CALCUTTA HIGH COURT

Indian and General Investment Trust Ltd

Vs.

Sri Ramchandra Mardaraja Deo

(Sinha, J.)

15.01.1952

JUDGMENT

Sinha, J.

1. These are two applications, one by the Indian and General Investment Trust, Ltd., suing as Trustees of the Khallikote Raj Sterling Loan, 1906 and another by the Indian and General Investment Trust Ltd., for an order that certified copies of the orders passed on the 29th day of November 1949 by the High Court of Justice, Chancery Division, England, in Actions Nos. 337 of 1949 and 351 of 1949 of that Court together with certified copies of the certificates dated the 9th day of January 1950 issued by the Master of the Supreme Court of Judicature in England, granted under Section 10 of the Foreign judgments (Reciprocal Enforcement) Act, 1933, together with the usual certificate of non-satisfaction, be transmitted to the District Judge's Court at Berhampore in the province of Orissa, for execution. These applications have been made under Section 44A read with Section 39 of the Code of Civil Procedure . By consent of parties, the two matters have been heard together.

2. The facts are briefly as follows :

3. Khalikote and Atagea are zemindary estates situated in Orissa. The respondent is the present zemindar. He is governed by the Mitakshara School of Hindu Law and he has a son who has not been made a party to these proceedings. In the year 1903, his father the late Raja, Saheb Meherban-i-Dostan Sri Sri Harihar Mardaraja Deo, was alive. The respondent is his only son and was born in 1900. In 1903, therefore, he was only an infant, three years old. In the year 1903, the late Raja being burdened by debts contracted by himself and also for outstanding Government revenue and cesses, conceived the idea of raising a loan in England of £135,000 upon the security of the zemindary properties. In order to effectuate his intention, an application was made before the High Court of Madras in its Extraordinary Original Civil Jurisdiction, and an order was made on the 24th September, 1903, appointing the late Raja as the Guardian of his minor son's property with power to mortgage the minor's share for the purposes of raising a Debenture loan of £135,000. The said loan was duly raised by floating a Debenture loan in London. By indenture dated 23rd October 1903, the late Raja, for himself and as guardian of his infant son, transferred the zemindary estates to the Indian General Investment Trust Ltd., as Trustees for the redemption of £135,000 raised on 1350 Debentures of £100 each. The remuneration paid for the

London financial agents was £10,800. In these applications, however, we are not concerned with this loan but a subsequent loan raised by the late Raja in 1906. It appears that in 1906, the late Raja wished to raise a further sum of £77,500. The entire process was therefore repeated. On the 11th December 1906, an order was obtained from the High Court of Madras in its Extraordinary Original Civil jurisdiction, appointing the late Raja as guardian of the property of the minor son, with power to mortgage his share for purposes of raising the new Debenture loan. I set out below the exact wordings of the order, as it is material :

> "It is ordered that the Rajah be and is hereby appointed guardian of the property of the said Sri Ramchandra Patta Deo during his minority and that the Rajah shall have the following limited powers (and no others), that is to say :
> Firstly, as such guardian as aforesaid and for the purpose of binding the interest of the said Sri Ramchandra Patta Deo therein to mortgage the estates of Khallikote and Atagada for the purpose of raising a further debenture loan of £77,500, and Secondly, as such guardian as aforesaid, to execute such Deeds and Documents as may be necessary for completing and carrying, into effect the said debenture loan and vesting the said estates by way of mortgage in trustees for the benefit of the debenture holders."

4. Upon this order, several questions have been raised, namely, as to whether the High Court of Madras has jurisdiction to pass such an order; secondly, as to whether in a Mitakshara family it is at all permissible to appoint a guardian of the share of the minor coparcener and as to whether such a guardian could enter into a personal covenant binding on the minor. These questions will be dealt with later, including the question as to whether this order had at all authorized the guardian to enter into any such personal covenant.

5. The debenture loan for £77,500 was duly raised by issuing 775 debentures of £ 100 each, bearing interest at the rate of £6 per cent. per annum. The late Rajah executed an indenture dated 18th December 1906, on his own behalf and as the guardian of his infant son, the present respondent, mortgaging the zamindary estates of Khallikote and Atagada. The English actions upon which the present applications are based relate to this indenture dated the 18th December 1906. The late Rajah died in 1909, leaving him surviving the present respondent, his only son. The respondent has also got a son but he has not been made a party to these proceedings. The original loan was for £77,500 as against which the plaintiffs have already realized a sum of £218,250/10/9 of which £ 177,348/18/0 represents interest. A sum of £9,675-0-0 has been deducted as remuneration and/or commission. These figures have been furnished by the respondent in his affidavit in opposition and there has been no serious attempt at controverting the accuracy thereof. In fact Mr. Chaudhury appearing for the plaintiffs has frankly confessed that the terms of the debenture loan could not be said to be mild, nor could it be denied that a great deal of money has been realized. He, however, argued that if the contract is binding and the decree obtained thereon was valid, the trustees were bound to make efforts to realise the same. The principal difficulty, however, in the way of the plaintiffs is the Orissa Money Lenders Act of 1939 which read along with Orissa Money Lenders (Amendment) Act, 1947 exonerates a borrower from paying for principal and interest a sum more than double the original loan. If that Act is made applicable to this case, it is obvious that the plaintiffs have realised considerably more than what they are entitled to. It has been stated that the Trustees repeatedly tried to have

the debenture loan exempted from the operation of the Act but were unsuccessful. They have now adopted the following procedure :

6. On or about the 24th January 1949, art action was instituted in the Chancery Division of the High Court of London by the plaintiffs as Trustees against the defendant (the present respondent) under the Indenture dated 18th December 1906 for recovery of the following sums :

> 1. £48,500 as balance of principal outstanding;
> 2. £2,425 as premium on debentures drawn for redemption since 1st May 1946 but not redeemed;
> 3. £4,365 as interest from 1st May 1947 to 1st November 1948;
> 4. Further interest and costs.

A further action was similarly commenced by the plaintiffs, The Indian and General Investment Trust Limited, for recovery of the following sums :

> 1. £1,425 as remuneration of Trustees, unpaid between the 1st May 1939 and 1st November 1948;
> 2. £1,425 as commission of the Trustees' London Agents;
> 3. Costs.

7. In each of the two cases, a writ was issued by the High Court in England on the 24th day of January 1949, requiring the defendant (the present respondent) to cause appearance to be entered within ninety days of the service of the writ upon him. This writ was issued pursuant to an application made for leave to serve the writ outside jurisdiction under Order 11 of the Rules of the Supreme Court in England and the Courts (Emergency Powers) Rules, 1943. One Sri Prosad Charan Mukherjee served the writs upon the respondent at Rumbha Palace in the District of Ganjam on the 27th May 1949 together with notices and counter-notices in Forms I and II under the Courts (Emergency Powers) Rules, 1943. The respondent refused to accept service of the writ and/or notices and made the following endorsement :

> "I am a non-resident foreigner holding no property moveable or immoveable in England. The English Courts have no jurisdiction upon me or under the contract."

The respondent did not enter appearance in the English actions and on or about the 17th November 1949, the plaintiffs took out two Master's summonses, addressed to the defendant for passing final judgments in the respective actions. Mr. Basil William Bloomer, Managing Director of the Indian and General Investment Trust Ltd., affirmed an affidavit in support of the application in which he inter alia submitted that the Orissa Money Lenders Act did not apply to the kind of transaction in suit or to the class of persons to which the respondent belonged. He then went on to say :

> "Even if the Orissa Act restricted the enforceability of the lender's rights, they do not discharge the borrower's obligations and they cannot affect liabilities assumed outside Orissa."

In an earlier affidavit in support of the application for leave to serve beyond jurisdiction, Mr. Chambers, a member of the firm of solicitors acting for the plaintiffs, had stated as follows :

> "In the event of the proposed plaintiffs obtaining judgment in this Hon'ble Court, it is their intention to seek to enforce the same by application in the Courts of Orissa under the Code of Civil Procedure, Sections 13, 14 and 44 A, and Order 34, R. 14, which permit the enforcement of foreign judgments subject to peace time conditions. It is open to controversy whether, in certain events the intended cause of action will be fruitful, but it is desired by the proposed plaintiff to adopt it inasmuch as it appears to afford the best (and perhaps the only) method by which the outstanding debenture-holders can avoid the baneful consequences of Indian legislation designed to protect borrowers of very different character to the proposed defendant."

8. I find nothing in the Orissa Money Lenders Act to justify the submission either that the Act was inapplicable to a debenture loan or that the Act was intended to apply to a class of individuals other than the class to which the respondent belonged. In any event, it is quite apparent that the matter was extremely controversial and the plaintiffs were quite aware of the difficulties in their way. It is therefore very unfortunate that the summonses which were solemnly taken out, addressed to the defendant, were never attempted to be served upon him, but on the 29th November, 1949, the Court, after having considered the summonses (which were never served) passed an order on each of the said actions. By the first order, the respondent was directed to pay to the plaintiff trustees the sum of £58,434/16/4 and the taxed costs, the security to be released upon such payment, and leave was granted to proceed with the execution. By the second order the defendant was directed to pay to the Indian and General Investment Trust Ltd., the sum of £2,850 together with the taxed costs, and leave was granted to proceed with execution. It will be observed that before the orders were passed, India was declared, on the 26th November 1949, a sovereign democratic republic. The point is of importance because in this case it is necessary to apply the principles of private international law.

9. After the passing of the said orders dated 29th November, 1949, the plaintiffs taxed their costs, and on the 21st January 1950, certified copies of the two orders with the necessary certificates were filed in this High Court in its Ordinary Original Civil Jurisdiction under the provisions of Section 44 A of the Code of Civil Procedure. On the 25th January 1950, two petitions were filed. The first petition recites that the sum of Rs. 782,096/10/2 was due in Indian currency in respect of the order dated 29th November 1949 made by the High Court of Justice, Chancery Division, in England, that so far as the petitioners were aware, the defendant owned some race-horses within the jurisdiction of this Court, but that the particulars thereof were not known, and that the respondent had properties within the jurisdiction of the District Court of Berhampore in the province of Orissa where he also resided; consequently the order should be transmitted to that Court for execution with the usual certificate of non-satisfaction. The second petition recited that a sum of Rs. 39,135/14/2.59 pies was due in Indian currency in respect of the second mentioned order of the 29th November 1949, and prayed for substantially the same relief. These petitions were presented before the learned Master of this Court, who directed notices to show cause to be issued and served upon the respondent, (together with the certified copies of the relevant orders, returnable after a month) as to why the orders passed on the 29th November 1949, by the High

Court in England should not be executed against him. These notices were issued by the learned Master but served upon the defendant by the solicitors for the plaintiffs. Pursuant to the notices, the respondent has appeared before me and shown cause why the orders should not be executed as against him. According to the respondent, the orders are not binding upon him and not executable and that they should not be transmitted.

10. The petitioners have made no point in their affidavits or before me that the learned Master should not have issued a notice and that the present proceedings before me are incompetent. They have proceeded with the application before me and contended that I should make an order in terms of prayers in the respective petitions notwithstanding the objections of the defendant. The applications have been made under Section 44 A of the Code of Civil Procedure read together with Section 39. The material portion of Section 44 A of the Civil Procedure Code runs as follows :

> "44 A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory :
> 1. Where a certified copy of a decree of any of the superior Courts of the United Kingdom or unrestricted territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.
> 2. Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.
> 3. The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court, executing a decree under this section, and the District Court shall refuse execution of any such decree if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in Clauses (a) to (f) of Section 13..........."

11. It is submitted on behalf of the respondent that the orders in respect of which the 'show-cause' notices have been issued, fall within the exceptions as set out in Clauses (a), (b), (c), (d) and (f) of Section 13.

12. Before I go into these questions, I must dispose of a preliminary point taken by the plaintiffs. It is argued that I have no jurisdiction to decide any such question upon these applications. It is said that these applications are not for execution but merely for transmission of the orders to the Executing Court. Such orders, it is stated, are merely ministerial and that it would be for the District Court of Berhampore to decide such questions. On behalf of the respondent, it is argued that I have jurisdiction to decide these questions, that this is the appropriate time when they should be decided and that the only object of shutting out an adjudication now was to be able to say before the District Court of Berhampore that the decree was to be deemed as that of the Calcutta High Court, and as such, the provisions of the Orissa Money Lenders Act did not apply. I am, however, not concerned with the motives of the petitioners. What I have to decide is as to whether in an application for transmission of a foreign decree filed under Section 44 A of the Code, the Court in which the decree (or order as the case may be) was filed and which Court was

called upon to transmit the same for execution to another Court, could or could not go into questions raised in these applications.

13. The first case cited on behalf of the plaintiffs is '*Chutterput Singh V. Sait Summarimal'*[1], In that case, a decree was passed on the 21st May 1896 by this Court, for payment of a certain sum of money by the defendant to the plaintiff. On the 1st June 1908, an application was made to this Court for transmission of a copy of the decree to the District Court of Murshidabad for execution. What actually happened was that the application for transmission was made before the Registrar of this Court in the Original Side, who directed that notice should be given to the judgment-debtor. The notice having been given, the judgment-debtor did not appear and the Registrar made an order for transmission. The question arose whether the order of the Registrar operated as a 'Revivor' within the meaning of Article 183 of the Indian Limitation Act. Sanderson, C.J., pointed out that the Registrar of this Court on its Original Side, could not adjudicate upon the question as to whether the decree was capable of execution or decide the question of limitation. Therefore, although notices were served on the judgment-debtor, the order for transmission was a mere ministerial order.

14. It will be observed that the point involved there was as to whether an application for transmission which was dealt with by the Registrar of this Court on its Original Side could operate as a 'Revivor'. A 'Revivor' is a special kind of legal proceeding in which it has been held that there must be some adjudication, either expressly or by implication that the decree was capable of being executed. Clearly, an order by the Registrar could not operate as a 'Revivor' because he could not adjudicate as to the excitability of the decree or decide the point of limitation. In the present case, however, the matter is not before the Registrar or the Master but before the Court. Besides, it is not an application for transmission of an ordinary decree or order. It concerns a special procedure under which a foreign decree has been filed in this Court and sought to be executed as a decree passed by this Court. If it is to be deemed to be a decree passed by this Court, it cannot be reasonably contended that this Court is powerless to decide questions under Section 13 or Section 47 of the Code, merely because the petitioners ask for nothing more than transmission. If the submission made on behalf of the petitioners be correct, then it follows that the District Court of Berhampore will be called upon to decide whether a decree which has been filed in this Court and is to be treated as if it has been passed by this Court, should have been filed here or is capable of execution. Further, this Court is called upon to transmit a decree for execution which upon a closer examination it might find to be not binding upon the defendant and not capable of execution.

15. '*Chutterput Singh's Case',(Supra)* was approved by the Judicial Committee in '*Banku Behari V. Narain das*[3]*',* It is there stated that there was some practice in the Original Side of this Court that the judgment-debtor gets no notice of an application made for transmission which is made ex parte before the Registrar and the order made therein is a ministerial order. In that case also, their Lordships of the Judicial Committee were considering as to whether such an order operated as a 'Revivor'.

[1]43 Cal 903
[2]54 Ind App 129

16. In my opinion, neither of these two cases have a bearing on the point to be decided in this case. There is no evidence before me to show that in the case of an application governed by

Section 44A, there is any rule or practice of this Court by which such applications are made ex parte before an officer of this Court. On the other hand, so far as I have been able to ascertain, the practice is that applications under Section 44A are always made upon notice to the judgment-debtor and the matter is decided by the Court after hearing his objections. In any event, in my opinion that is the right procedure to adopt. The learned Advocate-General has pointed out that under Section 44A(3) the words used are "District Court executing decree under this section." Can it be said that in making an order for transmission this Court was not a Court executing the decree? The action concludes in a decree. After a decree, there can be no other stage but execution. In other words, there is no intermediate stage or a 'hiatus' between a decree and its execution. A particular application may be said to be in aid of execution '*Sreenath Chakravarty V. Priya Nath*[3]*'*, or it may be an application which may not amount to a 'Revivor' so as to save limitation but it must be an application "in" or "relating to' execution and cannot be anything else. In that view of the matter, the words "District Court executing a decree" cannot exclude a Court in which an application is made for transmission. In my opinion, it is open to a judgment-debtor in an application made under Section 44A of the Code, to put forward his objections at any stage of the proceedings. and when such, objections are brought to the notice of the Court, the Court is bound to adjudicate upon it. '*Sheo Tahal Ram V. Vinayek Shukul'*[4]*,*

17. In my opinion, therefore, there is no warrant of saying that the Court in which a foreign decree is filed can be precluded from entertaining the objections put forward by the judgment-debtor, as are permissible under Section 44A, merely because nothing further is required from it by the petitioners other than transmission of the decree to another Court. In this connection the learned Advocate-General has relied on the case of '*Namatha Pal Choudhury V. Sarada Prosad Nath'*[5]*,* In that case, a rent decree was passed by the learned Additional Subordinate Judge of Nadia. An application was made before him for transmission of the decree for execution to the Subordinate Judge's Court at Alipore. This application was made ex parte but an order for transmission was made in the absence of the judgment-debtor. Thereupon the judgment-debtor made an application before the transferor Court, pRaying inter alia that the transfer order should be recalled and several questions decided under Section 47 of the Code. The transferor Court decided that it had no jurisdiction to entertain such an application which could only be decided by the transferee Court which was the Court executing the decree. Against this order there was an appeal to this High Court which allowed the appeal and decided as follows :

> "(a)That an application for transfer of decree to another Court is a step in aid of execution and is a question 'relating to the execution of a decree.'
>
> (b)That an objection to such an application by the judgment-debtor comes within the purview of Section 47 of the Code.
>
> (c)That the Court passing the decree does not function merely as a sort of post office for receiving the application for transfer of the decree and for transmitting it to the Court where actual execution of the decree is contemplated. Such a Court has a judicial duty to perform where an objection is preferred to the transfer of the decree."

[3] 58 Cal 832

[4] 53 All 747

[5] AIR 1939 Cal 651

18. It is argued that in this case the original decree was not passed by this Court in its original jurisdiction. In my opinion that makes no difference because the decision does not militate against the authority of 'CHUTTERPUT SINGH'S CASE', 43 Cal 903, or 'BANKU BEHARY'S CASE', 54 Ind App 129, mentioned above. In neither of those two cases was it held that the transferor Court, if moved in the proper manner, was powerless to go into questions appropriate to Section 47. They merely decided that if an order for transmission was actually made by an officer of the Court who could not adjudicate upon disputed questions, such an order could not save limitation. The learned Advocate-General argues that a foreign decree could not be filed in any and every Court but that it could only be filed in the Court where execution was actually contemplated. Mr. Chaudhury on the other hand argues that Section 44A did not lay down any restrictions whatsoever as to the Court where a foreign decree could be filed. According to him, his clients could file it in any Court throughout the length and breadth of India, or even simultaneously in several Courts and then get it transmitted to the Court where it was desired that the actual execution should take place. I have no doubt that the legislature must have intended that a foreign decree should be filed in the Court where it was desired to execute it, because it would be meaningless to give the holder of a foreign decree a choice to file it in several hundred Courts for no other purpose than having it transmitted, possibly from one end of the country to another together with a certificate of non-satisfaction by all these Courts, although the applicant for execution had no intention that these Courts should actually execute the decree or do anything further than transmit the same. Unfortunately however, that intention has not been adequately expressed in the Section as framed, and I am therefore unable to hold that the holder of the foreign decree must file it in that particular Court where actual execution is contemplated. But this is all the more reason why the Court where a foreign decree is filed should have the power to look into the matter before it sends the same to another Court for execution. If a foreign decree can be dumpted in any Court arbitrarily, that Court before stamping it with its own seal and sending it for circulation must be enabled to view the goods and test its quality.

19. In my opinion, therefore, I have jurisdiction in these applications to deal with the objections raised by the judgment-debtor and particularly with the objection that the decree falls within several of the exceptions laid down in Section 13 of the Code and is therefore not executable. The position may be summarized as follows.

(a) An application for transmission of a decree passed by the Calcutta High Court in its Original Side may be made ex parte and an order for transmission may be made by the Registrar or Master or such other officer as may be prescribed by its rules.

(b) Such an order would be a mere ministerial order and would not operate as a 'Revivor' for the purposes of Article 183 of the Limitation Act.

(c) But the transferor Court would not be precluded from entertaining objections by the judgment-debtor to such an application and such objections would be questions 'relating to the execution of the decree.'

(d) The words 'District Court executing a decree' as used in Section 44A of the Code of Civil Procedure includes the Court dealing with an application for transmission of the decree to another Court.

(e) Applications arising under Section 44A of the Code of Civil Procedure (whether for transmission or otherwise) should be dealt with by the Court and not by one of its officers,

and should be upon notice to the judgment-debtor. In such an application the Court will be entitled to consider all the matters referred to in Section 44A (3) of the Code including objections under Section 13.

(f) In any event, such objections can be taken by the judgment-debtor at any stage of the execution proceedings and if the objection is brought to the notice of the Court even on an application for transmission, the Court must adjudicate upon it.

(g) There is nothing in the wordings of Section 44A which compels the holder of a foreign decree to file it only in such Court in which actual execution is contemplated.

20. Before I deal with the objections under Section 13 of the Code, I must point out that the peculiar difficulties of this case arise from the fact that it is not entirely governed by the Municipal Law of any particular country; it is governed also by that branch of law called "Private International Law." The name "Private International Law" is rather unfortunate because it is difficult to conceive of a law which is both International and at the same time private ('Hibbert's International Private Law - XXVII). It is called "private" inasmuch as it deals with the legal relations of individuals and not of States; it is "International", inasmuch as it deals with conflicts of laws of different nations. It is properly called law, inasmuch as its rules are enforced by Courts, and in that respect it is a branch of the ordinary law of the land. In fact International Law proper is "Public International Law" which again is no law at all as it is not enforced by the ordinary Courts of Law, and there is no sanction behind it except the Comity of Nations. The problems of Private International Law originate in the territorial diversity of legal systems. Wherever such diversity exists, these problems are likely to arise. In "Private International Law", said Franz Kahn, - "dispute starts from the title page." The term "private international Law" was first used by Story in his pioneering "Commentaries on the conflict of laws" which appeared in 1834. The phrase 'Conflict of laws' originated from a tract by Ulrich Huber, 'De Conflictu legum Diversarum in Diversis Imperies' (1684). By a strange mutation, this Continental term became dominant in the United States, while Story's expression found favour on the Continent. In Europe, however, the word sequence in Story's phrase has been changed to "International Private Law" which appears to be on the whole a more satisfactory definition (Nussbaum - Principles of Private International Law). It has been said that this branch of law deals primarily with the application of laws in space, that is to say to indicate the area over which a rule of law extends (Beale 1, Chesire -. Private International Law, 3rd Edition, page 6). The function of Private International Law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute and it has been said by a French writer that this department of law resembles the inquiry office at a Railway Station where a passenger may learn the platform where a train starts. Private International Law is not a separate branch of law in the sense, as say, the law of Contract or the law of bankruptcy, but it is nevertheless a separate and distinct unit in our legal system. "Private International Law" says Chesire, "is not the same in all countries. There is no one system that can claim universal recognition.................This branch of law, as found, for instance in France, shows many striking contrasts with its English counterpart, and though the English and North American rules show considerable similarity, they are fundamentally different on a number of points. In England, for instance, the essential validity of a contract is determined by that system of law with which the contract has the closest connection but in the United States it is governed either by the law of the place where the contract is made or by the law of the place of performance. The many questions relating to the personal status of a

party depend in England and America upon the law of his domicil, but in France, Italy, Spain and most of the other European countries upon the law of nationality." (Chesire - Private International Law, 3rd Edition, p. 11).

21. It is, therefore, a serious question to be considered as to what rules of Private International Law we are to follow in India. Hitherto we have invariably followed the English rules. In fact, the Judicial Committee of the Privy Council in England being the ultimate authority in these matters, nothing else could be expected. Many of the decisions, as will be found, are based on the fact that India at some time formed a dependent colony under the British Crown. Circumstances, however, have now altered, and in my opinion it is no longer incumbent upon us to follow the English rules, or for the matter of that, any rule excepting our own. So far as the English rules are concerned, they are without question entitled to our very great respect. But no system of law is infallible and it must not be forgotten that Private International Law is of a comparatively recent growth and the English system has not yet had time to attain perfection. Many of the rules which are followed at present in England have been criticised by her own jurists as being unreasonable and not likely to be reciprocated in other countries. For example, a mere transient presence on English soil even for a few hours have been held to confer jurisdiction upon the English Court (...............). "The principle", says Chesire,

> "is certainly unobjectionable in case of itinerants with no fixed residence, but there is little to commend the rule which permits the institution of proceedings against a defendant, domiciled and resident abroad, merely because he was served with a writ during a visit of a few hours at Folkestone. It is noteworthy, also, that the Foreign judgments (Reciprocal Enforcement) Act, 1933, whose object it is to facilitate the enforcement in England of judgments obtained abroad, specifies the residence, not the mere presence of the defendant in the foreign country as one of the circumstances sufficient to found the jurisdiction of the Foreign Court in personal actions. Moreover, the English view is not always harmonious with the principle of effectiveness, for a judgment against a foreigner resident abroad is a 'brutum fulmen' unless followed by proceedings in his own country, and foreign Courts can scarcely be expected to recognise a jurisdiction based upon mere transient presence."

The English Courts have always applied the period of limitation as prevalent in England rather than in a foreign country, a view not likely to be reciprocated everywhere.

22. The nett result is that the Courts in India are now at liberty to lay down and follow their own rules with regard to Private International Law; and in this respect we are in a very fortunate position since we can adopt the rules laid down in various countries as accord best with our sense of justice, equity and good conscience. We can profit by their experience and avoid their errors.

23. It is not to be inferred from all this that in deciding this particular case there has been any substantial departure from the principles enunciated by the English School of Private International Law. A large number of English cases as also decisions of the Judicial Committee have, however, been cited, and emphasis has been sought to be placed on the inflexion of a word here or a phrase there, as if such views on Private International Law are final and binding on this

Court. I am merely pointing out the altered position so that it might be remembered that the authorities represent the angle of view of a particular school which we should treat with the greatest respect, but are not bound to follow.

24. I must come at once to Section 13 of the Code which is in the following terms :

> "13. 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 founded on an incorrect view of International Law, or a refusal to recognise the law of the States in cases where 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 the States."

The objections taken on behalf of the defendant falls under the exceptions (a), (b), (d) and (f) and will be dealt with in that order. The first objection, namely, that the High Court in England was not competent to entertain the action and pass the orders is the most important and substantial objection and sufficient by itself to dispose of the case. This objection as to jurisdiction is to be looked at not from the point of view of municipal law but private international law. In a suit concerning parties who are governed by the same municipal law, the main thing to be considered in an 'actio in personam' is the cause of action and alternatively the place of residence of the defendant. Such an action generally lies where any part of the cause of action arose or where the defendant ordinarily resides. From the point of view of Private International Law, however, 'cause of action' is not enough to found jurisdiction ('*Chormal Balchand Firm V. Kasturichand'*[6], In '*Pemberton V. Hughes*[7]*'*, at p. 791, Lindley, M. R. says as follows :

> "There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, i.e., over the subject-matter or over the person brought before them. '*Schibsby V. Westenholtz'*[8], '*Rousillon V. Rousillon*[9]*'*, '*Price V. Dewhurst'*[10], '*Buchanon V. Rucker*[11]*'*, '*Sardar Gurdayal Singh V. Raja Of Faridkot*[12]*'*, But the jurisdiction which is alone important in these matters is the competence of the Court in an international sense, i.e. its territorial competence over the subject-matter and over the defendant."

A judgment pronounced by a domestic tribunal has its force and sanction on the ground that it is a judicial order of the sovereign power, pronounced by the mouth of one of its

[6] 40 Cal Wn 591
[7] (1899) 1 Ch 781
[8] (1870) 6 Qb 155
[9] (1880) 14 Ch D 351
[10] (1838) 4 My and Cr 76
[11] (1808) 9 East 192
[12] 21 Ind App 171 (Pc)

tribunals and can be enforced by processes of execution within its territories. A judgment of a foreign tribunal cannot obviously have its force and sanction on such a ground. It has no right to claim recognition beyond its own territorial jurisdiction. But the comity of nations might accord to such a judgment a certain recognition. This it does in various ways in different countries. Firstly, the foreign judgment may be adopted by the domestic Court as its own and admitted to execution within its jurisdiction. Secondly, it may be received as evidence of the creation of an obligation, in which case a suit will lie to enforce the decree of the foreign Court or thirdly, it may be received as evidence of the original obligation in a suit brought on the primary cause of action. '*Chormal Balchand V. Kasturchand*', (ibid). But in all cases, the Court passing the decree must have jurisdiction in the international sense. Absence of that jurisdiction negatives the creation of an obligation by its judgments. In England this recognition of foreign judgments was at first based on the ground of reciprocity, that is to say, foreign judgments were accepted at their face value in an action brought in England on the basis of such judgments in order to get reciprocatory treatment in foreign Courts. This unsatisfactory principle in time gave way to the principle of obligation. This doctrine which was laid down in 1842, is that where a foreign Court of competent jurisdiction had adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in England by an action. *(Russell V. Smyth'*[13], at p. 819, Per Baron Parke, *'Schibsby V. Westenholtz*[14]*'* at p. 159, Per Blackburn, J.). It has even been said that there was an implied contract to pay the amount of the foreign judgment. Under the English Common Law, a foreign judgment though creating an obligation that was actionable in England could not be enforced there except by the institution of fresh legal proceedings. In time important exceptions were introduced by Statute viz. the Judgments Extension Act, 1868, the Administration of Justice Act, 1920, Part II and the Foreign judgments (Reciprocal Enforcement) Act, 1933. The first named Act of 1868 was passed to make judgments of specified Courts in England, Scotland and Ireland respectively, effectual in any other part of the United Kingdom. The Act of 1920 was passed upon the recommendation of the Imperial Conference of 1911 and made provision for the enforcement within the United Kingdom of judgments obtained in a superior Court of any part of the British Dominions. It was, however, discretionary on the Courts of the United Kingdom to allow such decrees to be registered or not. The policy of facilitating the direct enforcement of foreign judgments in England received a further impulse from the Foreign judgments (Reciprocal Enforcement) Act, 1933, which applied the principle of registration not only to the British dominions and territories but also to foreign countries. By this Act, the facility of registration might be extended by an order in Council to any country which was prepared to afford substantial reciprocity treatment to judgments obtained in the United Kingdom.

25. While the procedure for enforcing foreign judgments has progressively changed tends to render such proceedings simpler and more speedy, it must not be thought that there has been any alteration in the fundamental rule that the Court whose judgment it is sought to be enforced must be one which has jurisdiction from the point of view of Private International Law. This is recognised by the Administration of Justices Act, 1933. Section 9 (2) (a) and the Foreign Judgments (Reciprocal Enforcement) Act, 1933, Section 4(1) (a) (ii).

[13](1842) 9 M and W 810

[14](1870) 6 Qb 155

26. The provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 was extended to India and Burma by an order in Council.

27. It is evident, therefore, that the object of our enquiry must be as to whether the English Court had jurisdiction from the point of view of Private International Law, to pass the orders which have been filed in this Court. The matter has to be considered under three distinct headings. Firstly, we have to consider the general position under Private International Law, taking India to be an independent sovereign republic, whose citizens are "foreigners" so far as the English Courts are concerned. Secondly, we have to consider the effect of legislation, passed by the British Parliament, whereby it has assumed jurisdiction over absent foreigners under certain specified circumstances; and thirdly, we have to consider the effect of some old decisions which have sought to make a distinction in the case of British subjects in dependent colonies who are presumed to be under the supreme legislative authority of the British Parliament. What then is the position under the first heading above named? Jurisdiction must of course depend upon the frame of the action, since the law is not the same in the case of an action relating to land or an action personam or say, an action relating to marriage or divorce. In this particular case, the original obligation is founded upon a mortgage deed dated 18th December 1906. But the action was not for the enforcement of the security but for enforcing the personal covenant and was therefore a personal action, or as it is called - an "Actio in personam." In such a case, it is by now well established that no action lies against a non-resident foreigner unless he submits to jurisdiction. In the present case it is contended that the defendant has neither any property within the jurisdiction of the English Court nor did he reside there at the time of the commencement of the action, or at the time of the service of writ or the passing of the orders. Whether he submitted to jurisdiction is an issue to be decided. "As a general rule", says Chesire, (Private International Law, 3rd Edition, p. 139) :

> "an English Court is not prevented from entertaining a suit merely because the parties are foreign by nationality or by domicile or because the incidents that raised the issue have all occurred in a foreign country. At the same time it is obvious that the power to adjudicate must be subject to some restriction, for otherwise, to mention only one consideration, a judgment would often be nothing but a 'brutum fulmen.' The general doctrine of English law is that the exercise of civil jurisdiction, in the absence of an Act of Parliament, must in all cases be founded upon one or other of two principles, namely, the principle of effectiveness or the principle of submission."

28. The principle of effectiveness means that a Judge has no right to pronounce a judgment if he cannot enforce it within his own territory. Power in this connection means that physical power which becomes exercisable because the property which is the subject-matter of the suit is in England or because the defendant is present at the time of service of the writ in England. Speaking about personal actions, Chesire says (Private International Law, 3rd Edition, p. 142) :

> "The principle of effectiveness here is triumphant. Jurisdiction depends upon physical power, and since the right to exercise power, or, what is the same thing in the present connexion, the power of issuing process is exercisable only against persons who are within the territory of the sovereign whom the Court represents, the rule at Common Law has always been that jurisdiction is confined to persons who are within the process of the Court at the time of service of the writ. A Court cannot extend its process and so exert sovereign power beyond its territorial limits. Thus jurisdiction depends upon the presence

of the defendant in England at the time when the writ is served, since the exercise of judicial power in the shape of service of a writ obviously requires his actual presence ....The fact that England is the 'forum domicilli' or the 'forum reigestoe' or the place where a business has been carried on is insufficient at Common Law to found jurisdiction against an absent defendant. A legislature may and often does, authorise its Courts to pass judgment upon absentees after substituting some form of notice for personal service of writ, but such a judgment though binding in the country where pronounced has no international validity."

On the question of effectiveness it will be appropriate here to notice the leading case of *'Gurdayal Singh V. Rajah Of Faridkot[15]', ,* decided by the Judicial Committee. In that case, ex parte decrees for money were passed by a Court situate in the territories of the ruling chief of Faridkote, a State in subordinate alliance with the Government of India, against a person who had been employed by that State within its territories but had, before suit brought relinquished his employment, had left the State, and was at the time when he was sued, resident in another State of which he was the domiciled subject. It was held that the decree passed by the Court in Faridkote was a nullity according to private international law and could not receive effect in a British Indian Court. Lord Selbourne delivering judgment on behalf of the Judicial Committee said as follows :

"He (meaning the defendant) was in Jhind when he was served with certain processes of the Faridkote Court, as to which it is necessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them and never appeared in either of the suits instituted by the Raja, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise unless that Court had lawful jurisdiction over him. Under these circumstances there was in their Lordships' opinion nothing to take this case out of the general rule that 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 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........... In a personal action .... 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 authorised by special local legislation) in the country of the forum by which it was pronounced. These are doctrines laid down by the leading authorities on International Law; among others, by Story (Conflict of Laws, 2nd Edition, Sections 546, 549, 553, 554, 556 and 586) and by Chancellor Kent (Commentaries, Vol. I, p. 284, note (c), 10th Edition) and no exception is made to them in favour of the exercise of jurisdiction

[15] 21 Ind App 171 Pc

against a defendant not otherwise subject to it by the Courts of the country in which the

> cause of action arose, or (in 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 the defendant resides have power, and they ought to be resorted to, to do justice."

29. What is it then that takes the present case out of the principle so emphatically enunciated in the above case? It is argued that the English Courts have jurisdiction by reason of fee legislative enactment, contained in Order 11 of the Supreme Court Rules. The relevant rule is as follows :

> "1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever -
> (a) The action is brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract -
> (iii) by its terms or by implication to be governed by English Law .... or in respect of a breach committed within the jurisdiction of a contract wherever made ...."

The summons is now served in accordance with the rules laid down in the Courts (Emergency Powers) Act, 1943.

30. It is argued that even from the point of view of Private International Law, an agreement to be governed by the English Law would amount to a submission to the jurisdiction of the English Courts. In this particular case such an agreement is sought to be implied from the fact that the payments were to be made in London. A clear distinction must, however, be made between what is valid under a municipal law, and what is valid in an international sense. A country is at liberty to enact whatever law it likes and enforce the same within its own borders, but it does not follow that it will be accepted universally. The case of *'Buchanan V. Rucker'*[16], is to the point. The law of Tobago provided that service of process might be effected upon an absent defendant by nailing a copy of the summons at the entrance of the Court-house. After service in this manner judgment was given against the defendant by a Court in Tobago and later an action on the judgment was brought in England, but upon proof that the defendant was absent from the island at the time it was held that the judgment was internationally a nullity. Assuming that the local statute had expressly enacted that a person who had never been present in the island should be bound by the form of process in question. Lord Ellenborough asked: "How could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the fights of the whole world? Would the world submit to such assumed jurisdiction?" The noble Lord has himself answered the question in the negative. In *'Mathappa Chetti V. Chellappa Chetti'*[17], at p. 198, the defendant entered into a contract with the plaintiff in the Padukota State. The law in that State was that a Court of that State would have jurisdiction to entertain a suit if the cause of action arose within that State. The plaintiff sued in the Padukotta State and obtained a decree which was sought to be enforced by a suit in the British Indian Court at Madura. The defendant was not a

[16](1808) 9 East 192
[17]1 Mad 106

subject of that native state and at the time of the institution of the suit in that state was not resident there. Mr. Justice Holloway held that the decree passed by the Padukotta State would not be enforced in British India as that Court was not of competent jurisdiction. The Padukotta Court

was competent to try the suit according to 'its laws' in force in that State, but it had no jurisdiction in an international sense. In course of his judgment, the learned Judge said: "If Courts, as the French and English, arrogate to themselves jurisdiction wherever of false principle of International Law they may choose to regard the obligation as subject to their jurisdiction because the contract was made within their limits, the result will be that other nations will justly treat their decrees as nullities."

31. It must not be forgotten that a cause of action may arise in a foreign country, but 'cause of action' is not a general ground of jurisdiction in an international sense *'Chormal Balchand V. Kasturichand'*[18], *'Pemberton V. Hughes*[19]*',* If the provisions of Order 11 of the Supreme Court Rules or the Court's (Emergency Powers) Act, 1943 are intended to assume a jurisdiction contrary to the principles of Private International Law, it is binding in England but not in this country. "A general criticism" says Chesire (Private International Law, 3rd Edition, 151),

> "which may fairly be directed against the policy of Order 11 is that several of the reasons for which it allows service abroad are not sufficient according to English Law to confer jurisdiction upon foreign Courts. There is a lack of reciprocity. English Courts no doubt expect that judgments delivered by them in virtue of assumed jurisdiction will be universally recognized, yet they are not always prepared to recognize foreign judgments given in similar circumstances. It is obviously undesirable to claim a wider jurisdiction than is conceded to the Courts of other countries."
>
> "The High Court", says Dicey (Conflict of Laws, 6th Edition, p. 32.),
>
> "now claims jurisdiction 'in personam' over an absent defendant when the action is founded on a contract which is made in England, or which by its terms or by its implication is to be governed by English Law, or on a breach committed in England of a part of a contract wherever made, which ought to have been performed in England. Whether the High Court would concede an analogous jurisdiction to foreign tribunals is uncertain, for authority can be *'Rousillon V. Rousillon*[20]*',* cited for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the Courts thereof. Even this amount of respect for the 'forum obligationis' cannot be explained by the principle of effectiveness......"

32. Let us now see whether the case does come under the relevant provisions of Order 11 because the contract by its terms or implications, was to be governed by the English Law. The contract has been placed in extenso before me. The deed of mortgage was executed in India. It is expressly stated to be subject to the Indian Trustees and Mortgagees' Power Act, XXVIII (28) of 1866. The provisions of Clause XXI of the Deed are very important in deciding a question of intention. It is stated there that in certain circumstances disputes as to accounts were to be referred to two arbitrators, one to be appointed by each party with powers to the arbitrators to appoint an umpire, and the arbitration was to be

[18] 40 Cal Wn 59
[20] (1880) 14 Ch D 351
[19] (1899) 1 Ch 781

governed by the law for the time being in force in 'India.' One of the prime objects of the loan was to pay off various Indian creditors and release attachments in execution of decrees passed by Indian Courts. The only fact upon which the plaintiffs can possibly rely is the fact that

under the contract certain moneys (Repayment of principal, interest, commission etc.) were to be paid in London. Does that amount to an implied submission to the English Court and make the English law applicable to the exclusion of Indian Law? Mr. Dutt Roy has cited several cases respecting the sale of goods and/or other causes of action of a like nature before me. But it is not possible to draw a correct inference as to the position in International Law under the circumstances of the present case from which decisions, since the facts are of a completely different nature. (See *'Rein V. Stein'*[21], *'Bank Of Australasia V. Harding'*[22], *'Copin V. Adamson'*[23], where there existed a stipulation in the Articles of Association, *'Chatenay V. The Bazitian Submarine Telegraph Company Ltd.*[24]*'*, *'Benain V. L. S. Debono*[25]*'*, On the other hand, the learned Advocate-General has cited a case of undoubted authority, which comes very near to the facts of this case and which I shall now proceed to consider.

33. In *'Mount Albert Borough Council V. Australasian Temperence and General Mutual Life Assurance Society'*[26], the facts were briefly as follows :
The appellants, a New Zealand borough Council pursuant to an agreement of September 4, 1926, borrowed money for public works from the respondents a life insurance company incorporated in Victoria and carrying on business in Australia and New Zealand and as security therefor issued in New Zealand, debentures repayable in Victoria and bearing interest payable half-yearly in that State. The debentures were issued under the 'Local Bodies' Loans Act, 1913 (now 1926) of New Zealand and the loan and interest were secured on a special rate of three pence in the pound on the rateable value of all rateable property in the borough, provision being made for a sinking fund. The interest was payable half-yearly at the Bank of New Zealand in Melbourne, Victoria. The respondents claimed that the interest due on March 1, 1935, was £ 3,696/17/6 d. The appellants, however, paid £ 3,250 claiming that the amount was sufficient to satisfy the respondents' rights on the ground that the interest being payable in Melbourne, the law prevailing in Victoria will apply and as such the amount payable had been scaled down by the 'Financial Emergency Act, 1931' of Victoria. The Privy Council held that the Victoria Ad did not apply and the proper law of the contract was that of New Zealand. Lord Wright pointed out that the argument advanced made a confusion between the obligation and mode of performance. Lord Wright said as follows (page 238) :

> "The debentures and the interest coupons in so far as they give a security on real property, namely, a portion of the local rate in New Zealand, are beyond question governed by the New Zealand Law. The security can be enforced only in the Courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by the New Zealand Law. But in their Lordships' judgment, it is equally true that the personal obligation to pay is a New Zealand contract governed by New Zealand Law. It seems impossible to sever the personal covenant from the mortgage provisions which secure it.................Mr. O'Shea in his able and exhaustive argument has contended that the payment is governed by Victorian Law because Victoria is the place of performance and that

[21](1892) 1 Qb 753
[22](1850) 137 Er 1052
[23](1874) 9 Ex 345
[24](1891) 1 Qb 79
[25](1924) Ac 514)
[26](1938) Ac 224

> Victorian Law for this purpose includes Section 19, sub-section 1 of the Financial Emergency Act. He further contends that Section 19, sub-section 1 applies to the debt

> because it is a specialty debt and the coupon which is the document of title must necessarily be presented at the place of payment in Melbourne when payment is due and demanded and thus at the relevant moment the 'lex situs' applies, so as to introduce the statutory reduction of interest. Their Lordships are not prepared to accept either contention...............so to hold would be, in their Lordships' judgment, to confuse two distinct conceptions, that is, to confuse the obligation with the performance of the obligation.........English Law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as 'lex loci contractus' or 'lex loci solutionis' and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts............ It has already been pointed out that there are, in their Lordships' opinion, such circumstances as lead to the inference that in the present case the proper law of the contract is the law of New Zealand, and accordingly that law should govern the rights and obligations to be enforced under the contract by a Court before which the matter comes, a fortiori a New Zealand Court."

Applying these observations to the facts of this case, it is clear that the obligation under the personal covenant (if it existed at all) cannot be severed from the obligation under the mortgage, and that the law to be applied to both is Indian Law. Stipulation as regards payment In London will merely govern the method of payment which must presumably be made in sterling at the exchange rate prevailing there. Stipulation for payment at London has no other significance and cannot be taken to signify a willingness to submit to the jurisdiction of the English Courts.

34. Mr. Dicey is also of the opinion that the principle that the 'lex loci solutionis' applies to a contract, usually applies to the mode of performance as distinguished from the substance of the obligation. (The Conflict of Laws, 6th Edn., pp. 594-596). The principle has been explained thus :

> "In short, whenever the law of the place of performance is not the proper law of the contract or of any part of it, the Court will incline towards the view that a line must be drawn between the substance of the obligation (governed by the proper law) and the mode of performance (governed by the 'lex loci solutions'). Any issue which arises between the parties must be classified as affecting the obligation itself or as one referring to the method in which it is to be performed." (Dicey Conflict of Laws, 602).

35. It has been argued that the case above mentioned, holds that the New Zealand law is applicable but does not say where the suit should be filed. That however is a reasonable Inference to make. If the Indian law has to govern the case of an Indian loan, it is reasonably clear that so far as the obligation was concerned, either to enforce the security or on the personal covenant, the parties must have contemplated an action in India. The point of substance is however, not whether a suit could be filed in England, but whether in a suit so filed, a decree will be binding on the defendant. The only ground upon which it can be made binding is "submission", and the ground for submission put forward is that the English Law was applicable. It is sufficient therefore to show that this is an erroneous proposition and that the obligation to pay was never

governed by the English Law. Confining ourselves to the facts of this case, I think that it would be a dangerous thing to allow the personal covenant to be severed from the enforcement of the security, in the way the plaintiff seeks to do. If the mere fact that moneys were to be paid elsewhere, was to take out a loan from the mischief of the Money-lender's Act, then in every case, the provisions of such an Act could be avoided. (See '*Brijraj Marwari V. Anant Prosad*[27]*',* I do not go so far as to hold that a simple contract debt could under no circumstances be made subject to a foreign law by agreement of parties. It will however have to be considered (it is not necessary to decide here) whether in the case of a loan which comes within the mischief of the Money-lenders Act or the Usurious Loans Act or other special emergency legislation, it would not be against public policy to allow the obligations to be governed by foreign law so as to defeat the provisions of such beneficial legislation. Since, the submission to jurisdiction is based upon the wordings of the contract (namely to pay in England), it has next to be considered whether the defendant is liable on the contract as such. The way it has been argued is this: The contract dated 18th December, 1906, was entered into by the late Raja, on behalf of himself and as guardian for his son, the present defendant, who was then a minor aged 6 years. It is a disputed point whether a guardian can be appointed in the case of a Mitakshara family, and it is also disputed whether the Madras High Court had jurisdiction to appoint a guardian, since, neither did the parties reside within the original jurisdiction of that Court, nor had properties therein. *In 'Re Bijoy Kumar Singh and Buder'*[28]*, 'Narsi Tokersey and Co. V. Sachindranath Gajanan Gida*[29]*',* '*Gharib-Ul-Lah V. Khalak Singh*[30]*',* But assuming that the order of appointment was valid, it only appointed the late Rajah as the guardian of the property of his son with authority to bind the share of the minor. A personal contract entered into by a guardian is not binding on the minor. That was decided as far back as 1887 by the Judicial Committee in '*Waghela Rajsanji V. Masludin'*[31]*,* and is the law even now. So far as I am aware, the English Law is the same and no case has been cited before me to show the contrary. It is therefore quite clear that so far as the defendant is concerned he never entered into any contract to pay in England. Mr. Dutt Roy being confronted with this argument says that the defendant is liable upon his personal obligation to pay his father's debts which are not tainted with immorality. Now this is a different thing altogether. The actions in England never proceeded upon that footing and the pleadings in the London Proceedings will show that they were based on the personal covenant in the Deed dated the 18th December, 1906 and not on the pious obligation of the defendant to pay his father's debts. Such an issue was never present in the minds of the plaintiffs' lawyers. Assuming however that such an obligation does exist and the plaintiffs are entitled to agitate it in these proceedings as framed, it is quite clear that there exists no personal covenant or contract by the present defendant to pay in London, or to be bound by English Law, or to submit to the jurisdiction of the English Courts. In other words, jurisdiction in the present case depends on submission, submission is said to depend upon a binding contract to pay in London. The late Raja personally contracted to pay all amounts in London, but no such personal contract is binding on the present defendant. It may be that there is a cause of action but that could only be based on the principle of pious obligation to pay a father's antecedent debts untainted with immorality, confined to the share of the father which has devolved on the son. Such an obligation is imposed by

[27] Ilr (1942) 1 Cal 505
[28] AIR 1932 Cal 502
[29] AIR 1929 Bom 475
[30] 30 Ind App 165
[31] 14 Ind App 89 Pc

the personal law of the defendant, but there is no contract to pay in England or in any particular place and hence there is no submission either express or implied to the jurisdiction of a foreign Court like that of England, from the point of view of private international law. It is therefore clear that neither of the elements required by Order 11 of the Supreme Court Rules, are present in this

case. The personal contract to pay is an Indian obligation and failure to pay in London may be a breach of the method of performance but not of the contract itself. In any event, even if such a breach gives a cause of action, it does not give jurisdiction in the international sense. It has also been shown that there is no agreement on the part of the defendant either express or implied that the contract should be governed by English Law and no submission to the jurisdiction of the English Court. The order appointing the respondent's father as guardian (set out above) does not authorise him to enter into any personal Covenant on behalf of the minor but expressly limits his powers only to mortgage the interest of his minor son.

36. The next branch of argument on behalf of the plaintiffs seeks to avoid all these complications on the assumption that the law to be applied is different where there is a common sovereign. The argument is based on the case of '*Maozzin Hossein Khan V. Raphael Robinson*[32]*',* The facts were briefly as follows. The defendant Syed Moazzin Hossein Khan Bahadur was the father and the defendant Syed Motaher Hossain was the son. One Herman Robinson sued the father and son for the boarding and lodging charges of the son, in the Queens Bench Division of the High Court in London and a decree was passed. A suit was then brought upon the foreign judgment in India and a decree was passed against both the defendants. Then there was an appeal. The father's case was that he never entered into any contract with Mr. Robinson, had never gone to England and was never served with the writ. The son of course had been to England but had returned to India before the action was commenced in England. It was proved that both were served with the writ. On the point as to whether a decree could be passed against a non-resident foreigner who had not submitted to jurisdiction, Maclean, C.J., was of the opinion that 'GURDAYAL SINGH'S CASE', 21 Ind App 71 PC, was distinguishable because the defendant in that case was not the subject of the Raja of Foridkote where the decree was passed. The learned Chief Justice accepted the principle that a non-resident foreigner who had not submitted to jurisdiction was beyond the jurisdiction of the English Court, but held that the principle did not apply to Indians. The learned Chief Justice proceeded to say as follows :

> "It is however contended for the plaintiff that qua the circumstances of this case there exists territorial legislation of the sovereign power giving the English Courts Jurisdiction over British subjects, wherever they may be, and placing them under the jurisdiction of the English Courts, or at least making it compulsory upon them to come in and submit to that jurisdiction .... The appellants say that the object of service under that order is not to give jurisdiction over the party served but only to give him notice of a proceeding affecting his rights, so as to give him an opportunity of coming in to defend them. (*The Credito Gerundeuse Limited V. Van Weede*[33]*',*). This is no doubt, is so in the case of a foreigner but is it so in the case of a subject of the British Crown resident outside the territorial jurisdiction of England, but in a dependency of the British Crown? Though no doubt British India

[32] 28 Cal 641

[33] (1884) 12 Qbd 171

> has its own legislative councils, the subjects of the British Crown are subject to the Supreme legislative authority of the Imperial Parliament, and Order 11, Rule 1, sub-section (e) would appear to be general in its sphere of operation excepting only Scotland and Ireland. In my opinion, the order in question constitutes a legislative Act of the

> sovereign power regulating the jurisdiction in the case of a British subject, resident in British India and outside the territorial jurisdiction of the English Courts, and give the English Courts jurisdiction over such British subject, assuming that the particular case falls within the order."

It is to be remembered that the learned Chief Justice was not holding that the principles of private international law did not apply to the colonies. In fact he himself applied it in the case of *'Kassim Mamoojee V. Yusuf Mahomed Sulumain[34]',* That was a case where the Supreme Court of Mauritus passed a decree against the defendant who was not residing in Mauritus when the decree was passed. It was argued that both the plaintiffs and the defendant were British subjects, with a common sovereign and hence were not foreigners. The learned Chief Justice however accepted the definition of Dicey given in his "Conflict of Laws" namely that "Foreign" means "not English." He rested his decision on the fact that the British Parliament had not given any power to the Courts of Mauritus to pass a decree against the British Subject wherever he may be. He would not countenance the passing of a decree by one Colonial Court against the British subject residing in another colony. It is apparent therefore that the real ground of the decision in '28 Cal 641', rests on the principle of overriding sovereignty residing in the British Crown over British subjects in a dependent colony of the British Empire, and the supreme power of the British Parliament to pass legislation which would be binding on such a colony. The point, however, is as to whether the principle can be applied to an order passed when India has progressively advanced in status from a colony to a self-governing dominion and from a self-governing dominion to a sovereign democratic republic, shedding even the last traces of subservience to the British Crown, namely, allegiance to the King.

37. The decision in *'Moazzin Hossein V. Raphael Robinson[35]',* seen in the light of modern ideas, might be criticised as archaic (See Chesire, Private International Law, 3rd Edition, page 404), but it has been delivered by two very distinguished Judges and is a judgment binding upon me. It is sufficient for me to show that it has no application to the facts of the case. The 'ratio decidendi' in that case was that 'British India' was a subject nation and a dependency of the British Crown and subject to the legislation of the supreme legislative power, namely, the British Parliament. That status was however progressively changed until India has now become an Independent Sovereign Republic. We have therefore to consider her exact position on the 29th November 1949 when the orders in question were passed. It is unnecessary here to discuss the various processes by which the Indian territories passed to the British Crown. The dominion and authority of the Crown was derived from many sources, in part statutory and in part prerogative, the former having their origin in Acts of Parliament and the latter in rights based upon conquest, cession or usage, some of which had been directly acquired and others enjoyed by the Crown as successor to the rights of the East India Company. In 1901 when the decision referred to above came to be made, the status of what was then called "British India" was one of complete subservience to the British Crown, being a part of her far-flung colonial

[34] 29 Cal 509

[35] 28 Cal 641

Empire. It was expected that after the conclusion of the first world-war, India would attain the status of a self-governing dominion, but all that happened was the passing of the Government of India Act, 1919, which in its preamble contained a pledge of the gradual development of self-governing Institutions with a view to the progressive realization of responsible Government in

British India as an integral part of the Empire. This vague objective was admitted by the Governor-General in 1929 to be the attainment of 'Dominion Status", but in the Government of India Act of 1935 which repealed the Act of 1919, the previous preamble was retained. This was explained by Lord Peel to have been necessitated by the expediency of avoiding an unfavourable comparison with the constitution of other self-governing dominions like Canada or Australia. Dr. Keith on the other hand observes that the preservation of the smile of the Chesire Cat after its disappearance was justly adduced by critics as the best parallel to this curious piece of legislation omitting all reference to "Dominion Status."
I might pass over the many Intermediate stages and come at once to the passing of the "Indian Independence Act 1947" passed by the British Parliament on the 18th July, 1947. Section 1 of that Act states :

> "As from the fifteenth day of August Nineteen hundred and forty-seven, two independent dominions shall be set up in India, to be known respectively as India and Pakisthan."

Mr. Dutt Roy asks me to interpret this section as laying down no more than that the two dominions would be independent of each other but dependent on the United Kingdom. I am unable to accept this interpretation. Under Section 6, the legislature of each dominion was given full power to make laws including extra territorial laws, even if such laws were repugnant to the law of England . The most important provision, however, is contained in Section 7, whereby it was enacted that from the appointed day (15th August, 1947) the suzerainty of His Majesty over the Indian States lapsed and His Majesty's Government in the United Kingdom had no responsibility as regards any of the territories which immediately before that day were included in British India and the title of "Emperor of India" was dropped. Now, this alters the whole position from the point of view of Private International Law. "The root principle" said Lord Haldane in *'Russel and Company V. Cayzer Irvine and Company Ltd.[36]',*: "of the English Law about jurisdiction is that the Judges stand in the place of the sovereign in whose name they administer justice." The sovereignty of the British Crown having lapsed, the position indubitably altered in the eyes of Private International Law. It could no longer be said that any law passed by the British Parliament would be binding on the defendant in an action because he was the subject of a 'dependency of the British Crown.' The British Crown had expressly relinguished both power and responsibility, although normally continuing to be the head of a family of self-governing dominions. It would otherwise be impossible to explain the words "independent dominion", - Independent of whom? The answer must be, - Independent of the British Crown. Does allegiance to the Crown necessarily confer jurisdiction? The view expounded in '28 Cal 641', which is the view enunciated by Dicey has since been seriously challenged. 'The argument usually advanced in its favor' says Chesire (Private International Law Chesire, 3rd Edition, 789), namely, that :

> "A subject is bound to obey the commands of his sovereign and therefore the

[36]9(1916) 2 Ac 298

> judgments of his Sovereign Courts' (Dicey p. 404) is surely out of touch with the 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 Empire. A British subject resident in New Zealand owes allegiance to the

> Crown, but that fact alone cannot render him liable on a judgment given against him in England."

But even this slender connection, namely, allegiance to the Crown was severed when on the 26th November 1949, India resolved to become a sovereign democratic Republic and gave herself a constitution. The effect of it has thus been stated by Pandit Jawaharlal Nehru in a speech before the Constituent Assembly on 16th May, 1949, -

> "But the point is that so far as the Republic of India is concerned, her constitution and her working are concerned, she has nothing to do with any external authority, with any King and none of her subjects owe any allegiance to the King or any other external authority."

The argument of learned counsel for the plaintiffs on this point proceeded as follows : he points out Article 394 of the 'Constitution of India' where the date of the commencement of the constitution is stated to be the 26th January, 1950. According to him, it follows that up to that date the previous status continues and the Government of India Act, 1935 is in operation and there is a Governor-General who represents the British Crown. At best it may be said that the interregnum between the 26th November 1949 and the 26th January 1950 is a period in which the International status of India is rather anomalous. But such anomalies are bound to occur as we go on inventing new kinds of political or international status and alignments. It is no easy task for the student of Constitutional Law to explain the exact international significance of attaining the status of a 'self-governing dominion' of a particular type, or membership of the British Commonwealth of Nations. 'Self-governing dominions' have been best described as 'Autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affair's though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth Nations" (Halsbury Vol. XI, p.23), Ridge describes them as 'virtual independent kingdoms' (Ridge's Constitutional Law, 8th Edition, p. 448). The British Commonwealth of Nations has been described as a pragmatic way of describing something which has a political but no legal significance. The defect in the argument advanced lies in considering the Government of India Act, 1935 to apply 'As such' after the passing of the Independence Act, 1947. That Act gives unfettered power to the Constituent Assembly to legislate and only states that subject to such legislation, the dominions shall be governed "As nearly as may be" under the Government of India Act, 1935. That merely obviated a tiresome repetition of the law. But the effect of the Government of India Act, 1935 when the British Crown had real sovereignty, and when that sovereignty lapsed, cannot be the same from an international point of view. "British rule" says Ridge (Constitutional Law 8th Edition, p. 475),

> "Ended in India on August 15, 1947 when the Indian Independence Act, 1947 created the two dominions of India and Pakisthan. The whole complicated structure that British authority had enacted on the sub-continent, ended."

Even the slender basis of allegiance to the Crown lapsed when the people of India gave themselves a constitution whereby they constituted themselves a "Sovereign democratic Republic." Although the Constitution as a whole was to commence at a later date, some of the

provisions came into operation at once (Article 394) and the Government of India Act, 1935 and the Indian Independence Act, 1947 were repealed as and from the 26th November 1949. It cannot therefore be reasonably urged that after 26th November 1949, India still continued under a common sovereign, namely, the British Crown or in any event that the principle followed in '28 Cal 641', still applied. It follows therefore that on the 29th November, 1949 when the orders came to be passed, India was as much a foreign country from the point of view of Private International Law as any other, and the efficacy of the orders must be determined accordingly.

38. It is next argued that if execution was refused to these orders, it would be nullifying the reciprocity agreement that exists between Indie and the United Kingdom. That is a misconception of the nature of the agreement. There is no such agreement between the two countries that their respective pronouncements would operate as res judicata in the other country in the same way as within their respective municipal jurisdictions. The agreement is that decrees passed in accordance with the principles laid down in accord with the principles of private International Law, should be straightway allowed to be executed without the trouble of having to institute a full fledged suit, as was necessary before the reciprocating agreements. The two English Acts which are relevant, namely, the Administration of Justice Act, 1920 (10 and 11 Geo. V, C 81) and the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (13 Geo. V, C. 13), both contain provisions (Section 9(3)(b) and Section 4 respectively) analogous to Section 13 of the Code. Both the Acts speak of the defendant being a 'resident' of the country where the judgment was obtained. In fact the first-named Act requires that he should be "ordinarily resident" within that jurisdiction. I am therefore holding nothing against either the letter or the spirit of the reciprocating agreements. Lastly it must be noted that this branch of the argument based on the decision of *'Moazzin Hossein Khan and Another V. Raphael Robinson'*[37], merely attracts the operation of Order 11. As I have shown, even if order 11 appeared the English Courts have no jurisdiction on the facts of this case. The principles to be applied may therefore be conveniently summarized as follows :

> (1) After the attainment of a sovereign independent status, the Courts in India are not bound to follow any particular principle of Private International Law, as adumbrated by any particular school. India is now free to evolve her own principles, such as are consonant with her own ideas of justice, equity and good conscience.
> (2) The principles upon which the English Courts are prepared to entertain actions against non-resident foreigners are not wholly extended by them to foreign Courts and as such foreign Courts cannot always be expected to accept such principles or to recognize the result of proceedings based thereon.
> (3) In certain circumstances, the English Courts have by statutory provision,

[37] Ilr 28 Cal 641

> assumed jurisdiction over non-resident foreigners. In so far as such 'Assumed Jurisdiction' militates against the principles of Private International Law, acceptable to India, she cannot be held bound by the same. Such judgments are perfectly valid within the municipal jurisdiction where they are propounded but have no international validity.
> (4) The two grounds upon which the validity of a judgment in a personal action are based, from the international point of view, are - (i) Effectiveness and (ii) Submission.
> (5) 'Effectiveness' means that a Court should only pronounce judgment in a case where it

can execute the decree within its own territory. Such a decree cannot therefore be passed, if at the time of the service of the writ, the defendant does not reside within such jurisdiction and is a foreigner, being the subject or citizen of another independent country. But such a decree can still be passed if the defendant has submitted or agreed to submit to the jurisdiction of such a Court. Once he has done so, he cannot afterwards dispute the jurisdiction. According to the English law, even a transient presence of the defendant at the time of service of the writ is enough, and according to some English writers, residence or presence of the defendant at the time of the commencement of the action is sufficient to confer jurisdiction. These principles have, however, not been accepted internationally.

(6) 'Submission', means a voluntary acceptance of the authority of a Court to pass judgment, which authority such a Court would not otherwise possess.

(7) A submission may be express or implied. The mere fact that the parties agree that the law of a particular country would apply may or may not amount to an implied submission to the jurisdiction of the Courts of that country. It will depend on the contract taken as a whole and all the circumstances of a particular case. What must be gathered therefrom is the intention of the parties. But even such an intention cannot be given effect to, if it militates against public money (policy?).

(8) The proper law of a contract means that law which a Court is to apply in determining the obligations under the contract. In deciding these matters, there is no rigid or arbitrary criteria such as 'lex loci contractus' or 'lex loci solutionis.' The matter depends on the intention of the parties to be ascertained in each case on a consideration of the terms of a contract the situation of the parties and generally on all the surrounding facts from, which is to be gathered the intention of the parties.

(9) In the case of a mortgage (including the case of every secured loan and a debenture loan) the mere fact that moneys are stipulated to be paid in a foreign country, does not amount to an implied submission to the jurisdiction of the Courts of that foreign country, or make the transaction subject to the law of that foreign country except perhaps as to the mode of payment only. The personal covenant, in such a case, cannot be severed from the enforcement of the security so as to make it possible to institute an action in a foreign country and obtain a judgment thereon according to the laws of that country, such as would be vaild internationally.

(10) The fact that the loan has been raised in a foreign country or that the trustees entrusted with the realization thereof are foreigners, also do not by themselves amount to a submission to the jurisdiction of a foreign Court.

(11) According to modern ideas, mere allegiance to the Crown does not confer jurisdiction upon the Courts in England to pass a judgment which would be binding upon a nonresident foreigner. But even if such a principle ever existed, in the case of British subjects in dependant colonies, it can no longer be applied after India attained the status of an independent dominion (15th August 1947), and certainly not after the 26th November 1949 when she declared herself an independent sovereign democratic Republic.

(12) The mere fact that a cause of action or part thereof arose in a foreign country is not sufficient to confer jurisdiction, from the point of view of Private International Law. The principle of 'effectiveness' and 'submission' must be applied to find out whether a foreign Court had jurisdiction to pass a decree which would have international validity.

(13) There is nothing in the reciprocating agreements between India and the United Kingdom which would make any decree passed by the Courts in either country, valid in the other country, where it is not valid from the point of view of private International Law.

39. Applying these principles, I hold that the English Courts had no jurisdiction to entertain the actions or pass judgment thereof. In any event, the judgments are without jurisdiction from an international point of view and cannot be enforced under Section 44 A of the Code. The objection under Section 13 (a) of the Code is upheld.

40. The next objection is under Section 13 (b) of the Code. It is argued that the judgments now sought to be enforced were not given on the merits. This is based on the ground that the decisions were ex parte and the summons dated 17th November 1949 was not served upon the defendant. I cannot, however, see any jurisdiction (justification?) in saying that the decision is not on the merits, simply because it is ex parte. Let us see what actually happened.

41. In each of the two cases a writ was issued on the 24th day of January 1949, requiring the defendant to cause appearance to be entered within ninety days of the service of the writ upon him. An application was made for leave to serve the writ outside jurisdiction, as is required under Order 11 of the Rules of the Supreme Court, supported by an affidavit of Mr. Edgar Martin Chambers, a partner of the firm of solicitors acting for the plaintiffs. Such leave having been granted, we find, one Sri Prosad Charan Mukherjee serving the writ upon the defendant at the Rumbha Palace, Rumbha, in the District of Ganjam on the 27th May 1949. As stated before, the defendant refused to accept service. The defendant was also served with a notice and counter notice in forms 1 and 2 under the Courts (Emergency Powers) Rules, 1943, but he did not file any counter notice. Under the circumstances I do not see why a Master's summons was at all issued, addressed to the defendant dated the 17th November 1949. No rule has been pointed out to me under which the defendant is to be given a further notice and a Master's summons was necessary to be taken out. So far as I can see, Order 13, Rule 3 of the Supreme Court Rules and Rule 9 (2), Part III of the Courts (Emergency Powers) Rules, 1943 do not require any further notice. On the 29th November, 1949, final judgment was entered against the defendant in both these matters and leave was granted to proceed to execution. The orders themselves recite that the summons dated the 17th November, 1949, was read by the Court. There was admittedly no attempt whatsoever to serve the summons upon the defendant. The only question that arises is as to the form of the procedure adopted. If the summons was solemnly issued by the Court addressed to the defendant and read as part of the proceedings, it seems to be against all canons of justice that judgment should be entered without service of the summons on the defendant. I am rather doubtful whether it was brought to the notice of the Court that the summons issued had not been served. The practice in this High Court in its Original Side follows to a great extent the English Practice. I do not, however, know of any instance in which a Master's summons is issued and an order made upon the strength of it without the summons being served upon the defendant. Where it is intended to make a purely ex parte application, it is done by petition without a Masters' summons. But while it is arguable that the matter comes within exception (d) to Section

13 (Proceedings opposed to natural justice), I do not see how it can be said that the decision was not on the merits. A decision is said to be not on the merits when the Court does not go into the case as a whole but decides it upon a point, which cannot be said to arise on the merit. Thus where the defence was struck out because an order for interrogatories was not complied with, and an action decreed, it was held not to be on the merits (*'Keymer V. Visvanathan*[38]*',*). An ex parte decree after proper service of summons is nevertheless a decision upon the merits where the defendant does not appear and contest the case. (See *'Meher Singh V. Ishal Singh*[39]*', 'Wazir Sahu V. Munshi das*[40]*', 'Dr. Kulwant V. Dhanraj Dutt*[41]*', Ishri Pd. V. Shriram'*[42]*,*

42. The next objection is under exception (c) of Section 13 of the Code, which is in the following terms :

> "Where it appears on the face of the proceedings to be founded on an incorrect view of International Law or a refusal to recognize the law of the (State) in cases in which the law is applicable."

No judgments setting out the reasons were given in these cases. The respective summons was taken out supported by an affidavit and the relief asked for was granted. It is therefore permissible to look into the affidavit and the pleadings generally to find out the grounds upon which the order was based. The affidavits (and the pleadings generally) set out all the facts stated above, but incorrectly submit that the English Law is applicable to the case and that the Orissa Money Lender's Act should not be applied. Looked at from the point of view of Private International Law, the only ground for assuming jurisdiction could have been that the defendant (in this case, through his guardian) had agreed to pay all moneys due, in London, and hence submitted to the jurisdiction of the English Courts - a view, I have shown above to be incorrect. The English Court therefore, wrongfully assumed jurisdiction. But even assuming for a moment that an action lay in England, there is no basis for excluding the operation of Orissa Money Lender's Act. Reading the pleadings I cannot help thinking that the applicants were not at all unaware of the fact that the Orissa Money Lender's Act was applicable and the actions were brought in England to try and get out of what is called its "Baneful influence". No secret is made of the fact that if the suit was brought in India either on the personal covenant or to enforce the security, there would be difficulty. Mr. Chambers in his affidavit admits that there might be difficulty in enforcing either the security or the personal covenant. He, however, proceeds to submit that the effect of it was not to discharge the loan liabilities but to impose restrictions on the extent of the remedies available to lenders in the Courts of Orissa. Mr. Bloomer's affidavit is also couched in similar language. The office copy of the writ of summons (which includes the statement of claim) and the affidavit of Mr. Bloomer have been recited in the orders.

[38] 44 Ind App 6 (Pc)
[39] AIR 1932 Lah 649
[40] AIR 1941 Pat 109
[41] AIR 1935 Lah 396
[42] AIR 1927 All 510

43. It appears therefore that the orders were passed on the following basis :

1. That there was a personal covenant on behalf of the defendant.
2. That the Orissa Money Lender's Act was meant to apply to a humbler class of persons than the defendant Rajah.
3. That it did not affect the liability, which was a liability assumed outside Orissa.
4. That the contract being to pay In London, the English Law applied and there was an

implied submission to the English Courts.

5. That under the circumstances, a decree could be passed against the defendant which would then be executed in India.

44. I have shown above that each of these propositions are incorrect. Therefore, the decisions on the face of them are based on an incorrect view of international law. I must confess, however, that it is not free from doubt whether there has been a "Refusal" to apply the law of the States. "Refusal" to apply any particular law does seem to connote that someone must put it forward as a defense and the Court should ignore it. In this particular case, the submissions made ex parte on behalf of the plaintiffs, however erroneous, that the Indian law did not apply, might have been accepted. In such a case, it might be said that the Court went wrong but can it be said that it "Refused" to apply Indian Law? I think not.

45. The next objection is under exception (d) to Section 13. It is unfortunate that I should have to consider whether a judgment of the Chancery Courts of England was opposed to the principles of natural justice. It can almost be said that we have learnt those great principles from the decisions of English Judges, mostly sitting in the Chancery division of the High Court in England. and yet, those very Judges have taught us that justice should not merely be done but appear to have been done. I can understand an ex parte decision without issuing notice upon the defendant, in a case where summons has already been served and he has not availed himself of the opportunity of appearing. But what is the sense in issuing a notice addressed to the defendant and then not serving him? I can even understand the Court, in the circumstances of the case dispensing with the summons altogether. But in this case, it reads the summons and recites the fact in the order. It, therefore, comes to this, that the Court solemnly issues a notice to all the parties (including the defendant) directing them to be present on a stated day for the hearing of an application on the part of the plaintiffs for several drastic reliefs and then with knowledge of the fact that the notice was never served upon the defendant, proceeds to grant those reliefs on the stated day, on the strength of such a notice, reading it and making it a part of the order. As I have stated, it is my firm conviction that it was not brought to the notice of the Court that the summons was not served upon the defendant. If, however, such is the practice of the Chancery Court, namely, to issue summons addressed to the defendant and not insist on service thereof upon the defendant and yet to act on the basis thereof, such a practice, I regret to say, appears to me to be contrary to the principles of natural justice. What are the principles of natural justice is a debatable point (See *'Maclean V. Worker's Union[43]',)* but I entertain no doubt that issuing a notice upon a party and then permitting the non-service of it, and yet acting upon it, militates against such principles, I am glad, however, that this is not the only point upon which I have to base my decision in this case.

[43](1929) 1 Ch 602

46. The last point relates to the objection under Section 13 (f). It is argued that the Orissa Money Lender's Act precludes a decree being passed for more than double the principal amount and in passing a decree, based on a claim which violates that rule the English Court sustained a claim founded on the breach of a law in force in the State of Orissa. I am unable to accept the argument. The claim was not based on the law as prevailing in India at all. Rightly or wrongly, the plaintiffs alleged that the parties were governed not by the Indian law but the English Law. The English Court accepted that plea and were consequently not sustaining a claim based on any violation of the law in India. Suppose that the defendant had submitted to the jurisdiction of the

English Court and that Court passed a decree. Such a decree would by implication have decided that the defendant was bound by English Law and that the Orissa Money Lender's Act did not apply. Such a decision would be binding from the international point of view and the point could not be further agitated in these Courts. (See *'Ganga Prosad V. Ganeshi Lal[44]',*). I hold, therefore, that the objection under Section 13(f) should fail.

47. For the reasons given, these applications must fail and are dismissed with cost. As the hearing has been a protracted one, I direct that costs be taxed as of a defended suit, the hearing being considered as of two full days; certified for two counsel.
Applications dismissed.

[44] AIR 1924 All 161