of his becoming a citizen of the Indian Dominion. It did not enlarge his rights nor did it cure any infirmity in the rights of the citizen :....."

The other point raised in these appeals was as to whether the Tharao relied upon by the respondents was a law and, therefore, could be said to have been kept in force by the provisions of the Application of Laws Order, 1949 made by the Province of Bombay. My brother Ayyangar J., has largely on the basis of the decision of this Court in Madhorao Phalke v. The State of Madhya Pradesh ((1961) 1 S.C.R. 957) held that it is law. On the other hand my brother Hidayatullah J., has come to the opposite conclusion. My brother Shah J., has also held that the Tharao is not a law. I agreed with the view taken by my brother Hidayatullah J., and brother Shah J., that it is not a law

and that the decision in Madhorao Phalke's case ((1961) 1 S.C.R. 957) does not justify the conclusion that it is 'law'. I do not think it necessary for the purpose of this case to examine further the question as to what are the indicia of a law.

For these reasons I would allow the appeals with costs throughout.

ORDER

SINHA C.J. –

In accordance with the opinion of the majority the appeals are allowed with costs throughout - one set of hearing fees.

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