ANDHRA PRADESH HIGH COURT

Kishendas

Vs.

Indo-Carnatic Bank Ltd

First Appeal (C. M. A.) No. 7/ 1 of 1952-53

(Mohd. Ahmed Ansari and Jaganmohan Reddy, JJ.)

05.1.1953. 13.12.1957

JUDGMENT

Jaganmohan Reddy, J.

1. This appeal comes before us on a reference by our brother Qamar Hasan J., as involving an important question of law, viz.; the executability of a decree passed by the Madras High Court in 1940 by the Courts of the then Hyderabad State on the ground of it being a foreign decree. There is no dispute with respect to the facts. The respondent, the Indo-Carnatic Bank Ltd., Madras, went into liquidation and a liquidator was appointed by the original side of the Madras High Court. The liquidator filed an application under Section 191 of the Indian Companies Act for the recovery of a sum of Rs. 1,375/-from the appellant who was a subject of His Exalted Highness the Nizam and resident of Hyderabad, on account of unpaid calls and the Court passed an ex parte order on 15-8-1940 against the appellant to pay this sum to the liquidator. The liquidator presented E, P. 170/1951 praying for transmission of the decree which was ordered ort 16-3-1951. The liquidator filed an execution petition in the City Civil Court on 7-8-1952 for execution of the decree, but the appellant-judgment-debtor took objection to its executability and urged among other grounds, that the decree of the Madras High Court was a decree of a foreign court passed against a subject of the Hyderabad State and the Madras High Court could not exercise jurisdiction and any subsequent changes in the law cannot validate the order which was otherwise invalid and that the E. P. was barred by limitation. The Chief City Civil Judge by his order dated 15-1-1953, relying upon a Bench Judgment of the erstwhile Hyderabad High Court in *Dyna Craft Machine Co. v. Syed Jahangir Ali*[1], held that the decree could be executed by the Courts of the erstwhile Indian States which cannot be construed as foreign courts after the promulgation of the Constitution of India. He further held that the execution petition was not barred under Article 183 of the Limitation Act. In this view he directed the issue of a warrant of attachment. The judgment-debtor filed this appeal challenging the executability of the decree on the ground that it is a foreign decree.

2. The determination of the question now before us relating to the executability of the decrees of those courts which were foreign courts before the partition of India or

[1] ILR 1952 Hyd 1030 : AIR 1953 Hyd 19

before the coming into force of the Constitution of India, by the Courts which have now become domestic courts, has given rise to conflicting judgments in different High Court. The Bombay High Court in *Bhagwan v. Rajaram*[2], the Madhya Bharat High Court in *Brajmohan v. Kishorilal*[3], and the Hyderabad Court in ILR 1952 Hyd 1030 : AIR 1953 Hyderabad 19 held the view that the decrees passed by the Courts in what were provinces in India were decrees with an impediment, and this impediment having been removed by political changes beginning from the Indian Independence in 1947 and culminating in the transformation of these Courts which were then considered foreign Courts into domestic courts and the foreign creditors into citizens of India by the promulgation of the Constitution, such decrees become executable as decrees of the Indian Courts, and that no question of vested rights would arise as the changes which took place were not changes arising due to the acts of the Legislature, but were due to an act of State. The Mysore High Court in *Subbaraya Setty and Sons v. palani Chetty and Sons*[4], the Calcutta High Court in *Firm Shah Kantilal v. Dominion of India*[5], and the Nagpur High Court in *Ramkisan v. Harmukhrai*[6], and Firm *Kanhaiyalal Mohanlal Somani v. Paramsukh*[7], the Allahabad High Court in *Maloji Rao v. Sankar Saran*[8], the Punjab High Court in Firm *Radhe Sham Roshan Lal v. Kundan Lal Mohanlal*[9] and the Rajasthan High Court in *Laxmichand v. Mst. Tipuri*[10], held that the decrees were a nullity and the subsequent changes did not make them valid and executable. Some of these cases also decided that the immunity from execution being a vested right was saved by virtue of Section 20 of the Code of Civil Procedure Amendment Act 2 of 1951 and in some a distinction was sought to be made between a decree passed by the Courts of the Provinces or Part A States which were sought to be executed against a judgment-debtor who was a subject of a Native State merged in the Part A State, and those passed by a Native State which was sought to be executed in a Part A State, the former being held to be executable while the latter not.

3. On a full and careful consideration of the conflicting case law and of the weighty opinions of learned authors on the subject including the recent well-considered article on "Recognition and Execution of Foreign Judgments and Decrees" in 1958 SCJ 122 (Journal Portion), we propose in the first instance to state what in our view is the legal position relevant to the question before us for consideration. We will then examine the several decisions to ascertain to what extent they accord with our view, and whether it is possible to reconcile any that are at variance with those views. It is a matter beyond any controversy that prior to the Constitution of India, judgments and decrees of Courts in what were then called Native States were foreign judgments and their enforcement in the Provinces of India was subject to the provisions of the Indian Civil Procedure Code. Similarly judgments of the Courts in the Provinces of India (what were then termed as British India) were foreign judgments vis-a-vis the native States; their enforcement depending upon the provisions contained in the respective Civil Procedure Codes in force in those States. After the Indian Independence and before the Constitution certain political changes took place in some of the States which had acceded to the Indian Union.

[2] AIR 1951 Bom 125 (FB) [4] AIR 1952 Mys 69 (FB) [6] AIR 1955 Nag 103
[3] AIR 1955 Mad Bha 1 (FB) [5] AIR 1954 Cal 67 [7] AIR 1956 Nag 273
[8] AIR 1955 All 490 [10] AIR 1956 Raj 81 (FB)
[9] AIR 1956 Pun 193 (FB)

Some of them had merged in the erstwhile British Indian Provinces, while some others joined together forming bigger units. On the enforcement of the Constitution four categories of States came into existence; former British Indian Provinces became 'A' States, former native States Part 'B' States, and some other territories both native States as well as British Indian Provinces which

comprised of the Chief Commissioner's Provinces were classified as Part 'C States, while the Andaman and Nicobar islands were classified as Part "D" States. Clause (3) of Article 261 of the Constitution provides that final judgments or orders delivered or passed by the Civil Courts in any part of India shall be capable of execution within that territory but notwithstanding this provision the execution of the final judgments and orders of the Civil Courts depended upon the provisions of the Civil Procedure Code in force in the respective territories. This is so because the provisions of clause (3) of Article 261 are not only prospective, but also specifically make the execution of Civil Court decrees and orders subject to the law in force in that territory. In *Janardhan Reddy v. State of Hydrrabad*[11], and *Keshavan v. State of Bombay*[12], their Lordships of the Supreme Court not only laid down that the Constitution was not retrospective, but it cannot be held applicable to pending cases. On the 1st April, 1951, the Indian Civil Procedure Code was applied to the erstwhile native States by the Civil Procedure Code. Amendment Act, II of 1951, and since that date the whole of India has a common Civil Procedure Code. The execution of the decrees which were passed by the Courts of the erstwhile Indian States after the promulgation of the Constitution, particularly after the 1st of April, 1951, has given rise, as we have already noticed, to divergence of opinion is. the different High Courts. In so far as the topic of enforcement of foreign, judgments are concerned, the facts of this case confine us to a consideration of the topic to the case of judgments in personam which direct a sum of money to be paid to the successful party. Different countries vary considerably in their attitude towards the question of enforcement of foreign judgments. Whatever may be the different theories upon which the recognition of foreign judgments is based, in so far as the Anglo-Indian Law is concerned, tie doctrine of obligation is well-recognised, that is., in the words of Blackburn, J. in *Schibbsby v. Wes-ternholz*[13], "the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce". Even this theory has been criticised by Mr. Martin Wolf on the ground that it presupposes an acquired right while it is just that very question which is under consideration. Dicey in his Conflict of Laws, 4th Edition, page 19, enunciates recognition as being based on the common law principle that "any right, which has been duly acquired under the law of any civilized country is recognised and, in general, enforced by English Courts." No foreign judgment is enforced Proprio Vigore in another country. The effect given to it, therefore, is not on the recognition of it as foreign judgment, but on the basis of the enforcement of a right acquired under it. It is worthy of note that unlike the judgment of an English or an Indian Court, it does not merge the original cause of action and the foreign judgment-creditor has always the option of suing either on the original cause of action or on the foreign judgment. But as we have said, having regard to the accepted principles of the English as well as the Indian Law, a plaintiff who appears in Court on the basis of a foreign judgment is presumed to have acquired a right, which presumption may be rebutted

[11] AIR 1951 SC 217 [13]1870-6 QB 155 at p. 159

[12] AIR 1951 SC 128

by the defendant on his establishing that the judgment, for reasons recognised in law as defense, cannot be enforced. When a foreign judgment is pleaded by way of defense, it cannot be examined on merits and only be impeached on certain limited and recognized grounds. A judgment of a competent foreign Court on merits, therefore, is generally a complete answer to an identical action brought by the unsuccessful party in the English or Indian Courts. Foreign judgments can also be enforced on reciprocal basis under special Statutes enacted in this behalf. Section 13 of the Indian Civil Procedure Code embodies the principles of Private International Law and is as follows :

> "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except
> (a) where it has not been pronounced by a Court of competent jurisdiction;
> (b) where it has not been given on the merits of the case;
> (c) where it appears on the face of the proceedings to be found on an incorrect view of international law or a refusal to recognise the law of (India) in cases in which such law is applicable;
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
> (e) where it has been obtained by fraud;
> (f) where it sustains a claim founded on a breach of any law in force in (India)".

Before the Indian Adaptation of Central Acts and Ordinances Order, 1948, the words British India occurred in clauses (c) and (f) of Section 13. It may also be stated that clause (1) of Section 8 of the Hyderabad Civil Procedure Code, III of 1323 F., is analogous to Section 13 of the Indian Civil Procedure Code, clause (2) whereof is in the following terms :

> "Notwithstanding any provision in sub-section (1) when a suit has been filed on a foreign judgment in H. E. H. the Nizam's Dominions, the Court in which the suit has been filed is not precluded from enquiring into the merits of the case, but when the defendant objects the Court shall make such enquiry".

A foreign Court has been defined by Section 2 (5) before its amendment as a Court situated beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council and a foreign judgment under Section 2 (6) is a judgment of a foreign Court. In so far as Hyderabad is concerned, a foreign Court under Section 2 (v) of the Hyderabad C.P.C. is a Court established or continued by a foreign government. It is clear, therefore, that judgments of the Courts of British India were foreign judgments in Hyderabad and similarly judgments of Hyderabad Courts were foreign judgments in British India. The judgment-debtor, therefore, had the several defenses open to him on a suit filed against him on a foreign judgment. We do not propose to deal with the various defenses except the one which is pertinent for the determination of the question immediately before us, namely, the effect of a judgment of a foreign court against a defendant who is not amenable to the jurisdiction of that Court and has not submitted to it, that is, a judgment passed ex parte against him. The provisions of Section 13 of the Indian Civil Procedure Code as well as of Section 8 of the Hyderabad Civil Procedure Code recognise the conclusiveness of a foreign judgment with respect to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, subject to the defects specified in clauses (a) to (f). An ex parte decree passed either by the British Indian Courts as they then were or by the Courts of the Nizam's Dominions, against a person who is not subject to the jurisdiction of the respective Courts, would be without jurisdiction. Some Courts, as we have already observed, considered such decrees as absolute nullities, while others

considered them subject to an impediment. So far as the Hyderabad Civil Procedure Code is concerned, even foreign judgments which were not on merits would be enquired into by the Courts in Hyderabad if the defendant objected; in other words, not withstanding the defect on this count, a suit on a foreign judgment need not be dismissed, but the merits enquired into. A decree-holder from a Court in the erstwhile British Indian Province could either file a suit on that judgment as a foreign judgment in the Courts of the native States or file a suit on the original cause of action, or execute the decree on reciprocal basis by virtue of a notification issued under the Provisions analogous to Section 44 C. P. C. which empowered the Governor-General in Council to declare that the decrees of the Revenue or Civil Courts situate in the territories of a Prince of any native State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they have been passed by courts of British India. The Hyderabad Civil Procedure Code did not contain any provisions analogous to Section 44 so that the only remedy which the judgment-creditor had to enforce a foreign judgment was by way of a suit. The question here is not of a suit being filed on the basis of a foreign judgment, but of the execution of what at the time of the passing was a foreign decree.

The facts of the present case give rise to the contention that the decree after the promulgation of the Constitution, particularly after the application of the Indian Civil Procedure Code to the whole of India, is not a foreign decree and can be directly executed. It is argued that after the 1-4-1951, the Civil Procedure Code being common to the whole of India, the decree could be transferred under Sections 39 and 40 C. P. C. ignoring totally the character and validity of the decree at the time when it was passed. The relevant Sections 43 to 45 of the Amendment Code may now be set out :

> "43. Any decree passed by any civil Court established in any part of India to which the provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.
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> "44. The State Government may, by notification in the official Gazette, declare that the decrees of any revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, may be executed in the State as if they had been passed by Courts in that State.
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> "45. So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State Government has by notification in the official Gazette declare this Section to apply".

A combined reading of Sections 43 to 45 would show that the Indian Courts have power (1) to execute the decrees of those Indian Courts to which the C. P. C. does not apply, such as the scheduled districts; (2) to execute the decrees of the Civil Courts outside India which are established by the authority of the Central Government; (3) to execute the decrees of the revenue courts in any part of India to which the provisions of the C. P. C. do not apply, and (4) to execute decrees of the Indian Courts in the States to which the State Government has notified that Section

45 would apply. In our view the character and validity of the decree should be determined as on the date when it was passed, not on the date when it is sought to be executed. As we have stated, a foreign judgment is not the judgment of the domestic Court in which it is sought to be executed and the original cause of action has not merged in it. In so far as the jurisdiction of the foreign judgment in the domestic sense is concerned, it is certainly valid. It is not that the judgment is not executable in the court in which it is passed, even though the defendant is not resident within the jurisdiction of that Court and has not submitted himself to that jurisdiction. If there is property, whether moveable or immoveable, belonging to the judgment-debtor, or any property accrues to him or money becomes due to him subsequent to the passing of the decree within the foreign State, the judgment-creditor can execute the decree as against that property or money. Sections 39 to 43 of the Civil Procedure Code before its amendment dealt with these matters; but in so far as their enforceability in a foreign state is concerned, foreign judgments passed without jurisdiction in the international sense are not enforceable decrees. Whether they are termed nullity or absolute nullity is a matter of little moment. If this is so the defendant had the right to challenge the judgment as a nullity when the judgment-creditor seeks to file a suit thereon. If he had the right to challenge the judgment as a nullity before the Indian Civil Procedure Code was applied to the whole of India, that right being a substantive one that is, the right to immunity from execution under such a decree, cannot be taken away unless by express words or necessary statutory intendment. Under Section 8 of the Hyderabad Civil Procedure Code, the appellant had a right to challenge the judgment of the Madras High Court on the ground of it being passed without jurisdiction or that it is not on merits or take up any other defence open to him. This right is not only not taken away, but by section 20 of the Code of Civil Procedure Amendment Act, II of 1951, it has been saved. The relevant provisions of Section 20 are as follows :

> "20. (1) If, immediately before the date on which the said Code comes into force in any Part B State, there is in force in that State any law corresponding to the said Code, that law shall on that date stand repealed;
>
> "Provided that the repeal shall not affect.
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> (a) the previous operation of any law so repealed or anything duly done or suffered thereunder, or
>
> (b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed or

A legal right, according to Prof. Venkata Subba Rao in his Analytical and Historical Jurisprudence, p. 304, involves several essential elements; but generally speaking, the person, thing and act are inseparably connected with it. Prof. Holland in his Elements of Jurisprudence, page 88, seems to consider that with respect to the element of right as pertaining to something, there are some rights which have no objects and that there can be rights without an object or pertaining to anything. He illustrates his point by saying, "B is A's servant. Here A is the 'person of inherence', B is the 'person of incidence', reasonable service is the 'act' to which A is entitled. The 'object' of the right is wanting". Therefore, he was of the view that the object should be a mater al thing. Salmond differs from this view and says that the object need not be tangible and points out that in the illustration given by Prof. Holland the object of the right is the skill, knowledge, strength time and so forth of the person bound by the duty. .

It may be observed that where another has a duty I have a right. When another has no right I have immunity. When I am able to change the rights of others I have the power, such as testamentary power. When I change my own rights I have capacity, such as contractual capacity. It is,

therefore, evident that immunity against an assertion of claim by another is also a right. In the words of Salmond in his Jurisprudence, 10th edition, page 245, "immunity is that which other persons cannot do effectively in respect of me". The law confers an immunity by its refusal to accord active assistance to others. Viewed from this aspect the immunity of the defendant from the decree being passed against him on a foreign judgment of a Court to whose jurisdiction he has not submitted being a substantive right, is specially saved to him by Section 20 of Act II of 1951. Brij Mohan Lall, J. in the case of - AIR 1955 Allahabad 490 while holding that the Courts in Gwalior or Madhya Bharat continued to be foreign courts notwithstanding the accession of Madhya Bharat to the Indian Union and notwithstanding the unification of India brought by the Constitution of India, and the immunity of the judgment-debtor from the decree of the Gwalior Court remained in tact, observed at page 494 as follows :

> "It is, therefore, obvious that the right of treat-ting the decree as a decree of domestic Court which the decree-holder now puts forward is a right given by the repeal of an Act and not by an Act of State. This aspect of the case appears to have been overlooked in most of the rulings cited by the learned counsel for the decree-holder....."

Menon, J. in the Travencore-Cochin case, *Vareed v. Gopalbai*[14], as will be observed hereinafter has also taken a similar view on the question of vested rights. We would prefer to rest our judgment upon this unassailable ground even though on a consideration of the relevant authorities we would equally hold that the judgment at the time when it was given, being an ex parte foreign judgment would be considered a nullity in Hyderabad and that being so, the subsequent promulgation of the Indian Civil Procedure Code cannot in any way cure the defect. We propose now to examine a few of the relevant cases on this aspect of the matter,

4. The locus classicus on the question of foreign decree is the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote*[15], There the Faridkote Court which was a foreign Court

[14] AIR 1954 Tranv Coc 358 (FB)
[15] 21 Ind App 171 (PC)

passed a money-decree against the defendant who has been a Treasurer of Faridkote, but at the, date of the suit had ceased to be such being a resident of Jhind of which State he was a domicile subject. The decree was passed ex parte against him, he having ignored the processes served on him. Their Lordships of the Privy Council observed at page 185 as follows :

> "Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ("Actor Sequitur Forum Rei"); which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, Section 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter". All jurisdiction is properly territorial, and "Extra Territorium Jus Dicenti, Impune Non Paretur".....
> "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in Absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by

> the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.
> "These are doctrines laid down by all the leading authorities on international law; among others, by Story (Conflict of Laws, 2nd edition, Sections 543, 549, 553, 556, 586) and by Chancellor Kent (Commentaries, Vol. I, page 284, note c, 10th edition), and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in the cases of contract) by the Courts of the Locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice".

5. In AIR 1951 Bombay 125 (FB) a Full Bench of the Bombay High Court held that an ex parte decree passed by the Sholapur Court in the then British India, against a defendant, resident of Akalkot, before the merger can be executed after its merger on the ground that the character of the Akalkot Court and the status of the defendant having changed, the impediment which was initially there tothe decree being enforced in the Akalkot disappeared and the decree which was unassailable till the change came about, became enforceable and executable in the Courts of Akalkot. Chagla, C.J., delivering the judgment of the Full Bench found authority in the observations; of their Lordships of the Privy Council in Sirdar Gurdayal Singh's case, as contemplating the proposition that a decree may be enforced in the forum by which it was passed provided special local legislation authorizes that forum and consequently the decree is only a nullity in a limited sense. It was observed at page 127 that "the other way of putting the same idea is that the decree is a valid decree, but it is not enforceable in courts other than Courts where it was passed by reason of private international law". Referring to the argument that a vested right was created in the defendant by reason of an analogous provision to that of Section 13 (a) of the Akalkot Civil Procedure Code before its merger it was held placing reliance on Section 5 of the Merger Order, that that clause only refers to vested rights which have been affected by repeal of any legislation which was in operation in the merged States and

> "although the Civil Procedure Code of Akalkot has been repealed, Section 13 (a) has taken its place in identical terms and therefore whatever prejudice has been caused to the defendant has not been caused by the repeal of any legislation. The prejudice has been caused by an Act of State which altered the status of Akalkot Court, a municipal Court, and made the defendant a citizen, whereas Akalkot Court before, was a foreign Court and the defendant was a foreigner".

We are not aware of the terms of the merger which were being dealt with in that case. Whatever may be the effect of the merger order as an act of State, with great respect we are unable to appreciate the observations negativing the vested right of the defendant to resist a decree based on a foreign judgment or against the executability of such a judgment. In so far as Hyderabad is concerned, it remained an independent entity and had not merged in the Indian Union and became part of it only by virtue of the notification issued by the Nizam in November, 1949 and by the provisions of the Constitution itself. This is no doubt an act of State, but notwithstanding this act of State, the laws in force in the territories of Hyderabad, as in other territories, were

specifically saved by Article 372 of the Constitution and the Hyderabad Civil Procedure Code continued to govern the proceedings in Civil Courts. Article 261 (3), as we have already pointed out, makes the final judgments or orders delivered or passed by the civil courts in any part of the territory of India capable of execution anywhere within that territory according to law, which in so far as Hyderabad is concerned is the Hyderabad C. P. C. The act of State or political changes do not a whit alter the nature and character of a foreign decree. We have stated the principles upon which ex parte judgments of foreign Courts, even assuming that they were competent to pass them under the Municipal Law of that country are considered to be nullities. The reason for this is based on the principle that a Court passing such a decree had no opportunity of hearing the defendant and that it was based only on an ex parte view and the defendant who was not obliged to put in appearance in a foreign court might have been well advised to refrain from doing so or that it would be even expensive for him to have the suit defended. A judgment given without the presence of the defendant cannot be said to possess all the attributes of a judicial determination. When the authority of that State cannot be extended beyond its territories it would be futile to assume that the defendant would come and submit himself to the jurisdiction of the Court even on receiving a notice. This is not a mere technical objection, but goes to the root of the matter and affects the rights of the defendant who on the assumption that he is not bound to appear in a foreign court exercises that right by remaining ex parte. The observations of the Bombay High Court as well as the Courts that followed a similar view have been influenced by changes brought about in the foreign courts and the foreign creditors, thereby basing their conclusion upon the principle of common allegiance. The theory of nationality as a ground for conferring jurisdiction has not been accepted at any rate, in the Commonwealth countries in spite of the fact that they owed common allegiance to the king. Even in Great Britain decrees of Courts of Scotland and England, where the Englishmen and Sootmen owed common allegiance to their King, are not directly enforceable by the respective Courts. Prof. Cheshire in his Private International Law, dealing with the first of the five cases enumerated by Fry, J. in *Rousillon v. Rousillon*[14], namely, that the Courts in England would consider the defendant bound where he is a subject of a foreign country in which the judgment had been obtained, says at page 606-607 as follows :

> "....It remains to consider the first case and to ascertain whether the fact that the defendant is a national of the foreign country where the judgment has been obtained is sufficient to render him amenable to the jurisdiction of the local courts. There is no English authority which contains an actual decision to this effect, but the truth of the proposition has been affirmed obiter in several cases. It is also adopted by text-book writers. Nevertheless it is submitted with some confidence that nationality per se is not a reason which, on any principle recognised by private international law, can justify the exercise of jurisdiction. The argument usually advanced in its favour, namely, that 'a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign Courts, is surely out of touch with the known facts of modern life. Allegiance is all-important in Public International Law, but in itself has not been a contributing element to the formation of Private International Law .....Moreover, to make allegiance the basis of jurisdiction is scarcely practicable in the case of the British Commonwealth".

6. In *Ramalinga Aiyar v. Swaminatha Aiyar*[15] the Madras High Court in dealing with the

contention of the judgment-debtor that the decree of the District Judge, Trichur, given in his absence and without submission was not executable against him in the Province of Madras, subsequent to the passing of the decree, negatived and observed that

> "if the respondent was a Cochin Subject at the date of the passing of the decree any declaration renouncing his Cochin nationality after the passing of the decree would leave the position unchanged". Prof. C. H. Alexandrowicz in his article "International Law in India" observed as follows with reference to the case of *Chunnilal Kasturchand v. Dundappa Damappa*[16] which was approved by Chagla C.J. :
> "The question arises whether we are faced in these cases with a deviation from English Private International Law according to which nationality and allegiance do not justify the exercise of jurisdiction, though they are an important element in public international law. It seems probable that there is rather a confusion of ideas than a deviation". In our view, nationality therefore cannot be a ground for conferring jurisdiction. The Privy Council, as we have already observed, in Gurudayal Singh's case, leaves no doubt as to the absolute nullity of ex parte foreign decrees. The inference sought to be drawn by the learned Chief Justice of the Bombay High Court from the words "when authorised by special local legislation" from the observations of their Lordships of the Privy Council in Gurudayal Singh's (O) as investing the decree with validity in a Court of a foreign state if the Court is so authorised by special or local legislation is, with great respect, not borne out by the last

[14]1880-14 Ch. D. 351 at p. 371 [16] AIR 1951 Bom 190
[15]1941-2 Mad LJ 68

> para of the observations of their Lordships cited above. The words in
> paranthesis in the observations in the Faridkote Case (O) have been used consistently with the principle laid down in *Ashbury v. Ellis*[17] by the Privy Council.

In that case the New Zealand Legislature had authorised the local courts in any case of contracts made or to be performed in the colony to decide whether they will or will not proceed in the absence of the defendant and the question arose as to whether that rule was intra vires and reasonable. The Privy Council while declaring that the provision of law was intra vires and reasonable, nonetheless categorically observed that the question of enforceability of such a judgment in a foreign Court is not relevant in deciding the validity of the rule made and that it would be for the foreign Courts to determine the enforceability of that decree. At page 344 Lord Hobhouse said as follows :

> "But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand; and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged by the Courts of that country with regard to all the circumstances of the case".

7. The consideration which weighed with the Full Bench of the Bombay High Court was based

on Section 20 (c) of the Civil Procedure Code which empowers the plaintiff to file a suit within the local limits of whose jurisdiction the cause of action wholly or in part arises. This provision does not, as in the New Zealand case, affect the legal position or the enforceability of the decree by the Courts of a foreign country in the international sense, nor can the Legislature by an enactment give those decrees extra-territorial effect. All that the observations in the Faridkote case, upon which reliance was placed by the Bombay High Court would amount to is that the Legislature of a country has the power to direct its Court to entertain actions against absentee foreigners irrespective of the consideration whether and if so to what extent the courts will treat the decrees as binding and conclusive. This, however, does not solve the present difficulty and the question for consideration is whether a decree which could not be enforced in the foreign territory at the time when it was passed, could be enforced subsequently" by reason of any political changes that may have taken place due to which the foreign territory is no longer considered as such, and whether the original cause of action which has not merged in the decree becomes merged by reason of these changes. In so far as the domestic judgments are concerned, at common law" as Schmitthoff observes in his book "The English Conflict of Laws" at Page 459,

> "a security of lower order merges into a security of higher nature for the same debt. The judgment of an English Court of record for the payment of a sum of money creates, by operation of law, a 'contract' of record, the highest kind of security for a debt, and consequently the original cause of action - whether it was a simple contract or a contract by deed - merges into the judgment and is

[17]1893 A. C. 339

> extinguished".

Story in his Conflict of Laws, 7th edition, page 765-66, distinguishes domestic and foreign judgments as under :

> "Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters 'en pais' to be proved, the same as an arbitration and award, or an account stated; to be established as matter of fact before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof".

8. The decisions of the erstwhile Hyderabad High Court in ILR 1952 Hyd 1030 : AIR 1953 Hyderabad 19 and *Meherunnissa Begum v. Venkat Murli Manohar Bao*[18], follow the Full Bench judgment of the Bombay High Court, the latter also following the Full Bench Judgment in AIR 1955 Madhya Bharat 1 and the judgment in the D. C. Machine Co.'s case . In the D. C. Machine Co.'s Case (A) reliance was placed on the case of *Ram Dayal v. Shankarlal*[19], But in our view that case cannot be relied upon having regard to the judgment of the Fuller Bench in *Budhulal v. Deccan Banking Co. Ltd*[20]., It may be stated at once that in neither of these Hyderabad Cases has the question of vested right been argued or considered, though reliance was placed upon the provisions of Article 261 (3) and upon the fact that after the promulgation of the Constitution there has been a common Indian citizenship. These cases do not take us further than the case of the Full Bench of the Bombay High Court.

9. The Full Bench of the Madhya Bharat High Court in Brajmohan Bose's case has, by a majority of three to two, followed the reasoning of the Bombay High Court basing their judgment upon the question of common citizenship. The reference to the Full Bench was concerned with the execution of the decree passed by the Courts of British India against a person who has not submitted to its jurisdiction, by the Courts of Gwalior State after 26-1-1950. The force of the Mysore decision was sought to be minimized on the ground that the cases of *Dominion of India v. Hiralal*[21], and *Saidul Hamid v. Federal Indian Assurance Co. Ltd.*[22], were not referred to during the argument and have not been noted by the learned Judges. Both the cases dealt with a converse position where decrees were passed by the Courts of British India which on partition had gone to Pakistan, and which were sought to be executed by the Courts in the territories which remained in India. The decisions in those cases no doubt turned on the question whether the Courts passing the decree were on the date when they were transferred for execution were foreign courts and they held that they were, having regard to the existence of two separate Codes of Civil Procedure as adopted under Section 18 (3) of Indian Independence Act and the Adaptation of existing Indian Laws Order of 1947. A single Bench of the Madras High Court in *Messrs. Golden Knitting Co. v. Messrs. Mural Traders (India) in Sind Market Karachi*[23], in a very short judgment merely followed and applied the case of *Dominion of India v. Hiralal* . It may be observed that in all these cases no execution petition was pending in the

[18] AIR 1955 Hyd 184
[19] ILR 1952 Hyd 196 : (AIR 1952 Hyd 80 (FB))
[20] AIR 1955 Hyd 69
[21] AIR 1950 Cal12
[22] AIR 1951 Pun 255
[23]1949-2 Mad LJ 822

Courts of the territories which remained in India and the decrees were only sought to be executed after the 15th August, 1947, when the provisions of the respective Codes of Civil Procedure had not empowered the transfer of decree for execution in the territories of the other State. We are, however, unable to understand the raison d'etre for these decisions. No doubt, the Supreme Court in *Kishori Lal v. Sm. Shanti Devi*[24], in the case of an application presented on 18-3-1949 for recovery of arrears of maintenance before the First Class Magistrate of Delhi, held that it is recoverable under an order made by the Lahore Court on 29-3-1946. Bose, J. observed,

> ".....We see no reason why an order which was competent and valid at the time it was passed and which could have been enforced in Delhi should cease to be competent simply by reason of partition....."

These remarks were confined to applications under Section 490, Cr. P. C, with which alone they were concerned. Consequently it cannot be said that their Lordships were expressing any opinion relating to the executability of civil decrees passed by the courts in the territories which have gone to Pakistan. We are, however, unable to appreciate the basis of the Calcutta and Punjab Judgments (AIR 1950 Calcutta 12); AIR 1951 Punjab 255 or how a decree which was passed by the domestic Courts and operative throughout the territories could become foreign judgments retrospectively. If the basis of their non-executability depends upon the lack of any power to transfer decrees for execution on reciprocal basis in the respective Codes of Civil Procedure, that will equally apply to the instant case where the decree was transferred by the Madras High Court prior to the coming into force of the Indian C.P.C. in Hyderabad, when there was no power to transfer a decree to the Hyderabad Courts. The assumption underlying these decisions is not warranted by the provisions of Section 18 (3) of the Indian Independence Act which did not empower any change in the character of pre-partition decrees either by implication or by

adaptation. The sub-section merely authorizes, unless expressly provided in that Act,

> "that the law of British India and of the several parts thereof existing immediately before the appointed date shall so far as applicable and with the necessary adaptations, continue as the law of each State of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature, or other authority having power in that behalf."

There is nothing in the above provision to authorize the amendment of the Code in such a way as to affect the rights of a decree-holder to execute his decree in any of the territories of British India, nor was such a right affected.

10. The views expressed in the Full Bench Judgment of AIR 1952 Mysore 69; AIR 1954 Tranvancore Cochin 358, AIR 1956 Rajasthan 81 and the judgments of Allahabad High Court, Nagpur High Court and the Calcutta High Court are more in consonance generally with the view we have taken. In the Mysore case after referring to the Bombay judgment, Venkataramaiah, J. observed :

[24] AIR 1953 SC 441

> "the reason for refusing execution is not based on the consideration of the Court passing the decree having or not having jurisdiction to decide the case under law governing it, but on principles governing decisions of 'Foreign Court'. "

Again at page 75 he concluded thus :

> "In my opinion decrees which were inexecutable as those of a Court in a foreign State according to the law in force upto the date of the Constitution have not ceased to be so on account of the changes introduced by the Constitution with respect to status or in the definition of Foreign State or of territory of India and that the date of decree, not the date of application for execution is material to decide the question of executability'.

Referring to Article 261 (3) of the Constitution, Menon, J. in AIR 1954 Tranvancore Cochin 358 (N) stated at page 360 :

> "There can be no doubt that this provision has no retrospective effect and that it will apply only to judgments and orders delivered or passed subsequent to 26-1-1950. It is clear from the provisions however that the makers of the Constitution realized that but for such a provision the judgment of one of the States of India will be regarded as a foreign judgment in every other State in the country in spite of the evolution of a common Indian federation. There was no such full faith and credit clause in the instrument of Accession of 14-7-1949.
>
> "In a federation for all national purposes embraced by the Federal Constitution the State is of course one, united under the same sovereign and authority and governed by the same laws. But in other respect the States are necessarily foreign to and independent of each

other and a foreign judgment for purposes of private international law need not necessarily be of a Mate owing a different allegiance. It is enough if it is the judgment of another independent or unconnected jurisdiction and as to whether it is of an independent or unconnected jurisdiction will have to be decided according to the law inforce in the State where execution is sought". Dealing with the vested right based on Section 20 of the Code of Civil Procedure Amendment Act, II of 1951, after citing Salmond on Jurisprudence relating to the four classes of rights conferred by the law, it was further observed at page 361 as follows :

".....the defendant's right in this case to immunity from execution on the ground that the decree is a nullity as far as the Cochin Courts are concerned by virtue of the definitions of foreign Court and foreign, judgment in the Cochin Civil Procedure Code and the provisions of Section 11 of that Code which provided that a foreign judgment shall not be conclusive where it has not been pronounced by a Court of competent jurisdiction must necessarily be considered as a right of the fourth category saved by Section 20 of Act 2 of 1951".

11. P. B. Mukherji, J. in AIR 1954 Calcutta 67 after examining the several arguments advanced upon the Instrument of Accession, States Merger Order, 1949, the Extra Provincial Jurisdiction Act, the Civil Procedure Code and the Constitution of India, observed at page 72 as follows :

"The question is not to be determined by applying the test whether at the time of execution any of the sections of the Civil Procedure Cede applies, but must be determined in my judgment by the test whether such decrees by their nature of being foreign Court judgments are at all executable, and this goes to the very root of their validity and enforceability. The principle that the executing Court does not go behind the decree has always been understood subject to the overriding question of whether the decree is a nullity or not. It is settled law that an executing Court can always refuse to execute a decree which is a nullity. A foreign judgment is not conclusive if it is in breach of any international law". In that case the status and character of an ex parte decree passed by the Okhamandal Court in Baroda State on 21-10-1948 against the Dominion of India owning the East Indian Railway, was sought to be executed by transferring such, a decree to the Calcutta High Court. It was held that since the Indian Independence Act of 1947 and with the coming into being of the Dominion of India, the paramountcy of the British Crown ceased and lapsed with the result that by the ordinary tests of international law and constitutional jurisprudence, these native states became sovereign territories and that the only limitations were such as were imposed by the terms of the Indian Independence Act and specially in respect of customs, communications and like matters under Section 7 of the Indian Independence Act. In the circumstances the ex parte decree by the Baroda Court was a foreign decree and could not be executed by the Calcutta High Court as it was a nullity, notwithstanding the fact that the Civil Procedure Code had been applied throughout India including the territory in which the decree was passed and according to which a transfer of the decree to the Calcutta High Court could be made after 1-4-1951.

The Bombay and Mysore decisions were fully considered and the argument based on Article 261 of the Constitution was dealt with. Again dealing with the argument whether in International Law a judgment can be passed against a foreign State, the learned Judge observed at page 70 :

"On principles of international law it is well-settled that a suit against a foreign state is not entertained and no decree is passed against a foreign State unless the foreign state submits to such jurisdiction. This principle is founded on the doctrine that the sanction behind the Court in a State is the authority of the State in which the Court functions. As no sovereign State has any authority over another sovereign State, it follows as a corollary, that the Courts of one sovereign State can have no jurisdiction over another independent State except by its voluntary submission to such jurisdiction". With great respect we agree with this statement of law.

12. The Nagpur High Court in AIR 1955 Nagpur 103; and AIR 1956 Nagpur 273 ; and the Allahabad High Court in AIR 1955 Allahabad 490 followed a similar line of reasoning in arriving at the same conclusions. The majority of the Full Bench of the Punjab High Court in AIR 1956 Punjab 193 held that a decree passed by the Indore Court on 17-2-1948 was a foreign Court qua the Court in Punjab on the date of the decree (17-2-1948) and it could not, therefore, be executed in Courts in Punjab, viz., Ludhiana on that date; that in order to determine whether a certain decree is or is not a decree of a foreign Court, the nature of that decree has to be determined at the time of its birth and not at any subsequent date; that the right to execute a decree or a right to raise an objection to the decree are substantive and vested rights and cannot be taken away by a provision of law which is not retrospective; that on the date the decree was passed, the judgment-debtor could have objected that the decree was a nullity because it was a decree of a foreign court and that subsequent changes in the law could not take away that right. Khosla, J. sought to distinguish two sets of cases, one dealing with the execution of decrees passed by the British Indian Courts sought to be executed in the Courts of the erstwhile native States and the other decrees passed by the latter Courts sought to be executed in the former Courts. He observed at page 198 as follows :

"The decree passed by a Court of a native State was never a good decree as far as India was concerned. It was a nullity where the defendant had not submitted himself to the jurisdiction of the Court. This disability could not be removed because a thing which is non est cannot become a positive, effective and legal entity. The decree of the Court of Indore was of no avail whatsoever in Ludhiana at the time it was passed and by the subsequent extension of the Civil Procedure Code to Indore this decree could not become executable at Ludhiana". With respect to the decrees passed by the erstwhile British Indian Provinces, he says :

"A decree passed by a Court where the Civil Procedure Code applied could be executed throughout the territory of British India or Provinces as defined in Section 3 (45) General Clauses Act (10 of 1897) or Part A States as defined in the Constitution. This decree was, therefore, executable anywhere in India. The territory of India was extended by the merger of the native States and those States became subject to the law prevailed in India.

> In course of time the provisions of the Civil Procedure Code were extended to them and therefore a decree which was a good decree in India became a good decree in the area of native State also, whereas the opposite case was quite different".

With great respect we fail to understand the reasoning and at any rate, as we have already pointed out, the case of Hyderabad was not one of merger nor are the terms of any such merger under consideration. If the basis of the non-executability of the decree is, as clearly accepted in that judgment, based on the character of that decree on the date on which it was passed, no distinction can conceivably be made between a decree passed by the British Indian Courts before the merger or before the independence when it was a foreign decree, and a decree passed by the Courts of a native State before the independence or the merger. In both cases the character of the judgment would be that of a foreign judgment and if it suffers from any defect as to want of jurisdiction or otherwise, it will continue to be subject to that defect. The question before the Full Bench of five Judges of the Rajasthan High Court in AIR 1956 Rajasthan 81 was whether the ex parte decree passed in the former State of Jaipur against a respondent of the former State of Dholpur in 1947 could be executed at Dholpur after 26-1-1950. The decrees in all the five cases before that Full Bench of the Rajasthan High Court were passed by the Courts in Bombay, Beawar, Calcutta, Gauhati and Nasik, situated outside the boundaries of the State of Rajasthan and were similar in nature to the decrees which were considered in the case of *Premchand v. Danmal*[25], Wanchoo C.J., while holding that ex parte decrees passed in absentem before the advent of the Constitution against non-resident defendants, in personal actions, by Courts in other States which are now the territories of India and which may now be sought to be executed in Rajasthan State are foreign decrees open to challenge under Section 13, C. P. C. and inexecutable in Rajasthan inter alia they have not been passed by a Court of competent jurisdiction in the international sense, went on to observe,

> "so far as those foreign courts are concerned, which are now situate within the boundaries of the State of Rajasthan, is that, by virtue of these three provisions, decrees of these courts, even if they were foreign courts at the time when the decree were passed and even if the defendants were non-resident foreigners who had not submitted to their jurisdiction, become the decrees of the present courts of Rajasthan, and are therefore executable without the judgment debtors' having the right to raise an objection under Section 13 C. P. C."

This view was not necessary for the determination of the case as none of the appeals were from the decrees of a territory which became part of the State of Rajasthan. The matter was, however, considered merely because of a decision of a Full Bench of three judges in *Radhe Shiam v. Firm Sawai Modi Basdeo Prasad*[26], in which the executability of such a decree fell for determination. In any case the question was considered on the laws in force in the State of Rajasthan, such as the Rajasthan High Court Ordinance No. XV of 1949, Rajasthan Civil Courts Ordinance No. VIII of 1950 and the Rajasthan Small Causes Courts Ordinance No. VIII of 1950. Although we are unable to see any difference in the applicability of the general principles to this particular case, we are not here concerned with the latter view expressed by Wanchoo, C.J., and dissented to by Modi, J. as that is purely a question of interpretation of the three Ordinances. The view on the general question has been tersely put by the learned Chief Justice at page 84 thus :

"As the law stood at the time when the decrees were passed the defendants knew that they were not bound to obey them, and that even if any decree was passed against them, it would be a nullity in the State to which they owed allegiance. In such circumstances, the defendants might not have thought it necessary to go and contest the suit even if they had good grounds for such contest.

"To make all those decrees now executable because of the political changes that have taken place in this country after 1947 would, in my opinion, be working hardship on the judgment-debtors".

13. In our view, therefore, both on principle as well as on the authority of the majority of Courts in India, an ex parte decree of the Madras High Court, a foreign Court on the date when it was pass-led, is not capable of being executed in the Hyderabad

[25] AIR 1954 Raj 4

[26] AIR 1953 Raj 204

Courts even after the application of the Indian Code of Civil Procedure to that State by the Code of Civil Procedure (Amendment) Act, II of 1951, and even after part of the territory of that State has merged in the Andhra Pradesh, as the Jaws in force-in that State on the date of enforcement of the States Reorganization Act will continue to be in force by virtue of the provisions of the said Act. The vested right of the judgment-debtor to immunity still enures to him.

14. Consequently the judgment of the Court below is set aside and the execution petition dismissed. The appeal is allowed with costs here and below.

Appeal allowed.