CALCUTTA HIGH COURT

United Arab Republic

Vs.

Mirza Ali Akbar Kashani

Appeal No. 115 of 1960

(S.C. Lahiri, C.J. and R.S. Bachawat, J.)

17.04.1961

JUDGMENT

Lahiri, C.J.

1. This appeal raises two important questions about the immunity of a foreign Sovereign State from the civil process of the Courts of our country. The plaintiff respondent instituted a suit for recovery of a sum of Rs. 6,07,346/- as damages for breach of a contract for the supply of tea by the plaintiff. There are two defendants in the suit; the first defendant is the United Arab Republic and the second defendant is the Ministry of Economy, Supplies and Importation Department which is a department of the first defendant and which according to the plaintiff, entered into the contract on behalf of both. Both the defendants entered appearance in the suit through the Vice Consul in charge of the Consulate General of the United Arab Republic in Calcutta and took out a Master's Summons for an order, inter alia, that the plaint be rejected and/or taken off the file. In the petition in support of the Summons it is stated that the first defendant came into existence as a result of the amalgamation of the two Sovereign Republics of Egypt and Syria with the President as its Ruler and that the United Arab Republic has been duly recognized by the Central Government of our country. Though these statements in the petition were not admitted in the affidavit in opposition affirmed by the plaintiff at the time of hearing it was admitted that the first defendant was a Sovereign State recognized by the Central Government of India. Similarly it is admitted that no consent has been obtained from the Central Government under Section 86 Civil Procedure Code to sue the Ruler of the first defendant who according to the definition in Section 87A is the Head of the United Arab Republic.

2. The defendants claim immunity from the civil process of this Court on two grounds. First under Sections 86 and 87 of the Civil Procedure Code and alternative under the general principles of private international law as laid down by certain English decisions which, according to the appellants, should be treated as a part of the municipal law of our country. The learned trial judge has negatived both the claims and dismissed the summons. He has further held that the appellants have waived their right immunity by entering unconditional appearance in the suit and by filing the present application. Against that judgment the defendants have brought this appeal.
3. Upon the arguments advanced in this appeal the points that arise for decision are three. (1) Are

the appellants entitled to the protection of Section 86 read with Section 87 Civil Procedure Code? (2) If the answer to the first question be in the negative are they entitled to jurisdictional immunity under the general principles of private international law? (3) In either case have the appellants waived their rights by entering unconditional appearance in the suit?

4. I propose to take up the last point, first because if the appellants waived their right of immunity by submitting to the jurisdiction of this Court no other question arises for consideration. The trial court based its conclusion on the question of waiver on the fact that the defendants entered appearance to the writ and invoked the jurisdiction of the court under Order 7 Rule 11(d) and Section 86 Civil Procedure Code and thereby submitted to its jurisdiction. With great respect I am unable to accept this conclusion as correct. The two material prayers in the summons are prayers (a) and (b). By the first prayer the appellants ask for revocation of leave granted under clause 12 of the Letters Patent and by the second it is prayed that the plaint be rejected and/or taken off the file. The first prayer is ancillary to the second and so the dominant intention of the appellants in making the application was to have the plaint rejected as disclosing no cause of action. The question therefore is whether the appellants can be said to have submitted to the jurisdiction of this Court by making such an application. I have no doubt in my mind that the answer to the question must be in the negative. In England Order 12 Rule 30 of the Supreme Court Rules provides for entering appearance under protest for the purpose of making an application for setting aside the writ. (Sec Annual Practice (1960) - P.197 and the Form of Conditional Appearance at page 198). No such provision is to be found in our country either in the Code of Civil Procedure or in Chapter VIII - Rules 15 to 20A of the Original Side Rules which lay down the procedure for entering appearance in a suit on the Original Side. Under the law of out country therefore whatever may be purpose for which the defendant enters appearance, the appearance, must necessarily be unconditional. From such an appearance therefore there can be no inference of an unequivocal intention to submit to the jurisdiction of the Court. That inference may be possible under the English law which provides for conditional appearance but not under the law of our country.

5. The next question is whether the appellants can be said to have submitted to the jurisdiction of this Court by making the present application. On the face of it seems to me somewhat strange that a litigant can be said to submit to the jurisdiction of a Court by making an application challenging such jurisdiction. Denial of jurisdiction is certainly not submission to jurisdiction. This conclusion is supported by the decision of the Court of Appeal in England in the case of *Mighell v. Sultan of Johore*[1], At page 159 Lord Esher ruled that the question of submission to jurisdiction must be determined by reference to the

> "time when the court is about or is being asked to exercise jurisdiction over him (foreign sovereign) and not at any previous time." In the same case Kay L.J. went a step further and held that there can be no submission until the foreign sovereign "actively elects to waive his privilege. Lopes L.J. no doubt observed that there can be submission to jurisdiction by appearance to a writ; but he was in a minority and even his view does not, as I have, already pointed out, apply to the procedure

[1](1894) 1 Q.B. 149

> prevailing in India. The decision in the case of In re, Bolivia Republic Exploration Syndicate Ltd., (1914) 1 Ch. 139 also supports the conclusion that there can be no

submission to the jurisdiction of a foreign court by mere unconditional appearance. In that case a foreign diplomatic agent entered an unconditional appearance to the summons took out a summons for further time to file evidence and affirmed an affidavit on the merits stating his official position. Still it was held upon the authority of Sultan of Johore's case, 1894-1 QB 149 that there was no waiver. Astbury J. proceeded on the ground that waiver means a deliberate abandonment of a known right. Knowledge of the English Common Law of the immunity of a foreign diplomat could not be imputed to a diplomatic agent of a foreign State and that it was doubtful whether a diplomatic agent could waive the diplomatic privilege without the consent of the sovereign. Cheshire in his Private International Law (5th Edition) at page 100 makes the following observations :

"Waiver is effective where the sovereign himself invokes the jurisdiction as a plaintiff or where he appears as a defendant without objection and fights the case on its merits".

Similar observations are to be found in Dicey's Conflict of Laws (17th Edition) - page 143 where the learned author states that in order to constitute waiver there must be an unmistakable election to submit to the courts jurisdiction. Applying the above principles to the facts of the present case I hold that the appellants have done nothing from which it can be inferred that they have submitted to the Court's jurisdiction.

6. It is now necessary to consider the first point which raises the question of the immunity of a foreign State under sections 86 and 87 of the Code of Civil Procedure. Under section 86 (1), as it now stands, a "Ruler of a foreign State" enjoys a partial immunity from suit in any court otherwise competent to try it, which can be taken away by the consent of the Central Government. The second sub-section of section 86 lays down the circumstances under which the consent may be given by the Central Government with regard to specified suit or suits or class or classes of suits. A Ruler of a foreign state is defined in section 87A (1) (b) to be a person who is for the time being recognized by the Central Government to be the head of that State. In the present case it was conceded by the plaintiff in the trial court that the United Arab Republic and also the head of that Republic are recognized by the Government of India and that no consent was taken from the Central Government under section 86. Had the suit been instituted against the Ruler of the United Arab Republic it would have been hit by section 86; but the suit is not against the Ruler but against the State, because section 871 requires that "the Ruler of a foreign State shall be sued in the name of the State", except where in giving consent under section 86 the Central Government directs that the Ruler may be sued in the name of an agent or any other person. The question before us is whether the immunity conferred by Section 86 is a personal privilege of the Ruler of a foreign State or a privilege enjoyed by the State itself. If it be a personal privilege of the Ruler the present suit does not fall within the mischief of Section 86 because it is not a suit against the Ruler but against the State, if however the immunity of Section 86 means the immunity of the State the present suit is hit by that section. On behalf of the appellants it has been contended that since under Section 87 the Ruler of a foreign state is required to be sued in the name of the State it necessarily follows that a suit against the State must always be deemed to be a suit against the Ruler of that State, which attracts the immunity of Section 86; in other words a suit against a State must be equated to a suit against the Ruler of that State. It is argued on the authority of Oppienheim's International Law (8th Edition) Article 341 page 757 that

"Every state must have a Head as its highest organ which represents it within and without its borders, in the totality of its relations."

It is certainly true that in its diplomatic relations with other States every State is represented by its Head; but that is no ground for holding that when Section 87 lays down that that the Ruler of a foreign State shall be sued in the name of the State it equates the Ruler with the State. The proviso to Section 87 itself contains an exception to the rule that the Ruler of a foreign State shall be sued in the name of the State which indicates that a suit against a State cannot as a matter of law, be held to be a suit against its Ruler. In our country a suit against the Government of India cannot be construed to be suit against the President of India who is the Head of the Government of India nor can a suit against the State Government be construed to mean a suit against the Governor of the State although the Governor is the Head of the State (See Articles 300 and 361 of the Constitution of India). I accordingly hold on a construction of Section 87 Civil Procedure Code itself that a suit against a State does not necessarily mean a suit against the Ruler of the State. The position may be different in monarchical States where the State has no independent existence apart from its Ruler and where all the property and liabilities of the State vest in its Ruler. In the case of a Republican State, however, the property and assets and liabilities vest in the Government of the Republic and not in its Ruler. Consequently, a suit against a Republican State cannot be treated as equivalent to a suit against the Head of the Republican State. It is to be noted that the State against which the present suit has been brought is a republican State.

7. Mr. Subimal Roy appearing for the appellants relied upon the cases of *G.T. Gilmore v. State of Travancore*[2] *Kunhan Moothad v Banerji Avergal*[3], and *Bindeshwari Ahir v. Bishwanath Singh*[4], for the proposition that the Civil Procedure Code makes no provision for a suit against a foreign State separately from its Ruler. In the first case a suit was instituted against the State of Travancore for the recovery of a certain sum of money as damages for wrongful dismissal. A Bench of the Madras High Court held that the Maharaja of Travancore being a "Sovereign Prince or Ruling Chief" within the meaning of Sections 86 and 87 of Civil Procedure Code, as it then stood was immune from suits in British Indian Courts without the consent of the Governor General in Council which admittedly had not been given. It further held that the fact that the suit had been brought not against the Maharaja but against the State did not make any difference because the Civil Procedure Code made no provision for a suit against the State apart from its Ruler. This decision was given in 1912 under Sections 86 and 87 of the Civil Procedure Code as they stood prior to their amendment in 1951 and prior to the introduction of Sections 87A and 87B in the same year. At the time of that decision Section 86(1) and Section 87 stood as follows:-

"Section 86(1) - Any such Prince or Chief (meaning any Sovereign Prince or Ruling Chief whether in Subordinate alliance with the British Government or otherwise and whether residing within or without British India) and any

[2]23 Mad LJ 605 [4] AIR 1950 All 421

[3] AlR 1916 Mad 445

ambassador or envoy of a foreign State, may with the consent of the Governor General in Council, certified by the signature of a Secretary to the Government of India,' but not without such consent, be sued in any competent Court."

"Section 87- A Sovereign Prince or Ruling Chief may sue and shall be sued in the name of his State."....

After the integration of the Indian States the Central Legislature amended Sections 86 and 871 and also introduced Sections 87A and 87B by Act II of 1951. As a result of the amendment Sections 86(1) and 87 now stand as follows:-

"Section 86(1)- No Ruler of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government".

"Section 87- The Ruler of a foreign State may sue and shall be sued in the name of his State."

8. Sections 87A and 87B which were not in existence before were for the first time introduced in 1951. A foreign State has been defined in Section 87A separately from the Ruler of the State. By Section 87B the Ruler of a former Indian State has been given the same immunity as is accorded to the Ruler of a foreign State under Section 86 sub-sections (1) and (3). It seems to me that the effect of defining a foreign State as a State which has been recognized by the Central Government separately, from the Ruler of that State, is to authorize a suit against a foreign State independently of its Ruler and the proposition that the Civil Procedure Code makes no provision for a suit against the State apart from its Ruler is no longer good law after the amendment of the Civil Procedure Code in 1951. I, accordingly, hold that the Code of Civil Procedure, as it now stands authorizes a suit against a foreign State recognized by the Central Government independently of the Ruler of such State. The two other decisions cited by the learned Counsel for the appellants merely follow and explain the decision in the case against the State of Travancore and need not be considered in detail. For these reasons I am unable to accept the contention of the appellants that under the Civil Procedure Code a suit against a foreign State must be deemed to be a suit against the Ruler of that State and, since no consent has been obtained from the Central Government under Section 86 to sue the Ruler, the suit is not maintainable against the State as well.

9. The question that arises next is whether the diplomatic immunity conferred by Section 89 is a personal privilege of the Ruler of the State or a privilege of the State itself. For this purpose the language of Section 86 and some other allied sections requires close scrutiny. Section 86 (1) confers partial immunity upon the "Ruler of a foreign State". On behalf of the appellants it is contended that the phrase means "a foreign State" and/or its "Ruler". I am however, unable to accept this contention. The phrase "Ruler of a foreign State" occurs both in sub-section (1) and sub-section (3) of Section 86 and must have the same meaning under both. There can be no doubt that sub-section (3) confers on the Ruler a personal immunity from arrest and if the immunity conferred by sub-section (3) is personal to the Ruler there is no reason for holding that the immunity of sub-section (1) is anything but personal. Again Section 87B confers on the Rulers of a former Indian State a part of the immunity accorded to the "Ruler of a foreign State". After the integration of the Indian States with the Union of India the Rulers of former Indian States have no territorial Sovereignty and therefore the immunity under Section 87B must be the immunity of the individual who was formerly the Ruler of the Indian State. Section 87B equates

that immunity with the immunity of the "Ruler of a foreign Stale". From this also it follows that the phrase "Ruler of a foreign State" means the individual human being who for the time being is recognized as the Head of the foreign State by the Central Government of our country and does not mean the State which he represents. The phrase "Ruler of a foreign State" also occurs in Section 85 and it is beyond question that in that section it must mean the individual Ruler who represents the State and the request contemplated by that section must be the request of that individual. I think it is a sound rule of construction that we should attribute the same meaning to words and phrases occurring in different sub-sections of the same section or in different allied sections unless we are required to put different interpretations by the words of the Statute. Following this principle I hold that the words "Ruler of a foreign State" in Section 86 mean the individual who represents that State and do not include the State apart from its Ruler. The result is that the partial immunity of Section 86 is the personal immunity of the Ruler and not immunity of the State represented by him.

10. In the case of *United States of America v. Wagner*[5], it was held by the Court of Appeal in England that though in a monarchical form of Government a State is required to sue or be sued in the name of its Ruler, that is not so in a Republic; because in the former case the public property of the State vests in the Sovereign whereas in the latter case the property of the State remains in the State. In a republican form of Government therefore the liability of the State is separate from and independent of the liability of the Ruler of the State and the fact that Section 86 C.P. Code allows partial immunity to the Ruler of the State does not entitle the State itself to claim that immunity.

11. From the foregoing discussion it follow that the appellants being a republican state cannot claim diplomatic immunity under the Code of Civil Procedure and the first question arising upon the arguments before us must be answered in the negative.
12. It is now necessary to consider the second question namely whether the appellants are entitled to immunity under the general principles of private international law. In International law the doctrine of immunity is based on the comity of nations which recognizes the equality of all-States and to compel a foreign State to submit to the jurisdiction of another State against its will is deemed to be an infraction of the Sovereignty of the foreign State. This doctrine is embodied in the maxim "Par in parem non habet imperium" (one Sovereign cannot have any power over another Sovereign). The rule is thus stated in Oppenheim's International Law (8th Edition) Article 115a at page 264.

> "The third consequence of State equality is that according to the rule Par in parem non habet imperium no State can claim jurisdiction over another. Therefore although States can sue in a foreign Court they cannot as a rule be sued there unless they voluntarily submit to the jurisdiction of the Court concerned". So also Dicey in his Conflict of Laws (7th Ed) Rule 17 at page 129 states the law in the following terms:-

[5](1867) 2 Ch. A. 582

> "Rule 17: The Court has no jurisdiction to entertain an action or other proceeding against (1) Any foreign State or the land of Government or any department of the Government of any foreign State....."

Sovereignty means freedom from the laws of every other State except one's own and if a foreign

State is subjected to the jurisdiction of another State against its will, it is to that extent a denial of its sovereignty. But this broad rule is subject to certain well-recognized exceptions in Admirality and Chancery cases which are enumerated in chapters 8 and 9 in Rules 25, 26 and 27 under the headings, Jurisdiction in actions in personam and Jurisdiction in actions in Rem in Dicey's Conflict of Laws (Seventh Edition). As the present case is not sought to be brought under any of those exceptions I need not consider them in detail.

13. The arguments that found favor with the learned trial Judge are two. First, that in respect of immunity there is a distinction between the Sovereign and non-Sovereign acts of a foreign State, i.e. between Jure Imperii and Jure Gestionis and while a foreign State enjoys immunity in respect of the former it does not do so in respect of the latter. Secondly the immunity of a foreign State is co-extensive with the immunity of the domestic State; in other words the immunity of a foreign State cannot be higher or greater than the immunity of the domestic State. These are the two main points which have been argued before us at considerable length.

14. On the first point the conclusions of the learned trial Judge are not very clear. At one place of the judgment he observes that subject to certain safeguards "No rule of international law will be violated if jurisdictional immunity is declined to foreign States in acts Jure Gestionis" (P.28 L.35 of the paper book). At another place he seems to approve of the view of Professor Lautor Pacht that the distinction between Jure Imperii and Jure Gestionis is not easy to be applied or defined (Page 34 L.44-45 of the paper book) but in the end he holds that the appellants cannot claim immunity in the present case because the contract which forms the subject-matter of the suit is of a commercial nature. I therefore take it that the learned trial Judge upholds the distinction between the Sovereign and non-Sovereign acts of a foreign State in respect of diplomatic immunity notwithstanding the opinion of Professor Lauter Pacht to the contrary.

15. The first question therefore is whether the rule that a foreign State enjoys immunity in respect of a Sovereign act but not in respect of a commercial act, can be accepted as a sound rule of international law applicable to our country. On this point it is to be noticed that the English Courts do not recognize this distinction in personal actions; but recognise it in actions in rem. A case in point is that of the Parliament Beige, (1880) 5 P.D. 197. There the trial court denied immunity to a Belgian Vessel on the ground that the vessel in question was not dedicated to "public use" but was "engaged in commerce". The court of appeal reversed the decision on the ground that the vessel was dedicated to public use and that its use "for purposes of trade was only subservient to the main purpose of carrying the mails." At page 220 Brett L.J. made the following observations which are instructive:

> "It has been frequently stated that an independent Sovereign cannot be personally sued although he has carried on private trading adventure. It has been held that an ambassador cannot be personally sued although he has traded and in both cases because such a suit would be inconsistent with the independence and equality of the State which he represents".

The decision of the Court of appeal in the case of the Parlement Beige was approved by the House of Lords in the case of *Compania Naviera Vascongada v. S.S. Cristina*[6], where a ship belonging to a Spanish Company was requisitioned by the Spanish Government. The company

issued a writ in rem claiming to be the sole owners of the ship. That writ was set aside by the court of appeal. In affirming the decision of the court of appeal the House of Lords pointed out that English Courts

> "will not allow the arrest of a ship including a trading ship which has been requisitioned for public purposes by a foreign Sovereign State."

Three of the Law Lords viz. Lord Thankerton Lord Macmillan and Lord Maugham were inclined to think that the immunity could not be extended to a State-owned Commercial Ship and they reserved their opinion as to the correctness of the decision in the case of The Porto Alexandre (1920) P.30. But all the Law Lords concurred in the view that the immunity of a foreign Sovereign is absolute in personal actions "whether the proceedings involve process against his person or seek to recover from him specific property ordamages" and that in actions in rem involving the arrest of a ship where the foreign Sovereign is not a party the foreign Sovereign is exempt if the ship is dedicated to public as opposed to commercial uses. There is of course a considerable difference of opinion on the question of the immunity of a State-owned trading vessel. At pages 522, 523 Lord Maugham summarizes the results of different international conferences ending with the Brussels Conference of 1926 and also deals with the law relating to this matter revailing in France, Belgium, the Soviet Republic and the United States of America. I need not dilate on this aspect of the matter because the case before us is not an action in rem, far lessan action against a state-owned foreign trading vessel. The suit instituted by the respondent one for recovery of damages for breach of contract and it is nothing but a personal action. The decisions of English Courts are uniform that in such an action the immunity of a foreign State is absolute, unless it submits to the jurisdiction either by invoking it as a plaintiff or by appearing as a defendant without objection. See (1894) 1 QB 149; *Duff Development Co. Ltd. v. Kelantsan Govt*[7]. the *Cristina case*[8], and *Compania, Mercantile Argentina v. United States Shipping Board*[9], where it was ruled that a foreign State does not lose its immunity by entering into a trading contract with a foreigner; *Kahan v. Pakistan Federation*[10]. where it was held that a foreign State is immune even if by a contract it agrees to submit to the jurisdiction of British Courts. A dissentient note, however was struck by Lord Denning in the case of *Rahimtoola v. Nizam of Hyderabad*[11] There a certain sum of money standing in the name of the Nizam at an English Bank was transferred by the Bank to the account of Rahimtoola who was at the material time, the High Commissioner for Pakistan in the United Kingdom. A writ was issued by the Nizam and his Government as co-plaintiffs against Rahimtoolla and the Bank claiming payment of the money. Four of the Law Lords set aside the writ on the ground that Rahimtoolla was the agent of the Sovereign State of Pakistan and as such entitled to diplomatic immunity. Lord Denning, however based his decision on an altogether different ground. According to him Sovereign immunity does not depend on

[6](1938) AC 485 [8](1938) AC 485 [10](1951) 2 KB 1003
[7](1924) AC 797 [9](1924) 93 LJ KB 816 [11](1958) AC 379

whether a foreign government is impleaded directly or indirectly but on the nature of the dispute; if the dispute relates to the legislative or executive policy of a foreign sovereign or its international transaction, immunity should be granted. If, however, the dispute relates to the commercial transactions of a foreign Sovereign immunity should not be granted. At page 418 his Lordship observes:

> "It is more in keeping with the dignity of a foreign Sovereign to submit himself to the rule

of law than to claim to be above it and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."

It is to be noted that all the remaining four Law Lords expressly dissociated themselves from the views of Lord Denning. In fact Lord Denning himself was aware of the fact that he was not stating the law as it is but the law as it should be and he ended his speech with a quotation from Chief Justice Holt "I have stirred these points which wiser hands in time may settle." Mr. Subimal Roy appearing for the appellant rightly characterized these observations of Lord Denning as "thought provoking" but not as laying down any rule of positive international law.

16. Mr. Sobyasachi Mookerjee, appearing for the respondent has very ably pointed out that although the views of Lord Denning are against the authorities of British Courts they have the support of eminent international jurists like Professor Lauterpact who has edited the latest edition of Oppenheim's International Law and also another writer on International law named Sompong Sucharit-Kul in his book styled "State Immunities and Trading Activities". The views propounded by these authors are that in recent years there has been an enormous increase in the trading activities of modern states and when a Sovereign State engages in commercial undertakings it sheds its sovereign character and in the words of Lord Macmillan in, the Cristina case 1938 AC 485 enters "competitive markets of commerce." Therefore no legitimate claim of sovereignty is violated if one state assumes jurisdiction over another in respect of Commercial undertakings. In an article by Prof. Lauterpacht published in the British Year Book of International Law (1951) at page 220 under the heading "the problem of jurisdictional immunities of foreign States" the learned author points out that the doctrine of immunity has been largely abandoned by judicial practice in countries other than Great Britain. From page 250 to page 272 the learned author discusses the law prevailing in countries other than Great Britain and points out that Italy, Belgium, Egyptian mixed courts, Greece and Switzerland recognize the distinction between acts jure imperii and jure gestionis and assume jurisdiction over foreign states in respect of the latter. in Sompong Sucharitkal's book it is stated at Pages 217-218 that the current case-law of France recognizes the distinction between "Actes politiques" or Governmental acts as opposed to "Actes de Commerce" or trading activities of a foreign State. At pages 222-223 the learned author points out that up to the year 1926 when Germany ratified the Brussels Convention German Courts applied the principle of absolute immunity but thereafter they adopted the principle of restrictive immunity based on the distinction between sovereign acts and trading activities of a foreign state. Mr. Sabyasachi Mookerjee has contended that we should bring the law of our country into line with the law prevailing in continental countries in preference to the views expressed by the English Courts. There are two difficulties in accepting this argument. The first is that the foundation of the distinction between acts jure imperii and jure gestionis is not very firm. In fact Prof. Lauterpacht himself points out that it is not easy to draw the line between acts jure imperii and acts jure gestionis and he himself prefers to base the rule of restricted immunity upon the "close similarity between the immunity of a domestic state and the immunity of a foreign state". This view, again, is described by the leaned author himself as "admittedly un-orthodox and being at variance with the view almost universally expressed in text books, at first sight, startling". With great respect I venture to think that no analogy can be drawn between the immunity of the domestic state and the immunity of an independent foreign state, because the essence of independence is freedom from the laws of every other country except

one's own. The doctrine of restricted immunity based on the distinction between jure imperii and jure gestionis which rests on such an insecure foundation cannot be accepted as the positive international law of our country.

17. The second difficulty in accepting Mr. Mookerjee's contention is that so far as this court is concerned it has adopted the rule of English law as the rule of private international law applicable to our country. In the case of *Bir Bikram Kishore v. Province of Assam*[12], a Division Bench presided over by Harries C.J. and Mukerjea, J. has adopted the principles laid down in the cases of (1880) 5 P.D. 197 and Sultan of Johore, (1894) 1 QB 149 as the rule of positive international law in our country and has quoted with approval the following Passage from Oppenheim (5th Edition) p.590.-

> "He (meaning a Sovereign) must be granted so-called extra-territoriality conformably with the principle par in parem non habet imperium, according to which one Sovereign cannot have any power over another. He must, therefore, in every point be exempt from taxation, ruling and every fiscal regulation and likewise from civil jurisdiction except when he himself is the plaintiff."

18. No doubt in the latest edition (8th Ed.) of Oppenheim at page 271 the above view has been characterised as no longer "free from doubt"; but this opinion is coloured by the views of the editor Prof. Lauterpacht to which I have already referred. In Bir Bikram Kishore's case, 1949-17 ITR 220 (Cal) the Division Bench cited a decision of the Bombay High Court in the case of *Commissioner of Income-tax Bombay City v. A.H. Wadia*[13]. where the question was whether Gwalior Durbar was entitled to a refund under Section 48(1) or a set off under Section 18 (5) of the Indian Income Tax Act of the income-tax alleged to be deemed under Section 49B to have been paid by it as a shareholder in respect of certain dividends. The Bombay High Court answered the question in the negative on the ground that the Gwalior Durbar was not assessable under the Indian Income Tax Act in respect of those dividends. In upholding the view of the Bombay High Court on appeal Kania C.J. in delivering the judgment of the Federal Court observed as follows in *A.H. Wadia v. Commissioner of Income Tax Bombay*[14]*;*

> "His claim (meaning the claim of the Agent of the Durbar) must rest on the applicability of Section 48 to him. Under the Government Trading Taxation Act (III of 1926) the Durbar has not become an assessee or an individual liable to tax under the Income Tax Act generally. Only to a limited extent and for a limited purpose it is made liable to taxation. By that enactment for the purpose of the

[12](1949) 17 ITR 220 (Cal)
[13](1947) 15 ITR 367 : AIR 1948 Bom 87
[14](1949) 17 ITR 63 at p.77 : (AIR 1949 FO 18 at p.27)

> Income-tax generally the legal position of the Durbar is not altered in respect of the rest of its income."

At page 96 (of ITR) Mahajan, J. observes

> "By the comity of nations sovereign rulers of states are not subject to the municipal laws of any particular country, but by Act III of 1926, His Majesty's Dominion and territories

> under His Majesty's protection were made subject to payment of income-tax under certain conditions and limitations".

These observations of the Federal Court make it quite clear a foreign State loses its immunity only to a limited extent when it comes within the four corners of Section 2 of the Government Trading Taxation Act (III of 1928) i.e., when a trade or business of any kind is carried on by or on behalf of the foreign Government in India. This principle is also embodied in Section 86 (2) (b) of C.P. Code which enacts that the Central Government may give consent to the institution of a suit against the ruler of a foreign State when "He by himself or another, trades within the local limits of the Court". This principle is also recognized by the Division Bench in Bir Bikram Kishore's case, 1949 17 ITR 220 (Cal) when it points out at page 231 that under Sections 86 and 87 of C.P. Code the Government of India does not grant to the rulers of Indian States the full rights granted by international law. My conclusion therefore is that the only restriction to the immunity of a foreign State recognized by the law of our country is that enacted by Section 2 of the Government Trading Taxation Act (III of 1926) and Section 86(2) (b) of the Civil Procedure Code. As in the present case there is no allegation that the appellant "trades within the local limits of this Court, it does no fall within the exception and is entitled to immunity.

19. It remains now to consider two other points raised by the learned counsel for the respondent in support of the judgment under appeal. The first one is that the Civil Procedure Code is exhaustive on the question of immunity of a foreign State so that if a case does not come under the catena of sections beginning with Section 84 and ending with Section 87B C.P. Code no immunity can be granted to a foreign State. The second point is that since the Egyptian law does not grant immunity to a foreign State in respect of acts jure gestionis, i.e. non-governmental acts, the United Arab Republic which is the successor of the Egyptian Government is not entitled to such immunity. I shall take up these two points for consideration.

20. The first point is based upon the theory that since Section 84 and the following sections of the Civil Procedure Code expressly codify some rules of public international law all other rules are abrogated by necessary implication; if the legislature says something on some point it must be deemed to have said every thing on that point. This argument is untenable as it is opposed to the well-established rule of construction that a statute will not be construed as overriding principles of international law unless the words of the Statute compel the court to put such a construction upon it. This principle of construction is to be found in Maxwell on Interpretation of Statutes which has been quoted with approval by Harries C.J. in delivering the judgment of the Division Bench in Bir Bikram Kishore's case, (1949) 17 ITR 220 (Cal).

21. There is still another reason why this argument cannot be accepted. If we are to accept the principle that when the legislature legislates on any subject the legislation must be deemed to be exhaustive on that subject, the principle would apply equally to civil suits as well as to criminal trials. Now, Section 197A(2) Criminal Procedure Code enacts that

> "No court shall take cognizance of any offence alleged to have been committed by the Ruler of a former Indian State except with the previous sanction of the Central Government".

There is no other section in the Criminal Procedure Code conferring similar immunity to the Ruler of a non-Indian State. Section 197A (2) of the Criminal Procedure Code corresponds to Section 87B of the Civil Procedure Code. Can it be said that only the Ruler of a former Indian State enjoys partial immunity from criminal prosecution as contemplated by Section 197A (2) Cr. P.C. and that the Ruler of a non-Indian foreign State does not enjoy that immunity and can be prosecuted like an ordinary citizen? To my mind the answer must be in the negative. Section 197A(2) Cr. P. Code must in my opinion, be read as supplementing and not as supplanting the principle of international law that no Ruler of a foreign State shall be subject to the process of foreign court except by his consent. Therefore both upon principle fend on authority I must reject the contention that Section 84 and the following sections of the Civil Procedure Code exhaustively lay down the law on the subject of the immunity of a foreign State.

22. It now remains to consider an argument advanced on behalf of the respondent upon the doctrine of reciprocity. It is argued that Egyptian mixed courts used to assume jurisdiction over foreign states in actions jure gestionis, i.e., nongovernmental actions and since the United Arab Republic is the successor of the Egyptian Government we must assume that the United Arab Republic also administers the same law and since the Government of United Arab Republic reluses jurisdictional immunity of foreign States in respect of non-Governmental acts we must also refuse immunity in the present case. It is true that the Mixed Courts of Egypt drew a distinction between actions jure imperii and actions jure gestionis and refused immunity in the latter class of cases; but those courts ceased to exist in 1947 or 1949 (See the Article on Jurisdictional immunities of foreign States by Prof. Lauterpacht in the British Year Book of 1951 at page 255; Oppen heim on International Law (8th Ed.) page 265 and State Immunities and Trading Activities by Sompong Sucharikal at page 251). There is no knowing what is the law administered by the courts of the United Arab Republic. It is not also correct to say that the United Arab Republic is the successor of the Egyptian Government, because it came into existence as a result of the amalgamation of the two independent States of Egypt and Syria on February 22, 1958. I cannot accordingly assume that the courts of the United Aralb Republic administer the same law as the Mixed Courts of Egypt which were abolished in 1947 or 1949. As this point was not raised by the respondent in the trial court I need not pursue the point further.

23. Some reliance was placed by the respondent in this connection upon the decision of a Special Bench of this Court in the case of In re, Girish Bank Ltd. AIR 1959 Calcutta 762 where a rule of reciprocity arising from the distribution of the entire assets of a bank in liquidation was adopted in a modified form. In that case, however, the court was dealing with one bank functioning in two countries and in spite of a winding up order of this Court the East Pakistan High Court refused to make an ancillary order with the result that the assets in East Pakistan were not available for distribution by this Court and this Court was confronted with the problem of evolving a formula to meet the justice of the case. That case is no authority for the general proposition that reciprocity is the foundation of the immunity of foreign States.

24. It is interesting to note that judicial opinion in England is not uniform on this point. In the Cristiaa case, (1938) A C 485 Lord Wright holds at page 503 that the doctrine of immunity

> "is stated without any special reference to reciprocity". At pages 518-519 Lord Maugham observes as follows:-

> "I hold a strong opinion that the court of appeal was right in insisting as a condition of immunity on the adherence of other foreign Governments to the same rule as to immunity Neither justice nor convenience requires that a particular State should decline to grant justice to its own, nationals who have been injured by ordinary commercial vessels belonging to foreign governments if those Governments are not willing to extend a similar immunity to the similar vessels of the first State."

In *Dollfus Mieg et cie v. Bank of England*[15], Lord Porter says at page 613 that there is no authority for the proposition that immunity could only be granted where the country claiming it, itself granted reciprocal immunity to other nations. He goes on to observe "The question is what is the law of nations by which civilised nations in general are bound, not how two in dividual nations treat one another" and cites the observations of Lord Maugham in support of that proposition. With great respect I venture to think that Lord Maugham was laying down just the contrary proposition in the Cristina case, (1938) AC 485 but the opinion of Lord Porter is itself entitled to great weight even though it may be contrary to that of Lord Maugham.

25. Prof. Lauterpacht in his Article on Jurisdictional Immunities, in the British Year Book of International Law of 1951 at pages 245-246 has expressed himself against the view that immunity of a foreign State should depend upon reciprocity.

26. If the respondent had established that the courts of the United Arab Republic administer the same law as the Egyptian Mixed Courts prior to 1947, the question of reciprocity would have been a very important issue in the present appeal, particularly in view of the conflict in the opinions of Lord Wright, Lord Maugham, Lord Porter and Prof. Lauterpacht. Having regard to the fact that the respondent did not raise this point in the trial Court I would prefer not to express any opinion on it.

27. In the result my conclusion is that though the State of the United Arab Republic does not enjoy any immunity under Sections 86 and 87 of the Civil Procedure Code, it is exempt from the Civil process of courts of our country under the general principles of international law which have been adopted as part of the municipal law of our country by the Federal Court in the case of (1949) 17 ITR 63 at pages 77 and 96 : (AIR 1949 F C 18 at pp.27 and 36) and by this court in the case of Bir Bikram Kishore (1949) 17 ITR 220

[15](1952) AC 582

(Cal). I realize that the result is some what anomalous because under Section 86 Civil Procedure Code the immunity of the Ruler of a foreign state is only partial, because it can be taken away by the consent of the Central Government under Section 86(2) whereas the immunity under the general principles of international law is subject only to Section 2 of the Government Trading Taxation Act (111 of 1926) and Section 86(2) (b) of the Civil Procedure Code. It is however, a matter for the Central Legislature to bring the immunity of a foreign state into line with the immunity of the Ruler of a foreign State by making suitable amendments of Section 86 and the following sections having a bearing on the subject.

28. The appeal accordingly succeeds. The judgment and order of the trial court dated the 16th May, 1960 are hereby set aside. There will be an order that the plaint be rejected under prayer (b) of the Master's Summons. In the circumstances of the case I direct that the parties do pay and

bear their own costs in the trial court as well as in this Court.

Bachawat, J.

29. The suit out of which this appeal arises was instituted by the plaintiff against the United Arab Republic and the Ministry of Economy (Supplies Importation Department) of the Republic of Egypt claiming damages for breach of a contract dated March 27, 1958 by which the Ministry of Economy agreed to buy tea from the plaintiff upon the term that it would not place further orders in India during the tenure of the contract and that it would give the plaintiff the benefit of the first refusal for its requirements. The plaintiff alleges that during the tenure of the contract the defendants wrongfully placed an order for the supply of tea with a third party without giving the plaintiff the benefit of the first refusal and thereby deprived the plaintiff of the profits which he would have otherwise earned. The contract provided for settlement of disputes by arbitration in Egypt. Formerly the Republic of Egypt and the Republic of Syria were two independent Sovereign States. On February 22, 1958 the two Sovereign States amalgamated and as a result the United Arab Republic came into being as a new Sovereign State. The new State was recognised by the Government of India. Since February 22, 1958 the Ministry of Economy, Supplies Importation Department of the Republic of Egypt is a department of the United Arab Republic and is a part and parcel thereof. The Ministry is not a juristic entity and has no separate existence. The suit was instituted on August 10, 1959. The plaintiff did not obtain any consent of the Central Government to the institution of the suit under Section 86 of the Code of Civil Procedure 1908. On December 3, 1959 the defendants entered appearance in the suit. On December 17, 1959 they applied for an order that (a) the leave granted under Clause 12 of the Letters Patent be revoked, (b) the plaint be rejected, (c) further proceedings in the suit be stayed, (d) and the plaintiff do pay the costs of the suit and the application. In their petition they contended that the Court had no jurisdiction to try the suit. They averred that the President of the United Arab Republic was its Ruler and that the suit was in reality, if not in form, a suit against him and as such was barred by the provision of Section 86 Civil Procedure Code 1908. They also pleaded that no part of the alleged cause of action for the suit arose within the jurisdiction of the Court. The application came up for hearing before Ray J. Before him counsel for the defendants contended that the suit was incompetent in view of Section 86 of the Code of Civil Procedure . Secondly, it was contended that assuming that the suit was against the United Arab Republic and not against its Ruler, the Republic as a foreign Sovereign State enjoyed absolute immunity from the suit under the Rules of International Law as adopted and applied by the Municipal Law of India. The second contention was allowed to be raised in argument without any objection from the plaintiff though the claim of immunity under International Law was riot raised in the, petition. The learned Judge negatived both the contentions. He also held that the claim of immunity based on the second ground had been waived by the defendants. He accordingly dismissed the application. The defendants have preferred an appeal from this order.

30. On behalf of the appellant Mr. Roy contended that sub-section (1) of Section 86 of the Code of Civil Procedure , 1908 bars a suit against a foreign State. I am unable to accept this contention. The sub-section bars a suit against a "Ruler of a foreign State." In terms it gives immunity to the ruler but not to the foreign State. The words "Ruler of" in the sub-section are not redundant. The expression "no Ruler of a foreign State" appears in both sub-sections (1) and (3) of Section 86. Quite clearly sub-section (3) gives to the ruler personal immunity from arrest. Likewise sub-section (1) of Section 86 confers a personal privilege upon the Ruler.

31. The legislative history confirms this conclusion. The preceding Section 433 of the Code of Civil Procedure Act X of 1877. section 433 of the Code of Civil Procedure Act XIV of 1882 and Section 86 of the Code of Civil Procedure 1908 as it originally stood all conferred personal immunities upon any "Sovereign Prince or Ruling Chief whether in subordinate alliance with the British Government or otherwise." The new sections 86 and 87A introduced by the Civil Procedure Amendment Act (II of 1951) now extend the personal immunity to any Ruler of a foreign State who is defined as the person who is for the time being recognized by the Central Government to be the head of a foreign State. The Ruler enjoys the personal immunity, be he a Monarch or the President of a Republic. The immunity attaches whether he be sued in his private capacity as an individual or he be sued in his public capacity as head of his State and as, representing it.

32. A State is an artificial juristic person distinct from its head who is a natural person. The distinction is recognized in Sections 84 to 87A Civil Procedure Code 1908. The identity of the State continues though its head or even the form of its government changes; despite those changes, the State continues to be one and the same person : Oppenheim's International Law 8th Edition Vol. I Article 77. A State acquires the full capacities of an international person on its recognition by other States, it acquires the right to sue as also immunities and privileges for it self and its properties in the Courts of the recognizing State, see ibid Articles 63, 71 and 75. By Section 84 read with Section 87A(1)(a) Civil Procedure Code 1908 a foreign State recognized by the Central Government may sue in the Indian Courts; and though the Code does not specifically provide for a suit against the foreign state and does not enumerate its immunities and privileges, a foreign State is capable of being sued and of pleading the immunities given to it by law. A foreign State is a juristic entity and may sue or be sued in its own name just as a foreign corporation may sue or be sued in its corporate name, see Russian Commeroial and *Industrial Bank v. Comptoir D' Escompte de Mulhouse*[16], at p.149. The Ruler of a foreign State referred to in Section 86 (1) Civil Procedure Code 1908 cannot be identified with the foreign State of which he is the Ruler.

[16]1925 AC 112

33. Mr. Roy next contended that a suit against a foreign State is really a suit against its Ruler for, (a) by Section 87 the Ruler must be sued in the name of his State, (b) the Ruler represents the State outside its borders in all its affairs. In support of his contention Mr. Roy relied on 23 Mad LJ 605, AIR 1916 Madras 445, AIR 1950 Allahabad 421; and Oppenheim's International Law, 8th Edition Vol. I, Article 341. I am unable to accept this contention. Section 87 prescribes the form of a suit against the Ruler. He must be sued in the name of his State but he may also be sued in the name of an agent or in any other name if the Central Government so directs. In terms the section does not say that a suit which is in form a suit against the State is necessarily a suit against its Ruler. Now a plaintiff may intend to sue the State and may then sue it in its name; or he, may intend to sue the Ruler and must then sue him in the name of his State in accordance with Section 87. If then there is a suit which is in form a suit against the State the question arises who is really being sued. The solution to the question is to be found from the pleadings and the other materials on the record.

34. The cases relied on by Mr. Roy show that a suit against a former Indian State amounted to a suit against its Prince or Monarch. In none of those cases the suit was against a Republic. It is true that the Head of a State be it a Monarchy or a Republic represents it in all its international

acts such as the making of an international treaty, see Oppenheim's International Law, 8th Edition Vol. I Articles 341, 343 and 345, but on the question of representation of the State in other matters there is a real distinction between the Monarch of a Monarchichic State and the President of a Republic. In a Monarchy, the Monarch himself is the sovereign and in him alone the sovereignty of his State is vested, see ibid articles 346, 348 and 354. In the olden days the sovereign only and not his State was recognized in diplomatic intercourse and in the courts of other States, see (1867) 2 Ch. A.582 at p.593, but the practice seems to have changed now. By Section 84 Civil Procedure Code 1908 a Sovereign State even though it may be a Monarchy may sue in its own name and the State itself has the right of diplomatic intercourse though such right is necessarily exercised through the sovereign, see Oppenheim's International Law, 8th Edition, Vol. I, Articles 360 and 362. Formerly it was also said that the public property was vested in the sovereign individually and not in his representative capacity, see (1867) 2 Ch. A.582 at op.593-594, but the prevailing opinion is that the property is of the State which is represented by the sovereign, see *Vavasseur v. Krupp*[17], at p.360. The cases relied on by Mr. Roy deal with suits against Indian State. Those States were semi-sovereign vassal States, their position in International Law was somewhat anomalous, but the Rulers of those States successfully claimed the immunities of a sovereign both in England, see *Statham v. Statham and Gaekwar of Baroda*[18] and in India. Internally the Ruler of an Indian State was an absolute Monarch. His State was for the time being identified with him and it was even said that his State had no juridical existence apart from him, see (1949) 17 ITR 220 at p.226 (Cal.) But truly speaking, though the Ruler was an absolute Monarch, he, as an individual, was not the State. He only represented it. The State was a corporation sole. It did not die on his death, see (1949) 17 ITR 63 at pp. 112 and 113 : (AIR 1949 FC 18 at p. 44); *Maharaja of Kashmir v. Mohanlal*[19] On his death the property vested in him in his capacity as the sovereign passed to the next Ruler and not to his heirs, see *Secretary of State v. Kamachee Boye Saheba*[20], But the Ruler so completely represented the State and all its public rights and liabilities that a cause of

[17](1878) 9 Ch. D.351
[18]1912 P.92
[19]51 Pun Re 1886 p.99 at pp. 101-2
[20]7 Moo I.A. 476 at p.537 (PC)

action against the State was necessarily a cause of action against him as representing the State and a suit against the State was really a suit against him in his representative capacity as sovereign, see 23 Mad LJ 605. Even a suit against an un-incorporated State railway which was vested in the Ruler was in reality though not in form a suit against him : see *Gaekwar Baroda State Rly. v. Hafiz Habibul Haq*[21], It is also plain that if the plaintiff intended to sue the Ruler personally he had to sue him in the name of his State in view of Section 87 Civil Procedure Code 1908. Consequently in all cases a suit against an Indian State was necessarily a suit against the Ruler himself either personally or in his representative capacity.

35. The case of a Republican State and its President is however very different; the sovereignty is vested in the people; the President is the head but he is not a sovereign: he is one of its many organs through whom it acts. The public property is vested in the State. The State itself enters into contracts in which it is represented by its appropriate department. The President by virtue of his office alone is not a party to the contract nor does he by virtue of his office represents the State in is litigations. The other party to the contract may have a cause of action against the State and may sue it; such a suit is not a suit against the President. The Ministry of Economy, a department of the United Arab Republic, is the party to the contract which is sought to be enforced in this suit. If is neither alleged nor proved that the President of the Republic, is a contracting party or that by the law of the Republic, he is deemed to be so or that he can be sued

for a cause of action arising out of the contract. The plaintiff has sued the Republic and there is nothing to show that he intends to sue the President or that the suit though in form a suit against the Republic is in reality a suit against him The suit therefore cannot be said to be barred by the provisions of Section 86(1) Civil Procedure Code 1908.

36. Mr. Roy next contended that the appellant being a Sovereign Foreign State enjoys absolute immunity from the suit by the rules of International Law adopted by the Common Law of England and by the Indian Law and consequently the Court has no jurisdiction to entertain the suit. Let us examine this contention.

37. Every State has plenary sovereign power over every person, matter or thing within its territory and every person within its territory is amenable to its courts of justice; nevertheless having regard to the equal sovereignty of each State and having regard to the Comity of Nations, the English Courts, as a rule, decline to exercise jurisdiction over another State.

38. The dignity, equality and the independence of States is said to be the foundation of this immunity, see (1880) 5 P.D.197; following The *Exchange v. McFaddon*[22] The rule is sometimes based on the principle, "par in parem non habet imperium";-an equal has no power over an equal. It is justified on grounds of expediency, on the difficulty of the sovereign amenable to the courts of another making and of the danger of attempting to make State, see Duke of *Brunswick v King of Hanover*[23], at page 50. The rule is also based on the Comity of Nations. By International Law, a State cannot as a rule be sued in the courts of another State but the municipal laws of different States differ considerably in giving effect to this broad rule, see Oppenheim's International Law, 8th Edition, Vol I

[21]65 Ind App 182
[22](1812) 7 Cranch 116
[23](1844) 6 Beav 1

Articles 115a, 115ac, 115ad.

39. The English law is stated by Lord Atkin in 1938 AC 485 at p.490, thus:

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign; that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or which is in his possession or control."

40. The two rules formulated by Lord Atkin are subject to well-recognized exceptions. But subject to those exceptions both rules are now firmly entrenched in English Law Generally speaking a foreign sovereign cannot be impleaded in any legal proceeding against his will and his property is also immune from legal process. Neither rule however is inflexible, both admit of exceptions. The foreign sovereign does not enjoy absolute immunity. There is no absolute rule that a foreign sovereign can never be impleaded in a legal proceeding or that his property cannot

be seized or detained under all circumstances, see 1952 AC 582 at pp.615-16, *Sultan of Johore v. Abubakar Tunku Aris Bendahar*[24], The arrest of a ship in the possession or control of a foreign State by the issue of a writ in rem violates both rules for in such a case not only is the State impleaded but its property is also seized; but there is a sharp conflict of opinion as to whether State owned ship's engaged in ordinary commerce is entitled to immunity in an action in rem see (1920) P.30. The Charkieh (1873) 4 A and E 59 and 1938 AC 485 at pp.490, 496-6, 498, 509-513 521-3. Only a few States now adhere without qualification to the practices of conceding jurisdictional immunity to such ships. See the Brussel's Convention of 1926 and Oppenheim's International Law, 8th Edition Vol. I. Article 451a. Where proceedings are brought or continued for the administration of a trust or an estate in the hands of a trustee or some person over whom the court has control or for the winding up of a company or for the adjudication of a debtor as insolvent, the court will not decline jurisdiction by reason of the mere fact that a foreign sovereign is or may be interested in the trust or like fund and/or has to be served with notice of the proceedings. See *Lariviere v. Morgan*[25], on appeal sub-nomine *Morgan v. Lariviere*[26], *In Re Russian Bank for Foreign Trade*[27], at pp.768-770; *Madan Lal v. Reza Ali Khan*[28], *at p.249; (1844) 6 Beav*[29]. This exception does not cover a case where it is sought to be established by adverse litigation against the sovereign that he is the trustee of some property or chose in action, see 1958 AC 379. The immunity has not yet been extended to a suit against the foreign sovereign with referenoe to immovable property situated within the jurisdiction of the Court in which he is sued, see 1952 AC 318.

[24]1952 AC 318 at p.343, 1938 AC 485 at p.494
[25](1872) 7 Ch. A. 550
[26](1875) 7 H.L.423 at p.430
[27](1933) 1 Ch 745
[28] AIR 1940 Cal244
[29]1 at p. 39; 1938 AC 485 at p.520; 1952 AC 582 at pp.617-18

41. It is however well settled that the courts have no jurisdiction to entertain an action in personam against a foreign sovereign. In 1938 AC 485 at p.515 even Lord Maugham observed:

> "My Lords, it is not in doubt that an action in personam against a foreign Government will not be entertained in our Courts unless that Government submits to the jurisdiction."

Broadly speaking in this context an action in personam is an action which seeks the recovery of a personal judgment, i.e. a judgment in the nature of a command or prohibition against some person, e.g. the payment of a debt or damages or the doing or not doing by him of some particular thing. Thus the courts have no jurisdiction to entertain an action in personam against the foreign sovereign which seeks to recover from him damages for breach of a promise of marriage, (1894) 1 QB 149 or against a foreign State which seeks to recover from it the amount of freight overpaid, see (1924) 131 LT 388, or moneys payable under a contract for purchase of goods, see (1951) 2 KB 1003, or damages for breach of contract for sale of goods, see *Baccus SRL v. Servicio. Nacional Del Trigo*[30], or damages for an alleged libel, see *Krajina v. The Tass Agency*[31], or which seeks an injunction, payment of over-due interest on bonds and damages for wrongful dismissal, see *Strousberg v. Republic of Costa Rica*[32],

42. In its origin the English doctrine of immunity is rooted in the personal immunity of foreign Princes and their ambassadors. The Diplomatic Privileges Act, 1708 (7 Anne c. 12) especially provided for the immunity of the person and property of ambassadors and public ministers of foreign Princes and States. The Act was passed in consequence of the hue and cryraised over the arrest of the Russian ambasador. Formerly Sir Edward Coke thought that if an ambassador in

England makes a contract which is good jure gentium he must answer for it there, see Coke 4 Institute 153, but his opinion did not subsequently prevail. It is now the accepted doctrine that the Statute of Anne is declaratory of the common law, see *Triquet v. Bath*[33], at p.1480; *Magdalena Steam Navigation Co. v. Martin*[34], at pp.113-4. It was thought that the sovereign also was entitled to at least the same immunities which his ambassador enjoyed and that in accordance with the Law of Nations a foreign Prince resident in the dominion of another was as a general rule exempt from the jurisdiction of the courts there, per Langdale M.R. in (1844) 6 Beav. 1 at p.51. The personal immunity enjoyed by foreign Princes was subsequently extended to foreign States. Indeed the modem theory is that the immunity enjoyed by the foreign Prince is only a derivative of the immunity of the State which he represents, Dicey's Conflict of Laws 7th Edition page 131. Immunity from actions in personam has been successfully claimed by the Republic of Costa Rica in (1881) 44 LT 199, by a Department of the United States of America in (1924) 131 L T 388, by a Department of the United States of Soviet Russia in (1949) 2 All England Reporter 274, by the Federation of Pakistan in (1951) 2 KB 1003 by a Department of the State of Spain in (1957) 1 QB 438. The immunity of their property from the processes of the Courts was suessfully claimed by the Republics of France and the United States of America in 1952 A.C. 582 and immunity from actions in rem was successfully claimed by the Republic of Spain in 1938 AC 485 and The Arantzazu Mendi, 1939 AC 256 and

[30](1957) 1 QB 438
[31](1949) 2 All England Reporter 274
[32](1881) 44 LT 199
[33](1764) 3 Burr. 1478
[34](1859) 2 E and E 94

by the State of Portugal in 1920 P.30.

43. The rules of International Law on the object which have been thus adopted and accepted by the English Courts are now incor porated into the Common Law of England and have now become part of it see *Vascongado v. S.S. Cristina*[35], at p.490 *Chung Chi Cheung v. The King*[36],

44. In the present suit the plaintiff seeks to recover from a foreign sovereign State damages for the breach of a contract. If the common law of England and the rules of International Law adopted by it are applied, it must follow that the Court has no jurisdiction to entertain the suit.

45. In the absence of any specific Law, Regulation or Act applicable to the case the Common Law as also the Statutory Law as it prevailed in England in 1726, as far as those laws could be applied to Indian conditions, used to be administered in the City of Calcutta by the Mayor's Court and the Supreme Court, see *Advocate General of Bengal v. Ranee Surnomoyee Dossee*[37], while justice, equity and good conscience which were generally interpreted to mean the rules of English Law if found applicable to Indian society and conditions See *Waghela Rajsanji v. Sheik Masludin*[38], used to be administered by the East India Company's Courts called the Dewanny Adawlats and the Sudder Dewanny Adawlat: The two systems of law continued to be administered respectively in the City of Calcutta by the High Court on its Original Side, see *Bhooni Money Dassi v. Notobar Biswas*[39] and *R. Ray v. V.G. Dalvi*[40], and in the muffasil by the Civil Courts and the High Court on its Appellate Side.

46. From the earliest times the courts In India have administered and applied to Indian Society and conditions the English Common Law and the rules of International Law adopted by it with regard to the immunity of foreign sovereigns and foreign States and those rules are now part of our municipal law. Applying those rules, the courts refused to entertain suits against Indian Ruling Princes for the recovery of the price of goods sold, see *Jwala Pershad and Nihal Chand*

v. Rana of Dholepur[41], for the recovery of the price of goods sold, moneys lent and moneys due on account stated in writing, *Ladkuver Bai v. Sarsangji Pratabsangji*[42] and for arrears of salary, see *Phumman Lal v. Shamsher Parkash*[43], The immunity of foreign sovereigns from civil claims was recognised in the Circular Order No.172 of the Sudder Dewanny Adawlat for the Western and Lower Provinces dated the 4th March and the 20th May 1836 adopting the instructions issued by the Court of Directors of the East India Company dated the 27th May 1835 by which they interdicted all their officers from taking cognizance of civil claims preferred against independent Chiefs, whether by their own subjects or others. See The Circular Orders of the Court of the Sudder Dewanny Adawlat for the Lower and Western Provinces from 1795 to 1852 by J. Carrau, 1833 Edition, pages 105-6. In the Province of *East Bengal v. State of Tripura*[44], a Division Bench of this Court held that the Court had no jurisdiction to try a suit against the Province of the Sovereign State of Pakistan for a declaration that the provisions of the Bengal Agricultural Income Tax Act 1944 so far as

[35]1938 AC 485 [37]9 Moo Ind App 387 at pp.430-1 (PC)
[36]1939 AC 160,167-8 : (AIR 1939 PC 69 at p.70) and 1952 AC 582 at p.615
[38] ILRll Bom 551 at p.561 (PC) [40]65 Cal WN 190 at p.194 [42]7 Bom H.C.O.C 150
[39]5 Cal WN 659 at pp.662-3 [41]1 SDA Decisions for NWP 579 [43]93 Pun Re 1875
[44]84 Cal LJ 52

it impose liability on the plaintiff to pay tax was ultra vires and void and for an injunction restraining the defendant from taking any steps to assess the plaintiff to agricultural income-tax. Chakravartti, J. observed at page 59 :

> "It cannot, therefore, be disputed that under the rule and principle of the Comity of Nations, a Court in India could claim no jurisdiction to try a suit against a Province of Pakistan against its will."

The Court also ruled that the general rule of International Comity was not excluded by special Statutes. The decision on the latter point was reversed on appeal by a majority judgment of the Supreme Court, see *State of Tripura v. Province of East Bengal*[45], but the decision of this Court on the first point was not challenged before the Supreme Court. In Re, Commissioner for Workmen's Compensation, Madras, AIR 1951 Madras 880, the Madras High Court applying the principles laid down in (1880) 5 P.D. 197 decided that an application under the Workmen's Compensation Act for an award of compensation against the British Admiralty could not be entertained by the Commissioner and observed :

> "Any claim against the British Admiralty will be really a claim against the British Crown which is entitled to immunity from the jurisdiction of courts and tribunals of the Indian Republic."

47. The Courts have even held that by the Comity of Nations a Ruler of an Indian State was not amenable to local taxation and that there was nothing in the Indian Income Tax Act or the Assam Agricultural Income Tax Act which took away this immunity, see (1949) 17 ITR 220 (Cal) and (1949) 17 ITR 63 at p.112 : (AIR 1949 PC 18 at pp.43-44).

48. Mr. Mukherji on behalf of the respondent contended that the foreign State is not entitled to any immunity from suits because (a) the Code of Civil Procedure, 1908 does not specially exempt it from the jurisdiction of Civil Courts, (b) the Code having specially provided for the

immunity of the Ruler of a foreign State must be taken to have impliedly abrogated the immunity given to a foreign State by International Law. I am unable to accept this contention. A Full Court, rejecting a similar contention will reference to the Code of Civil Procedure (Act VIII of 1859) in 1 SDA Decisions for NWP 579 at p.580 said :

> "We observe that although the Sections of the Civil Procedure Code relating to the jurisdiction of the Civil Courts contain no provisions-specially exempting Indian Native Chiefs from the jurisdiction of our Civil Courts, it might reasonably be inferred on general grounds, that the Act in question was applicable only to those persons who are generally subject to the laws of the British Government and that therefore no special enactment would be deemed necessary for the exemption from the jurisdiction of our Courts of those persons, who were generally not subject to the laws of the British Government". In (1949) 17 ITR 220 at p.232 (Cal).
>
> "It is true that there is nothing in the Provincial Act exempting a ruling Prince but it is a well established rule of construction that a statute will not be construed as

[45]1951 SCR 1

> overriding International Law unless the words of the statute compel the court to put such a construction upon it".

Similarly, there is nothing in the Code of Civil Procedure 1908 which over-rides the general principles of International Law with regard to the immunity of a foreign Sovereign State from adverse suit. The maxim, expressio unius est exclusio alterius, has no application. The express immunity of the Ruler of a foreign State given by Section 86 (1) of the Code of Civil Procedure 1908 does not mean that the foreign State has no immunity. The express exemption means that the person named is exempt, but it is not to be construed as an implied provision that no others are exempt.

49. The immunities of both personal sovereigns and of foreign States are governed by substantially the same set of rules under International Law and the English Common Law. In Indian Law there was no special provision with regard to those immunities before 1877. The Civil Procedure Codes of 1877, 1882 and 1908 specially provided for the immunity of sovereign Princes and Ruling Chiefs from suits. The Civil Procedure Code 1908 as amended by Act II of 1951 has extended the immunity to all heads of foreign States. But the Code has not specially provided for the immunity of a foreign State. The result is somewhat unfortunate. The Courts have to apply the rules laid down by Section 86 Civil Procedure Code 1908 with regard to the Rulers of foreign States, whereas they have to apply the rules of International Law with regard to foreign States. The two sets of rules are in many respects divergent By Section 86 except in one specific case the Kuler cannot be sued without the consent of the Central Government whereas by the rules of International Law, if the suit lies at all against the foreign State, no such consent is necessary. Again by Section 86 suits may be instituted against the Ruler in certain exceptional cases with the consent of the Central Government whereas the rules of International Law give a somewhat different answer with regard to the exceptional cases in which suits may be brought against the foreign State.

50. Mr. Mukherji next drew a distinction between acts jure gestionis, that is to say non-sovereign

and private law acts and acts jure imperil, that is to say, sovereign and public law acts and he contended that foreign States and foreign sovereigns are not entitled to any immunity in respect of claims arising out of their acts jure gestionis i.e. acts of a non-sovereign or private law nature, e.g. a commercial contract or a trading activity. He argued that the suit in this case is in respect of a commercial contract and that therefore the appellant is not entitled to any immunity. His contention found favor with Ray J. who held that

> ".....the claim in respect of the contract forming the subject matter of the suit is of a commercial nature and such a transaction is not entitled to immunity,"

I am however unable to accept his contention. Many States recognize the distinction drawn by Mr. Mukherji and they do not grant any immunity to foreign States and foreign sovereigns in respect of their activities jure gestionis, but English Law has consistently refused to draw such distinction, see Oppenheim's International Law, 8th Edition, Vol. I, articles 115, 115 c, 115ad, Dicey's Conflict of Laws, 7th Edition, pages 123-3. In *Mighell v. Sultan of Johore*[46], at p.152, counsel for the plaintiff contended that the immunity

[46](1894) 1 QB 149

attached only to acts done by the sovereign in his character as a sovereign. The Court rejected that contention and held that the foreign sovereign could not be sued in respect of a personal act such as a promise of marriage even if the promise was made while ne was living incognito. Similar argument was advanced in 7 Bom HCOC 150 at p. 154 and was rejected by the Bombay High Court; and the Court refused to entertain a suit against an Indian sovereign Prince for goods sold and moneys lent to him within its jurisdiction. In 93 Pun Re 1875 the Court held that an agent employed by an Indian Prince for the purpose of trading in British India could not sue the Prince to recover the arrears of his salary.

51. Similarly the English Courts have refused to draw a distinction between the trading and non-trading activities of the foreign sovereign with regard to his immunity in an action in personam. The sovereign cannot be personally sued, although he has carried on a private trading adventure, per Bret L.J. in (1880) 5 PP 197 at p.220; he does not lose his immunity by entering into trading transactions as a private person in another country see (1894) 1 QB 149 at p. 154. Likewise a foreign State does not lose its immunity from an action in personam by engaging itself in private trading business, (1924) 131 LT 388, (1957) 1 Q B 438, or by pursuing trading activities within the jurisdiction of the court on he date of the issue of the writ, see (1949) 2 All E R 274 at pp. 275, 284. In (1924) 131 LT 388 at p. 390, Bankes LJ observed:

> "There is no authority anywhere to be found that the mere fact that a sovereign is engaging in some private trading business subjects him to the process in the courts of a foreign country".

There is a sharp difference of opinion on the question whether a public vessel of a foreign State employed in private trading is immune from process in an action in rem, but the question does not arise in a case where proceedings are taken in personam, see ibid at page 389 and 93 Pun Re 1875 page 218 at p.227. The solitary opinion of Lord Denning in (1958) AC 379 at p.422 than there is no ground for granting immunity if the dispute concerns the commercial transaction of a foreign government and it arises properly within the territorial jurisdiction of the Court is not

supported by any other authority. The other Law Lords in that case expressly disassociated themselves from his opinion, ibid 398, 404 410. In (1951) 2 KB 1003 the Court refused to entertain a money claim against a foreign State arising out of a commercial contract by which the foreign State like an ordinary individual agreed to be bound by the English Law and to submit to the jurisdiction of the English Courts. The Court rejected the contention that the action lay as there was no generally accepted principle of International Law that an independent sovereign State is immune from jurisdiction in respect of commercial transaction. It may be noted that the appellant stands in a stronger position for the contracts in the instant case provides for settlement of disputes by arbitration in Egypt. Besides there is no logical or cogent distinction between acts Jure imperii and acts jure gestionis. The activities of many States are now-a-days all embracing and it may well be said that many activities of a State, though ostensibly of a private law nature are really of a public law nature, see Oppenheim's International Law, 8th Edition Vol. I, article 115ad, page 274, foot note 2. In his article on the problem of Jurisdictional Immunities of Foreign States in the British Year Book of International Law 1951, Vol.28, Professor H. Lauterpacht points out that in the case of contracts the supposed distinction is impossible of definition and has led to diametrically opposite decisions in the Courts of different States and even in the Court of the same State. The State always acts as a public person, in a real sense all its acts jure gestionis are acts jure imperii. The economic activities of a Welfare State, such as State management of industry, State buying and selling are undertaken by it for public purposes and for the benefit of its nationals. It must be admitted however that many States have abandoned the rules of absolute immunity, they now give a foreign State a limited immunity in respect of acts jure imperii and assume jurisdiction over is in respect of its trading activities and acts jure gestionis. The principle of near absolute immunity recognized by the English Law goes much beyond the requirements of International Law as it now stands; and in view of the increasing activities of States in all spheres of economic life, the concession of immunity of foreign States in respect of its trading activities often leads to serious denial of justice.

52. One other fact, if that is material, may be noted. By the contract in suit the appellant agreed to purchase tea from the plaintiff. But there is no material showing that the appellant entered into the contract as a trader or with a view to re-sell the goods at a profit or that otherwise the transaction was not for the public purposes of the appellant.

53. A question may arise whether a Sovereign State is entitled to any immunity in a case where on the date of the institution of the suit it is carrying on a business or a trade within the local limits of the jurisdiction of the Court in which it is sued. By Section 86 of the Code of Civil Procedure , 1908, the Ruler of a foreign State may be sued with the consent of the Central Government if he by himself or another trades within those local limits. Jervis C.J. in *Taylor v. Best*[47] at p. 519, remarked that an ambassador violates the character in which he is accredited by engaging in commerce during his residence in the country but nevertheless he did not thereby forfeit his immunity. By Section 86, Civil Procedure Code 1908 an ambassador may with the consent of the Central Government be sued if he trades within the local limits of the jurisdiction of the Court. Does not a foreign State violate the hospitality of this country by engaging in commerce and at the same time avoid payment of its just dues? Can it not be said that in such a case the remedy is not confined to diplomatic action? By civil law, proceedings in rem could be founded by seizure of the commercial assets of an ambassador who was engaged in trade, see (1854) 14 CB 487 at pp. 506-7, 521-2, (1859) 2 E and E 94 at p.114. Can it not be said that since proceedings in rem are not available in this country in a similar case against a foreign State a

proceeding in personam may well be founded against it, if on the date of the institution of the suit it trades and has commercial assets within the local limits of the jurisdiction of the Court? It may be that the authorities are too strong for this Court to hold that a foreign State loses its immunity by reason of that fact, see (1949) 2 All England Reporter 275. It is plain however that the anomalies in this branch of law require immediate and effective legislative action. In the instant case there is neither any allegation nor any proof that the United Arab Republic has traded or is trading in Calcutta or anywhere else in India. The question whether the suit could proceed if it did so, therefore does not arise.

54. Mr. Mukherji next contended that a foreign State enjoys the same immunity as the domestic State enjoys and no more and since the Union of India is liable to be sued in respect of its contracts a foreign State is also liable to be sued in respect of contracts
[47](1854) 14 C.B 487
entered into by it. This argument found favor with Ray J. who held that

> ".....where the rule of law prevails the foreign State ought to be entitled to such immunity but no more as enjoyed by the domestic State before its own tribunal." I am however unable to accept the contention. Mr. Mukherji relied upon the following observation of Lord Denning in 1958 AC 379 at p. 418,
>
> "There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them".

The other Law Lords however disassociated themselves from this opinion, see ibid 398, 404, 410. Mr. Mukherji also relied upon the opinion of Dr. H. Lauterpacht in his article on the Problem of Jurisdictional Immunity of Foreign States in British Year Book of International Law. 1951. In that article Professor Lauterpacht indicated that a State will not be disregarding a clear or binding principle of International Law, if it passed laws subject to proper safeguards and exceptions, placing foreign States in the same position which the domestic State occupies in the matter of suits brought against it. The change in law is desirable. The views of Lord Denning and of Dr. Lauterpacht indicate what the law should be, they do not represent the English or the Indian Law as it now stands. It is plain that as the law now stands a foreign State cannot be placed on the same footing as the domestic State in respect of suits brought against them. The legislative acts as also the executive acts of our own State are subject to review in our courts. It is however generally accepted that the validity or legality of legislative acts of a foreign State such as Act and decrees of nationalization or sequestration of property and of its executive acts, such as expulsion of aliens or detention of nationals cannot as a general rule be questioned in this country at any rate in so far as those acts purport to take effect within the sphere of the foreign States' own jurisdictions, see Oppenheim's International Law, 8th Edition Vol. I, articles 115aa and 115ab, *Duke of Brunswick v. King of Hanover*[48], at p.19. In 1958 AC 379 at p.422 even Lord Denning indicated that the Court should grant immunity if the dispute brings into question the "legislative or international transactions of a foreign government or the policy of its executive". No such immunity is enjoyed by our own State. Peculiar rules of limitation and of procedure are applicable in the case of a suit brought against our State. In the absence of legislation those rules cannot be applied in the case of a suit brought against foreign States. In my opinion it has not

been established that under the law as it now stands a foreign State enjoys the same immunity as the domestic State enjoys and no more.

55. Mr. Mukherji next contended that immunity will be granted only where the State claiming it grants reciprocal immunity to other States that the United Arab Republic does not grant reciprocal immunity to other States in respect of claims arising out of activities jure gestionis and contracts of a private law nature and that consequently the Republic is not entitled to any immunity in this suit. I am unable to accept this argument. The point was not raised before Ray J. It raises a mixed question of law and fact and ought not to be allowed to be raised in this Court for the first time. Mr. Mukherji relied upon passages in Oppenheim's International Law, 8th Edition, Vol. I, article 115a, foot note 2, page 265; Dicey's Conflict of Laws, 7th Edition page 133 foot note 30 and the article on the

[48](1848), 2 HLC 1

Problem of Jurisdictional Immunities of Foreign States by Professor II Lauterpacht in the British Year Book of International Law, 1951, to show that the State of Egypt did not grant any immunity to other States in respect of acts which are not governmental. The authorities cited show that the mixed courts of Egypt for nearly half a century assumed jurisdiction to decide claims against other States arising out of activates jure gestionis. The mixed courts have now been abolished. Besides a new State called the United Arab Republic has now come into being as a result of the amalgamation of the Republics of Egypt and Syria. It is not known whether the courts of the United Arab Republic administer the same law which used to be administered by the mixed Egyptian courts before 1949. A contention, somewhat similar to the one advanced by Mr. Mukherji was raised in argument and was rejected in 1952 AC 582, at pp.586, 589. Lord Porter observed at p.613,

> "One other point on the question of substance has been mentioned. It was suggested that; immunity would only be granted where the country claiming it in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition and in any case it was not taken either before Jenkins J. or in the Court of Appeal and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another. See per Lord Maugham in The Tristina, 1938 A.C. 485, 518".

These observations were followed by Jenkins L.J. in (1957) 1 QB 438 at p. 469. He pointed out that Lord Maugham's observation in the Cristina case, 1938 AC 485, at p.518, suggested a somewhat narrow view, but the question was: what was the law of nations by which civilized nations in general were bound? He added :

> "If the point is material, I think one must assume, although there is no positive evidence of it, that the particular civilized Sovereign State of Spain considers itself bound by the general principle of sovereign immunity. That, in my view, tor the present purpose suffices and it is unnecessary to go further and enquire what view would the courts of Spain take of a claim to sovereign immunity raised by some foreign sovereign in those

courts and based on facts comparable to the particular facts of this case".

56. The general rule of immunity of foreign States is recognized by all civilized States but the municipal laws of different States differ considerably in its application. Exceptions recognized by some States are not allowed by others. The laws vary with regard to the conditions upon which the Courts assume jurisdiction in suits before it. The substantive and procedural laws differ. It is rare to find two States which administer identically the same set of rules with regard to the immunities to be granted to foreign States. Denial of immunity on the ground that the law of the State claiming immunity is different from our law would be in effect denial of immunity to all foreign States in all cases. In my opinion it is not established that our Court should decline to grant immunity to a foreign State in respect of acts jure gestionis because that State declines to grant immunity to other States in respect of similar acts. To say this is not to deny altogether the existence of the principle of reciprocity. The State may pass laws authorizing withdrawal of the immunity for reasons of lack of reciprocity. Thus the Diplomatic Immunities Restriction Act 1955, authorizes the British Crown by order in Council to withdraw the immunity of envoys of foreign States and their suites on the ground that the degree of immunity enjoyed by them exceeds that accorded to British envoys etc. by such States and the Crown there has passed an order in Council curtailing the immunity of a large number of foreign missions. The Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 contains similar provisions for the exclusion or modification of the immunities on the basis of reciprocity. I also venture to think that independently of any statute, the courts may refuse to give immunity in cases where the State claiming the immunity denies our State equality before its laws and refuse to give our State immunities which it gives to other States. Those considerations do not arise in the present case.

57. Mr. Roy next contended that the appellant has submitted to the jurisdiction of this Court and has waived its claim to immunity by (a) entering unconditional appearance in the suit (b) by applying for rejection of the plaint on the basis of a claim of immunity under Section 86, of the Code of Civil Procedure and (c) by applying for revocation of the leave granted under Clause 12 of the Letters Patent. The contention found favor with Ray, J. I am however unable to accept this contention. Waiver is an intentional abandonment of a right. It is plain that the appellant did not by entering appearance and by making the application intend to waive its claim to immunity. On the contrary it always claimed immunity from the suit. Under the rules on the Original Side of this Court the appellant was bound to enter appearance before it could be heard on the question of immunity. There is no provision in our rules which enables the defendant to enter a conditional appearance or an appearance under protest in a case of this kind. The appellant entered appearance and made the application with a view to challenge the jurisdiction of the Court. The objection as to the jurisdiction was always kept in the forefront. Every step taken by the defendant in the suit was a step taken in denial of the jurisdiction. In 7 Bom HC OC 150, an ex parte decree was passed against the Ruler of an Indian State. The defendant subsequently applied to set aside the decree on account of his misdescription in the proceedings. The application was dismissed on the ground that it was too late. Subsequently after the plaintiff had applied for execution of the decree, the defendant applied to set aside the decree on the ground that he was an independent sovereign Prince and as such the decree was passed without jurisdiction. The plaintiff contended that he had submitted to the jurisdiction of the Court and had waived his claim for immunity. The Court rejected this contention. Westropp C.J. observed at

page 164,

> "The defendant, if originally privileged from suit in this Court, has not in anywise waived that privilege by acquiescence in the jurisdiction of the Court. Every step which he has taken has been in denial of that jurisdiction."

In 84 Cal LJ 52 the Province of East Bengal which was a Province of the State of Pakistan intervened in a suit pending against the Province of Bengal and the Agricultural Income Tax Officer, Dacca Range and applied for permission to file a written statement. The application was granted and the Province of East Bengal entered appearance in the suit and filed a written statement stating that it was the Province of an Independent Sovereign State and claiming that the Court had no jurisdiction to try the suit. This Court held that the Province of East Bengal had not waived its privilege by intervening, entering appearance and filing written statement in the suit. The decision of this Court was reversed on appeal by a majority decision of the Supreme Court on another ground, see (1951) SCR 1 . The majority of the Court did not express any opinion on the question of submission to jurisdiction. Fazl Ali J. who was in the minority however dealt with this question and ruled that the Province of East Bengal had not waived its privilege by its intervention and application for permission to file written statement.

58. In my opinion this suit is barred by the general principles of International Law which now form part of the Indian Law.

59. I agree with the order passed by my Lord.

Appeal allowed.