

# CALCUTTA HIGH COURT

Royal Nepal Airline Corporation

Vs.

Monorama Meher Singh Legha

Appeal from Original Orders Nos. 156 and 165 of 1964

H.K. Bose, C.J. and G.K. Mitter, J.

11.09.1964

## JUDGMENT

### **Bose, C.J.**

1. This appeal No. 156 of 1964 is from an order of Mallick, J. dated the 26th May 1964 refusing an application for trial of certain issues arising in the suit as preliminary issues and for examination of certain witnesses de bene esse in respect of such preliminary issues.

2. The suit out of which the application for trial of issues as preliminary issues arises was instituted by the plaintiffs-respondents on or about the 30th October 1961 for recovery of a sum of Rs. 8,42,500 for damages, interest and costs against the appellant Royal Nepal Airline Corporation. The cause of action as stated in the plaint is in substance as follows:-

The defendant is a Corporation incorporated under the laws of Nepal having its Head-Office at Kathmandu, Nepal and it carries on business inter alia at No. 42 Chowringhee Road, Calcutta, within the jurisdiction of this Court. One Meher Singh Legha was at all material times employed as an Aircraft Pilot by and under the defendant on a basic salary of Rs. 1,800 per month. Efficiency Allowance Rs. 200 per month and Nepal Allowance Rs. 500 per month aggregating to Rs. 2,500 per month besides Overtime Allowance at rates mentioned in the letter of appointment. On the 5th November 1960 the said Meher Singh Legha was in course of his employment under the defendant acting as the Captain and/or was in charge of plying a Dakota Aircraft belonging to the defendant which took off from Bhairwa Aerodrome in Nepal for Pokhra at about 2 p.m. Within three or four minutes after such taking off the aircraft instead of proceeding towards Pokhra was returning to Bhairwa and was attempting to land at the Bhairwa Aerodrome. During such attempted landing the air-craft crashed near the Bhairwa Aerodrome and the said Meher Singh died shortly after as a result of the said crash. The said air crash of accident and the death of the said Meher Singh was due to negligence ;and/or breach of duty on the part of the defendant. The particulars of such negligence are set out in paragraph 7 of the plaint. In paragraph 8 of the plaint it is stated that the said air craft was at all material times owned, looked after, maintained and/or managed by the defendant. In paragraph 12 of the plaint it is stated that Meher Singh Legha died intestate leaving plaintiff No. 1 his sole widow, plaintiffs Nos. 2 and 4, his minor sons and the plaintiff No. 3 his minor Daughter as his sole heirs and legal

representatives and the plaintiffs have by reason of the death of Meher Singh suffered loss and damages which the plaintiffs assess at Rs. 8,42,500. The particulars of such loss and damage are set out in paragraph 15 of the plaint.

3. The defendant entered appearance on or about the 2nd February 1962 and filed its written statement on or about the 19th February 1962. In the written statement it is denied that the defendant carried on business at premises No. 42 Chowringhee Road or any other place in Calcutta either within the jurisdiction of this Court or otherwise and the Company known as Jamair Co. (Private) Ltd. acts as an agent of the defendant in Calcutta for the limited purpose of handling ground services and general sales as mentioned in the agreement entered into between the defendant and the said Company on the 9th December 1959. The said Jamair Co. is an independent Contractor and has its business in Calcutta and other places. It is further denied in the written statement that the defendant Royal Nepal Airline Corporation is a body corporate or that it is incorporated under the Royal Nepal Airline Corporation Act, 2014 S. Y. It is alleged that the defendant is functioning under the direct supervision and control of the Government of Nepal through a Governing Body and an Administrator and in the premises the suit in its present form is not maintainable. These allegations are contained in paragraph 2 of the written statement and without prejudice to these contentions the merits of the case are dealt with in the subsequent paragraphs of the written statement being paragraphs 4 to 24 thereof and in paragraph 25 it is stated that the plaintiffs were without prejudice offered a sum of Rs. 35,000 on account of compensation for the death of Meher Singh in course of employment but the plaintiffs refused to accept the same. In paragraph 26 of the written statement it is alleged that this Court has no jurisdiction to entertain and try this suit. In paragraph 27 it is stated that the suit is not maintainable and in paragraph 28 it is stated that there is no cause of action and the suit should be dismissed with costs.

4. The written statement is signed by the constituted attorney of the Administrator for Royal Nepal Airline Corporation. This constituted Attorney Divakara Bickram Rana who described himself as an Administrative Officer of the defendant Corporation and as the constituted Attorney of the Administrator of the said defendant has verified the written statement on behalf of the defendant.

5. The letter of appointment dated 12th January 1960 is annexed to the written statement and marked A. From the said letter it appears that Meher Singh was appointed as a Pilot of the defendant Corporation and was put under the immediate control of the Operations Manager of the Corporation subject to the overall control of the Administrator (Paragraph 5). He was also to abide by the rules and regulations of the Corporation and was to devote his efforts solely to the duties in the Corporation and to the furtherance of its interests. Under paragraph 7 of the letter of appointment Meher Singh was also entitled to 30 days leave in every 11 months of completed service and in case the Corporation was not in a position to give him leave, salary in lieu of such leave would be paid to him by the Corporation. This letter is signed by the then Administrator for the defendant Corporation.

6. On 24th February 1962 on the application of the plaintiffs the defendant was directed to file its affidavit of documents and on the 24th March 1962 the defendant filed its affidavit of documents. On the 30th March 1962 on the application of the defendant the plaintiffs were directed to file their affidavit of documents. On the 14th December 1962 notice was given by the

solicitors for the plaintiffs to the solicitors for the defendant informing that the suit would be mentioned on the 17th December 1962 for early hearing. On the 17th December 1962 the solicitors for the defendant requested the plaintiffs' solicitors not to mention the suit as their clients belonged to Nepal. On the 4th January 1963 the suit was mentioned by the plaintiffs and was directed to appear in the list on the 7th January 1963 marked to be mentioned. On the last mentioned date upon the representation made by the defendant's solicitors that inspection of documents was not yet complete, the suit was directed to go out of the list. Thereafter between 12th February 1963 and 2nd January 1964 the suit was mentioned from time to time. and on the last mentioned date it was directed to appear in the list on the 16th January 1964. On the 20th Feb. 1964 a notice of motion was taken out by the Solicitors for the defendant returnable on the 24th February 1964 for an order that (a) the issues as to whether this Court has jurisdiction to entertain and try the suit and whether the suit is maintainable be tried and determined as preliminary issues, (b) directions be given for trial of the said preliminary issues and a special date be fixed for hearing of the said issues and (c) if necessary, the petitioners' witness on the said preliminary issues be examined de bene esse.

7. In the petition which was affirmed as ground of this notice of motion it is inter alia alleged that in or about 1958. His Majesty's Government of Nepal decided that the Nepalese Airlines would be started on a commercial basis and for this purpose certain aircrafts were acquired and purchased by the Government of Nepal which started running the aircrafts under the name Royal Nepal Airline Corporation through its Ministry of Transport and Communication. The aircraft which was involved in the accident was received by the Government of Nepal in 1959 as aid and gift from the United States Government and was all material times the property of His Majesty's Government of Nepal. A Statute known as the Royal Nepal Airlines Corporation Act, 2014 S. Y. was promulgated by His Majesty the Government of Nepal for running and managing the aircrafts and it was published in the Nepal Gazette, but only Section 1 of the Act providing that the said Act was to be called "The Royal Nepal Airlines Corporation Act 2014 S.Y." came into force immediately upon the promulgation thereof but the other provisions or the said Act never came into force or became operative. The aircraft in question and all other aircrafts continued to remain the property of the Government of Nepal and the Airlines continued to operate under the direct supervision and control of His Majesty's Government through a Governing Body and an Administrator. The defendant Corporation which was never a body corporate continued to remain an undertaking and organ of His Majesty's Government. The expense of the air lines are met from the Government revenue and all receipts and profits formed part of Government revenue. Nepal has at all material times been and still is recognized by the Central Government as a foreign State and His Majesty the King of Nepal is recognized as the head of the State of Nepal. But no permission of the Central Government was ever obtained by the plaintiffs to institute this suit. Alternatively and in any event, the Government of Nepal and/or its ruler enjoys full and complete immunity and exemption from the processes of Civil Courts in this country. Moreover, the alleged cause of action which arises out of an alleged tort arose wholly within the territories of Nepal and as such this Court has no jurisdiction to entertain and try the suit. In paragraph 14 of the petition the issues arising out of the pleadings are set out as follows :-

- (1) Is the defendant a body corporate as alleged in paragraph 1 of the plaint ? If not, is the suit maintainable ?
- (2) To whom did the plane belong at the time of the alleged accident ? Did it belong to

His Majesty's Government of Nepal ? If so, has this Honourable Court any jurisdiction to entertain and try this suit ?

(3) Did the defendant at the date of the said institution of the suit carry on business at premises No. 42, Chowringnee Road, Calcutta ? Is Messrs. Jamair Co. (Private) Ltd. an independent Controller? If so, has this Honourable Court any jurisdiction to entertain and try this suit ?

(4) Did the air crash occur due to negligence and/or breach of duty on the part of the defendant as alleged in the plaint ?

(5) To what damages, if any, are the plaintiffs entitled ?

8. In paragraph 15 of the petition it is stated that in view of the facts stated above, no issues on merits can be decided by this Honourable Court and this Honourable Court had no jurisdiction to entertain and try this suit, The petitioner never submitted nor intends to submit to the jurisdiction of this Honourable Court. In the premises, the issues which arise for determination by this Honourable Court before any question of merits is gone into are as to whether the suit is maintainable and whether this Honourable Court has jurisdiction to entertain and try this suit (paragraph 16). In the subsequent paragraphs of the petition certain facts relating to the balance of inconvenience relating to the suit being tried in this Court are set out and it is alleged that it will be extremely inconvenient and the defendant will be seriously prejudiced if the suit is tried on its merit in this Court.

9. In the affidavit-in-opposition which is filed on behalf of the plaintiffs and which is affirmed by the plaintiff No. 1 Monorama Meher Singh Legha it is denied that the aircraft in question was at all material times the property of His Majesty's Government of Nepal. It is also denied that only Section 1 of the Royal Nepal Airlines Corporation Act, 2014 S. Y. has come into force and the other provisions have not. It is also denied that the suit is in reality against a Ruler of a foreign State and/or a foreign State or that it is necessary to obtain the permission of the Central Government to institute the suit. It is further stated in this affidavit that the defendant has duly submitted and is in law bound to submit to the jurisdiction of this Court. Mallick, J. who heard the application has in his judgment observed that the issues sought to be raised as preliminary issues namely, whether the Court has jurisdiction to try the suit and whether the suit is maintainable are not pure issues of law, but they are mixed issues of fact and law and for the reasons given in his judgment the learned judge came to the conclusion that no order as asked for in the application could be made. It appears that the parties agreed before the learned trial judge to have an early date fixed for the hearing and accordingly 16th June 1964 was fixed as the date of hearing and the suit was directed to appear at the top of the list subject to part-heard. But this order was made without prejudice to the rights of the parties to raise any point at the hearing as to the manner in which the trial is to be conducted. It is against this order of the learned trial Judge that the present appeal has been preferred.

10. In appeal No. 165 of 1961 the Ambassador of the King of Nepal has made an application that the said suit being (*Monorama Meher Singh Legha v. Royal Nepal Airlines Corporation*<sup>1</sup>) be dismissed on the ground of sovereign immunity claimed and, if

<sup>1</sup> suit No. 1678 of 1961

necessary, for intervening in the said suit for the purpose of claiming sovereign immunity on behalf of His Majesty the King of Nepal. In the petition affirmed by the Ambassador himself on

the 21st May 1964 it is stated that in or about 1958 His Majesty's Government of Nepal decided that a Nepalese Airline would be started on commercial basis to operate on international routes and His Majesty's Government acquired and/or purchased some aircrafts and started running the same under the name and style of Royal Nepal Airlines Corporation through its Ministry of Transport and Communication. The aircraft which is the subject matter of the suit was acquired in or about 1959 from the United States Govt. under its Aid Programme and at all material times was the property of His Majesty's Government of Nepal. To run and manage the aircrafts a Statute known as the Royal Nepal Airline Corporation Act 2014 S. Y. was promulgated but only Section 1 of the said Act providing that the said Act be called "The Royal Nepal Airline Act, 1014" came into effect upon such promulgation but the other provisions of the Act never came into force or became operative. All the aircrafts continued to remain the property of His Majesty's Government of Nepal and the Airlines continued to be operated under the direct supervision and control of His Majesty's Government through a Governing Body and an Administrator appointed by His Majesty's Government. At all material times the Airlines was merely an undertaking and an organ of His Majesty's Government. Expenses of the Airlines were met from out of the Government Revenue and all receipts and profits similarly formed part of Government revenue. The Airlines Corporation is not a body corporate but assuming it is so, it is only His Majesty's Government which is financially and otherwise interested in or concerned with the said undertaking which is a public undertaking run by His Majesty's Government of Nepal for the benefit of the subjects of the King of Nepal. Nepal is an independent and sovereign monarchical Hindu State and is recognised by the Government of India as a foreign State and the King of Nepal is recognised as the Head of that State. The petitioner is the accredited representative of His Majesty the king of Nepal and is His Majesty's Ambassador in the Republic of India as would appear from the certificate of the Secretary to the Government of India, Ministry of External Affairs. The suit filed is in reality against a Ruler of a foreign State and/or a foreign State. The Government of Nepal and/or its Ruler enjoys full and complete immunity and exemption from the processes of Civil Courts in this country and the Royal Nepal Airlines Corporation is also immune from the processes of this Hon'ble Court. The contract of employment was entered into wholly within the territories of Nepal and is subject to Nepalese Laws and the cause of action alleged arises out of an alleged tort which took place in Nepal. At no time His Majesty or His Government in any way submitted to the jurisdiction of this Court. Permission of the Government of India should have been obtained by the plaintiffs to institute the suit. In the circumstances, it is prayed that the suit should be dismissed on the ground that this Court has no jurisdiction to entertain or try this suit.

11. In the affidavit-in-opposition which has been affirmed and filed by Monorama Meher Singh Legha it is denied that the aircraft which was involved in the accident was the property of His Majesty's Government of Nepal. It is also denied that the Airlines Corporation was not a body corporate or that it is operated under the direct supervision and control of His Majesty's Government of Nepal or that it is an undertaking or organ of the Government or that the expenses of the Government are met from out of the Government revenue and all receipts and profits form part of Government revenue. It is further stated that neither the defendant Corporation nor its Governing Body nor its Administrator enjoy immunity or exemption from the processes of Civil Courts in this country. It is also denied that the suit is in reality or otherwise against the Ruler of a foreign State or a foreign State or that it was necessary to obtain the permission of the Government of India to institute this suit. Neither His Majesty the King of Nepal nor His Government is a party to the action and as such the claim for sovereign immunity

is not maintainable and in any event, the immunity, if any, has been expressly or impliedly waived.

12. It is to be noted that besides these bare denials and allegations in the affidavit-in-opposition there are no materials furnished on behalf of the plaintiffs to support the denials and allegations in the affidavit nor any facts relating to the waiver are pleaded in this affidavit.

13. In the affidavit-in-reply affirmed on the 4th June, 1964 and filed by the Ambassador there is repetition of the facts stated in the petition and it is stated that having regard to the certificate obtained from the Ministry of External Affairs, Government of India and the affidavit claiming immunity filed on behalf of His Majesty the King of Nepal, the onus of proof has shifted entirely on the plaintiff to establish that His Majesty the King of Nepal or His Majesty's Government is not entitled to claim sovereign immunity from the jurisdiction of this Court.

14. Mallick, J. before whom this application came up for hearing dismissed it with costs on the 17th June 1964. The learned Judge observed in course of his judgement that "I do not find any provision in the Code of Civil Procedure whereby a stranger to a suit can ask the Court to dismiss the suit nor has any authority been cited in that behalf. I can well understand a stranger to the suit asking the Court to be added as a party on the allegation that he is interested in the litigation, the Court has power under the Code to add him as a party. That however, is not the instant application. In that view of the matter I do not think that the petitioner is entitled in law to ask for a dismissal of the suit.

Mr. B. Das learned counsel appearing in support of the application cited to me a number of cases which I do not think it necessary to discuss. Substantial question of International Law will have to be decided at the appropriate time in the suit. In this application however I do not think it necessary to decide any such question. In the result, the application fails and is dismissed with costs."

15. It is against this decision that this appeal No. 165 of 1964 has been preferred.

16. Now it is true the Code of Civil Procedure does not contain any express provision laying down the procedure to be followed where a foreign Ruler or a foreign State affected by a claim in a proceeding filed in Courts in this Country, claims immunity in respect of the processes of this Court. There is no provision in the Code for the foreign Government entering a conditional appearance to the suit as is provided for in the Rules of the Supreme Court in England under Order 12 Rule 30 nor is there provision in the Civil Procedure Code for giving notice of motion for an order that the writ should be set aside on the ground that it had impleaded a foreign sovereign State. But the question arises whether the absence of any specific procedure in the Code of Civil Procedure will leave the foreign Ruler or the foreign State directly or indirectly impleaded in the proceedings filed in this Court, without any remedy. It is well known that since laws are general rules, they cannot regulate all cases that may possibly happen. The Civil Procedure Code is not exhaustive and any particular point not specifically dealt with must be governed by general principles.

17. The foundation for the application to set aside the writ and all subsequent proceedings thereto is as pointed out by the House of Lords in the case of *Compania Naviera Vascongada v.*

*Steamship "Cristina"*<sup>1</sup> at p. 490 (per Lord Atkin) to be found in two propositions of International Law which seem 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.

18. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain any property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to properties only used for the commercial purposes of the sovereign or to personal private. In this country it is, in my opinion, well settled that it applied to both.

19. Lord Thankerton at page 495 laid stress on a passage in the judgment of L.J. Bratt in the case of the *Parlement Beige* (1880) 5 PD 197 (220) describing it as a striking passage and which is as follows :-

"The ship is in fact not brought within the first proposition. As to the second it has been frequently sued although he has carried on a 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 consistent with the independence and dignity of the State which he represents. ... .."

20. Lord Wright after referring to and dealing with a large number of cases of the English Courts as also of the American Court observed at page 512 :-

"This modern development of the immunity of public ships has not escaped severe and in my opinion justifiable criticism on practical grounds of policy, at least as applied in times of peace. The result that follows is that Government may use vessels for trading purposes in competition with private ship owners and escape liability for damage and salvage claims."

Then at page 513 Lord Wright further observed :

"I may add that in the present case it is in my opinion sufficiently shown by the evidence before the Court that the Spanish Government had actually requisitioned and taken possession and control of the *Christina*. That is all that is needed to justify the claim to immunity on the ground of 'property'. The question how far a mere claim or assertion by that Government would be conclusive on the Court

<sup>1</sup>1938 A. C. 485

does not arise here."

21. It will not be out of place to mention at this stage that in this case before the House of Lords

the ship Christina belonging to the appellant which was a Spanish Company, had been requisitioned by the Spanish Government and the Spanish Government has actually taken possession of the ship which was then lying in the port of Bardiff by putting a new Master in charge of the ship after dismissing the old Master. Thereupon the appellant company issued a writ in rem claiming possession of the Christina as their property. The Spanish Government entered a conditional appearance and gave notice of motion for an order that the writ should be set aside inasmuch as it impleaded a foreign sovereign State. The House of Lords held that the Courts of that country will not allow the arrest of a ship including a trading ship which is in the possession of a foreign Sovereign State inasmuch as to do so would be an infraction of the Rule of International Law that a Sovereign State cannot directly or indirectly be impleaded without its consent.

22. Lord Maugham at page 516 made the following observations :

"There is I think neither principle nor any authority binding this House to support the view that the mere claim by a Government or an Ambassador or by one of his servants would be sufficient to her (sic) the jurisdiction of the Court except in such cases as ships of war or other notoriously public vessel or other public property belonging to the State. An independent sovereign sued for breach of promise of marriage in our Courts can indeed claim to be outside of our jurisdiction; but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's Rule he would in my opinion, be bound to prove his title".

23. At page 523 Lord Maugham recorded this following further observations :

"It would seem that the legislature of the United States like that of all or nearly all other civilised countries, is disposed to the view that the immunity of State-owned private vessels ought not to be continued."

24. In the case of *United States of America v. Dollfus Mieg Et Compagnia S. A.*<sup>2</sup>, is equal to 1952 AC 582 an action had been brought by a French Company for recovery of 64 gold bars which had been stored in a Bank at Limoges in a special vault hired for the purpose but which had been seized and forcibly taken away by the Germans in 1944 but recovered later on by the allied forces and ultimately deposited in the Bank of England sometime in March, 1948 in a gold set aside account in the name of the Treasury on account of "Governments of the United States, the United Kingdom and France". The action was brought against the Bank of England claiming inter alia delivery of the bars and alternatively damages for their conversion. It appears that 13 of these gold bars had been sold by the Bank by mistake. The Bank applied by motion to have the writ set aside and all subsequent proceedings in the action stayed, on the ground, that the bars were in

<sup>2</sup>(1952) 1 All England Reporter 572

the possession or in control of the three Governments and the action impleaded two foreign sovereign States which declined to submit to the jurisdiction of the Court. Jenkins, J. before

whom the action came to be heard ordered all further proceedings in the action to be stayed. On appeal, the Court of appeal upon receiving further evidence which disclosed that after the issue of the writ in the action, 13 of the gold bars had been sold by mistake, allowed the appeal so far as regards 13 bars were concerned and discharged the orders for stay in relation thereto, but maintained the order of stay with regard to the remaining 5.1 gold bars. Subsequently the Bank applied to the Court of Appeal for the postponement of the drawing up of the order to enable the Government of the United States of America and the Republic of France to be joined as defendants in the action but this was refused. Upon that these two Governments presented a petition to the House of Lords for an order adding them as defendants in the action. An order was subsequently made joining them as parties. These two Governments then moved for a stay of further proceedings in the action but this was dismissed by Romer, J. and the Court of Appeal affirmed his decision. Thereupon the two Governments appealed to the House of Lords. It was held by the House of Lords that the relationship between the bank and the three Governments was that of bailee and bailors and with regard to the 31 bars remaining with the Bank the relationship of bailee and bailors still existed and the doctrine of immunity of foreign sovereign from process in a Municipal Court in respect of property which was in his possession or under his control was not confined to cases in which the foreign sovereign was either directly in possession of the property himself or indirectly in possession by his servants but applied also where bailment of the property was made by or on behalf of the foreign sovereign; and as action was brought against the bailee, the Court had no jurisdiction to order the Bank to deliver to the French Government the 51 gold bars which were still subject to the contract of bailment; inasmuch as "possession" within the meaning of the doctrine of immunity included a right to immediate possession. It was further held that with regard to the 13 bars the action against the Bank for damages for conversion of the 13 bars should be allowed to proceed inasmuch as the Bank had itself put an end to bailment by selling the same.

25. In this case passages from the speeches of Lord Atkin and Lord Wright in the *Cristina* case were quoted and the principles enunciated therein were applied to the case of a bailment.

26. In the case of *Juan Ysmeal and Co., Incorporated v. Republic of Indonesia*<sup>3</sup>, it has been laid down by the Judicial Committee that a foreign Government claiming that its interest in property will be affected by the judgment in action to which it is not a party and in which it alleges that it is indirectly impleaded, is not bound as a condition of obtaining inasmuch to prove its title to the interest claimed, but it, must produce evidence to satisfy the Court that its claim is not merely illusory nor founded on a title manifestly defective. The Court must be satisfied that conflicting rights have to be decided in relation to foreign Government's claim. When the Court reaches that point, it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

27. It has been further laid down in this case that the view of Scrutton, L.H. in the *Jupiter*, 1924 P. 236 that mere assertion of claim by foreign company to property, the subject of

<sup>3</sup>1955 AC 72

an action, compels the Court to stay the action and decline jurisdiction is against the weight of authority and cannot be supported in principle. The facts of this case were that an action in rein had been brought by the appellant company against a steamship of which it claimed possession as owners. The Republic of Indonesia to whom the vessel had been chartered by the appellants and used for carrying troops alleged that they had bought the vessel through an Agent of the

appellants and so were the owners of the vessel and they sought to have the writ and the subsequent proceedings set aside on the ground that the writ impleaded a foreign sovereign State. The evidence adduced established that the appellant's agent had no authority to sell the ship and the Agent acting for the foreign company was fully aware of that fact. It was on these facts held that the title of the foreign company to the ship was manifestly defective and they had not established that they possessed such an interest in the vessel as would show that they were impleaded and therefore there was no ground for setting the writ aside.

28. The doctrine of immunity has been extended to the case of debt in the case of *Rahimtoola v. Nizam of Hyderabad*<sup>4</sup>, In this case the facts were that in 1948 when Indian troops were invading Hyderabad a sum of Pounds 1007940-9-0 standing to the account of the Nizam and his Govt. in the West Minster Bank Ltd. in England was transferred without authority by one Nawab Moin or Nawah Miz (either of whom were entitled to operate on the account) into the name of Rahimtoola (then High Commissioner for Pakistan in the United Kingdom) who received it on the instructions of the Foreign Minister of Pakistan, Sir Md. Saffrullah Khan. The Nizam and his Government brought an action against Rahimtoola and the Bank claiming the money as money had and received to their use. Rahimtoola asked that the writ in the action be set aside as against him and the proceedings be stayed as against the Bank on the ground that the action sought to implead a foreign sovereign Pakistan or sought to interfere with the right or interest of the Government of Pakistan in the money. It was conceded that Rahimtoola had not established any equitable title to the money and the claim to immunity was based on the fact that the legal title to the debt was vested in him as High Commissioner for Pakistan. It was held that the writ should be set aside against Rahimtoola and the proceedings stayed against the Bank notwithstanding the fact that the money was paid to Rahimtoola wrongfully or by a mistake of fact, for Rahimtoola was the agent of the sovereign State of Pakistan which had a legal title to the subject matter of the action and the right to sue the Bank for it. Viscount Simonds in discussing the views of Romer, L.J. whether Rahimtoola was acting as "Agent" for Pakistan or that he was acting as the "organ" or "alterego" of Pakistan observed :

"If these words or either of them connote that a High Commissioner is in the same sense to be identified with Government he represents, as is for instance, a Department of State, I am not prepared to take a different view. But for the purpose of the present case it appears to me to be unimportant. No doubt if a defendant by whatever name he is called can be identified with the sovereign State, his task is easy. He need prove no more in order to stay the action against him. But as soon as it is proved that quoad the subject matter of the action the defendant is the agent of a sovereign state that in other words, the interests or property of the state are to be the subject of adjudication, the result is reached."

<sup>4</sup>1958 AC 379

29. Lord Reid laid stress on the fact that the only evidence before the House about the transaction was given by the appellant in two affidavits and he was not cross-examined and it appears from the affidavits that the appellant was acting throughout under as instruction in his official capacity as High Commissioner for Pakistan. Lord Reid further quoted in extenso from the judgment of the Court of Appeal in the case of *Haile Selassie v. Cable and Wireless Co. Ltd*<sup>5</sup>, at pp. 844-945 where Greens M.R. said :

"The rule applies in the case both of actions in personam and of actions in rem. But it has

never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the Court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party and the plaintiff claims it from that third party and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that title is being questioned. It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the Court merely because a claim to the property, or the doubt, had been put forward on behalf of a foreign sovereign."

Lord Canning struck a somewhat different note in his speech and pointed out that.

"Sovereign immunity should not depend on whether a foreign Government is impleaded directly or indirectly but on the nature of the dispute. If the dispute brings into question the legislative or international transactions of a foreign Government or the policy of its executive, immunity from process should be granted, but if the dispute concerns the commercial transactions of a foreign Government and arises properly within the territorial jurisdiction of our Courts immunity should not be granted."

30. Relying on the passage in Haile Selassie's case 1938 Ch 839 quoted above and the observations of Lord Denning it has been argued before us that the cause of action as pleaded in the plaint relates to a claim for damages arising out of certain commercial transactions and as such cause of action has no direct relation to any foreign sovereign or to any property of a foreign state and the dispute is one which is properly cognizable by this Court being a claim for damages resulting from an accident suffered by Meher Singh Legha in course of his employment, the claim for immunity cannot be extended to such a case. But as pointed out in the Cristina case 1938 AC 485 the doctrine of immunity, does extend, to the case of a claim for damages and this proposition has been approved of in Dollfus' case, 1952 AC 582 at p. 612 where Christina case is quoted.

31. This doctrine of sovereign immunity has also been extended to an action for breach of

<sup>5</sup>1938 Ch. 839

promise of marriage in the case of *Mighell v. Sultan of Johore*<sup>6</sup>. The facts in this case were that Sultan of Johore went to England and got himself introduced to the plaintiff in August 1885 under the assumed name of Mr. Albert Baker. After such introduction he promised to marry the plaintiff in that year, but later on he broke his promise. At all material times the Sultan had represented himself to be a private individual and an ordinary subject of the Queen and was always treated as such. In October 1885 the plaintiff accidentally discovered that the defendant

was the Sultan of Jahore but the latter made her promise never to reveal who he was nor to call him by any other name than that of Albert Baker saying that he wished to conceal his real position and to preserve his incognito. But as a result of his breaking the promise of marriage, an action was brought by the plaintiff. The Sultan then took up the plea that he was a sovereign prince and that no action could be maintained against him in the Municipal Courts of the Country for anything which he had done. It was held that by concealing the fact that he was an independent sovereign until the time the action was brought, he was not precluded from asserting at the proper time, namely, at the time when the action was brought that the Court had no jurisdiction to enter into any enquiry into the matters alleged by the plaintiff on the ground that he was an independent sovereign and was not submitting himself to the jurisdiction of the court.

32. The doctrine of immunity has also been applied in an action claiming damages for an alleged libel in an article in a weekly newspaper published by a business of news agency known as the Tass Agency. The case is reported in *Krajina v. Tass Agency*<sup>7</sup>, In this case the first defendant The Tass Agency after entering a conditional appearance applied to the Court to set aside the writ which the plaintiff issued claiming damages for an alleged libel published on the 7th May 1948 in an article in a weekly newspaper. It appeared that under the Russian Statute by which this Tass Agency was established, it was provided that the Agency should enjoy all the rights of a juridical person but the Soviet Ambassador in Great Britain gave a certificate to the effect that the Agency constituted was a Department of the Soviet State "exercising the rights of a legal entity". It was held by the Court of Appeal that having regard to the certificate of the Ambassador that the Tass Agency was a Department of the Soviet State, the burden of disproving that the Agency constituted such a Department was on the plaintiff. It was further held that even if the Agency was a State Department having a separate entity, it did not follow that the Soviet Government by procuring its incorporation had deprived it of the right to assert the immunity normally attached to a Department of a foreign State under the International law and accordingly the order setting aside the writ and service thereof on the Tass Agency was rightly made and should be upheld. So this case shows that even an incorporated body having a juristic personality is entitled to sovereign immunity if it is a Department of the sovereign State.

33. The next case to which reference may be made is that of *Baccus S. R.L. v. Servicio Nacional Del Trigo*<sup>8</sup> In this case the plaintiffs who were a limited company formed under the laws of Italy and carrying on business, there entered into two c.i.f. contracts with the defendants carrying on business in Spain for sale by the defendants to the plaintiffs 26,000 tons of rye. The contract continued a term which provided that

"for any divergence which may arise..... both parties submit to the jurisdiction of

<sup>6</sup>1894-1 O. B. 149

<sup>8</sup>(1957), 1 QB 438

<sup>7</sup>1949-2 All England Reporter 274

the technical courts at London." Upon dispute arising between the parties the plaintiffs issued a writ claiming damages for breach of contract. The defendants entered appearance through their solicitors in London and subsequently they also issued a summons for security for costs on the ground that the plaintiffs registered office was situate out of the jurisdiction. On this summons an order was made by consent for security for the defendants' costs in the sum of Pounds 150 and that amount was lodged. This was on the

30th January 1956, On the 18th April 1956 a summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a Department of the State of Spain and that the State of Spain through its Ambassador claimed sovereign immunity. An order was made as prayed by the defendants upon the evidence concerning the defendants' status and constitutional position and the laws of Spain in relation to them being adduced by means of certain affidavits which were filed in the proceeding. It was admitted by the defendants that they possessed a legal personality, had power to make contracts on their own behalf for the buying and selling of wheat and could sue and be sued in their own name. It was not disputed that apart from the effect of their incorporation the defendants should be a Department of the sovereign State of Spain. It was held by the majority judgment of the Court of Appeal that the defendants were a department of the State of Spain notwithstanding that they were a corporate body and a separate legal entity and they were therefore entitled to claim sovereign immunity. It was also held that the mere fact that the head of the defendants had given instructions to the defendants' solicitors to enter appearance and asked for security for costs did amount to submission to the jurisdiction of the Courts, as such instructions had been given without the knowledge or authority of the foreign sovereign or the superiors of such head of the Department and the head of the Department giving such instructions had also no knowledge that the right to immunity was being waived by giving instructions. Jenkins, L.J. observed at p. 466 as follows :

"In my view of the evidence it is reasonably claimed that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were accorded that status for the purpose for which they were formed and the purpose for which they were formed were briefly the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a Department of State. Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body ? In my view that would be plainly wrong. In these days the Government of a sovereign state is not as a rule reposed in one personal sovereign : It is necessarily carried out through a complicated organization which ordinarily consists of many different Ministries and Departments'. But Jenkins, L.J. has also made it clear that each case must depend on its own facts and it is not to be taken as following from what he has said that every Corporation in which a foreign State may be interested will necessarily be in Department of the State.

34. It will thus appear that even if the Nepal Airlines Corporation, the defendant in the case before us, had been in fact a corporate body, that would not have prevented the defendants or the Ambassador of the King of Nepal from claiming sovereign immunity on behalf of the King of Nepal provided the defendant can be regarded as a Department of the State of the Government of

Nepal. I have no doubt that the materials placed before this Court in the affidavits filed by the Ambassador and on behalf of the defendant amply Justify us in holding that the defendant is a Department of the Government of Nepal and as such is entitled to claim immunity from the processes to exercise its jurisdiction in respect of the claim for damages which has been brought by the plaintiffs against the defendant.

35. The attention of the Court has also been drawn to a decision of this Court reported in *United Arab Republic v. Mirza All Akhar Kashan*<sup>9</sup>. In this case also a suit had been brought in this Court against a foreign Republic State (United Arab Republic) claiming damages for breach of a contract for the supply of tea by the plaintiff. Lahiri, C.J. held that

"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 this country under the general principles of international law which have been adopted as part of the Municipal Law of this Country by the decision of the Federal Court and/or this Court".

But the learned Chief Justice further observed as follows :

"I realise that the result is somewhat anomalous because under Section 86, Civil Procedure Code, the immunity of the Ruler of a foreign State is duly 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 and Section 86 (2)(b) of the Civil Procedure Code."

36. It has been pointed out that this observation of the learned Chief Justice that the principle of sovereign immunity is linked up with Section 86 of the Code of Civil Procedure and is modified by the provisions contained therein is not strictly accurate. It appears that in the case of *Gaekwar Baroda State Railway v. Hafiz Habib-ul-Haq*, some such argument which leads colour to the observation of Lahiri, C.J. which is extracted above, was advanced on behalf of the appellant and is set out at p. 185 of the Report. It is to the following effect :

"So far as the Indian states are concerned the Code of Civil Procedure modified the rule of private international law based on the principle of the absolute independence of a foreign sovereign and the case has to be decided on the construction of the provisions of Section 86 and 87 of the Code and not with reference to private International law."

<sup>9</sup> AIR 1962 Cal 387

<sup>10</sup>65 Ind App 182

37. This was the argument of Sir William Jowitt, K.C. and it is possible that the learned Chief justice's observation is inspired by this argument advanced in the Baroda case. But it appears to us that Sections 86 and 87 of the Code have no relation to the principles of private International law based on the independence of a foreign sovereign or of a foreign State but these

provisions of the Code afford an additional protection or privilege to a foreign sovereign providing immunity from being sued in the Municipal Courts of this country without previous permission of the Central Government being obtained to the institution of such suits.

38. The Judicial Committee in the Baroda case 65 Ind App 182 (Supra) at p. 197 used the expressio "privilege" while dealing with the provisions contained in Section 86 and 87 of the Code and held that the said provisions were imperative and having regard to the public purposes which they served, they could not in their Lordships' opinion be waived in the manner suggested by the High Court. It may be noted that after the amendment of the Civil Procedure Code in 1951 a specific provision has been inserted in Section 86 of the Code of Civil Procedure to the effect that the privilege conferred by the Section can be waived.

39. The Supreme Court in the case of *Mohanlal Jain v. Sawai Man Singhji*<sup>11</sup>, has traced the history of the provisions of Sections 86 and 87 on some detail at pp. 74 to 76 in paragraph 11 of the judgment Hidayatullah, J. has observed :

'Immunity from Civil action may be described also as a privilege because the word "privilege" is sufficiently wide to include an immunity .... .. In our opinion the words "personal rights and privileges" are sufficiently comprehensive to embrace an immunity of this character. It is therefore clear that the section cannot be challenged as discriminator because it arises from a classification based on historical facts".

40. This decision of the Supreme Court makes it clear that Sections 86 and 87 of the Code provide additional protection or privilege to Rules of foreign States in respect of suits proposed to be instituted against them in the Courts in this country, but this is quite apart from the principles of International Law relating to sovereign immunity based on the absolute independence of a foreign sovereign.

41. The next point which may be taken up for consideration is whether there has been any submission to jurisdiction of this Court or waiver of the immunity which precludes the defendant or the Ambassador from claiming this sovereign immunity. The facts on which reliance is placed on behalf of the plaintiff as indicating that there has been submission to jurisdiction or waiver of the immunity are that after the plaint was filed on the 8th October 1961 the solicitors of the defendant wrote a letter dated the 2nd February 1961 to the solicitors of the plaintiffs intimating that they entered appearance on behalf of the defendant Corporation. Then on the 19th February, 1962 the written statement was filed on behalf of the defendant and there is elaborate pleading in the written statement on the merits of the case. Then on the 24th February, 1962 upon the application of the plaintiffs

<sup>11</sup> AIR 1962 SC 73

an order was made directing the defendant to file its affidavit of documents and on the 24th March 1962 the affidavit of documents was filed on behalf of the defendant. On the 30th March, 1962 upon the application of the defendant the plaintiffs were directed to file affidavit of documents. Then between 14th December 1962 and 2nd January 1964 the suit was mentioned before the learned Judge taking such suit from time to time for adjournment for the purpose of inspection and directions were given for the suit to appear in the list for the purpose of fixing a date and ultimately on the 20th February 1964 notice of motion was taken out by the solicitors of

the defendant for trial of certain issues arising on the pleading as preliminary issues and for certain witnesses on the said preliminary issues being examined de bene esse. It was also suggested that on the 5th February 1964 an application for commission for examination of witnesses in Nepal was taken out on behalf of the defendant but this is disputed by the learned counsel for the defendant and no material has been placed before us to show that any such application for commission had actually been made. But it appears that at the time Mallick, J. had passed the order refusing the application for trial of certain issues as preliminary issues, the parties agreed that an early date should be fixed for the hearing of the suit and so the suit was directed to be placed at the top of the list subject to part-heard on the 16th June 1964 for hearing. It is also submitted on behalf of the plaintiffs that there is no pleading of Section 86 of the Code of Civil Procedure claiming protection under that section and so the presumption is that there has been waiver of the sovereign immunity. But as pointed out already Section 86 of the Code is not to be mixed up with the principle of International Law relating to immunity from the processes of the Courts based on the Independence of the foreign sovereign and absence of pleading of Section 86 does not lead to the conclusion that the immunity available under the principle of International Law has been waived by reason of omission of such pleading. The further question which however arises is whether the other facts already referred to constituted waiver of immunity or submission to jurisdiction.

42. In the case of *The Jassy*, 1906 P. 270 an action in the Admiralty Jurisdiction was brought on March 6, 1906 by the owners of a Greek Vessel *Constantinios* against the owners and parties interested in the steamship *Jassy* belonging to the Roumanian Government claiming damages arising out of collusion between *Constantinios* and *Jassy* alleged to be caused by the negligence of the defendants or their servants. The steamship *Jassy* was thereafter arrested at Liverpool on the 18th March 1906 but released on an undertaking to put in bail for Pounds 1000 given by a firm of Liverpool solicitors acting under the instructions of the Liverpool representatives of the Government of Roumania. Subsequently an appearance was entered on March 22, 1906 on behalf of the owners of the *Jassy* by the London Agents of the Liverpool firm of solicitors and on the 12th April the London Agents wrote to the plaintiffs' solicitors informing that *Jassy* was owned by the Roumanian Government and suggesting that the plaintiffs should withdraw from the further prosecution of the action. But this the plaintiffs declined to do. On the 5th May a letter in the nature of a certificate was written by Charge d' Affairs of the Roumanian Government to the Secretary of State for Foreign Affairs setting out the facts that *Jassy* was a public vessel of the State of Roumania and under some misapprehension on the part of the local Agents of the *Jassy* in Liverpool and without the knowledge or authority of the Roumanian Government an undertaking to give security on behalf of *Jassy* had been given to secure her immediate release and as soon as these facts had been brought to the notice of the Roumanian Government the Charge d' Affairs, had been instructed to intervene. The letter of the Charge d' Affairs was forwarded by the Secretary of State for Foreign-Affairs to the Registrar of the Admiralty Court for information of the President of the Probate Divorce and Admiralty Division. Thereafter there was a Motion to dismiss "the action for damage" on the ground that the vessel proceeded against was the property of a foreign sovereign State and destined to its public use. It was submitted in support of this Motion that all proceedings should be stayed, that it has been shown to the satisfaction of the Court that the steamship *Jassy* was the property of His Majesty the King of Roumania in his sovereign capacity and that the vessel was employed in the service of the State Railways which were the public property of the State. On behalf of the plaintiffs it was contended that the recognised mode of objecting to the jurisdiction was appearance under protest, but as

there was an unconditional appearance in this case, the privilege claimed had been intentionally waived. Sir Borrel Barnas. President, held that as the vessel was the property of the State of Roumania and there was a certificate of the representative of the Government to the effect that the vessel was employed for public purposes of the State in connection with the National Railways, then notwithstanding that undertaking had been given to put in bail and appearance was entered by some Agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a sovereign State, the action must be dismissed with costs.

43. In the case of 1957, 1 QB 438 to which preference has already been made, Jenkins, L.J. who disagreed with the views of Singleton, L.J. dealt with the question of waiver or immunity which arose in that case in the following manner at pp. 469-471 :

"As to the question of waiver, I confess that at first sight and considering the matter apart from authority, it seemed to me that a formidable case had been made out, having regard to the fact that on instructions by Mr. Cavero, the head of the defendants, Servicio Nacional Del Trigo, an unconditional appearance was entered to the Writ and later again on his instructions an application was made for security for costs and an order for security was obtained. Mr. Kerr, however, referred us to two cases (if we accept them as rightly decided, as I think we should, seems to me to conclude the matter the other way".)

44. Jenkins, L.J. then referred to the two cases of 1906-P. 270 and *in re Republic of Bolivia Exploration Syndicate Ltd*<sup>12</sup>. and recorded the following conclusion at p. 471 :

"Applying those authorities to the present case it seems to me that the evidence here and in particular the evidence of the ambassador, makes it reasonably plain that Mr. Cavero knew nothing about sovereign immunity, or at all events had no idea that by entering an appearance the defendant would be giving up any advantage or in particular any right to the claim of immunity which they might otherwise have. Furthermore, Mr. Cavero's superiors know nothing about the matter at all until after the acts relied on as submission to the jurisdiction had taken place. It seems to me therefore that what was done here was done by Mr. Cavero without the knowledge of any of his superiors. In ignorance of his rights and without actual authority inasmuch as I think the evidence shows that the authority of the Minister of Agriculture would in fact have been necessary to

<sup>12</sup>(1914-1 Ch 139)

enable Mr. Cavero to submit to the jurisdiction".

45. Parker, L.J. also dealt with this questions of waiver at pp. 473-474 and came to the conclusion that on the facts of the case he was satisfied that there had been no waiver.

46. In the case of *Indian National Steamship Co. Ltd. v. Manx Faulbaum*<sup>13</sup>. I had occasion to consider this question of sovereign immunity and the question of waiver of such immunity. and although in the facts of that case I held that the petitioner had submitted to the jurisdiction of the Court and had waived its privilege to claim immunity from the jurisdiction of the Court, I had occasion to refer to the case of *Vavasseur v. Krupp*<sup>14</sup>, and pointed out that in that case the Mikado

of Japan had only "submitted to the jurisdiction, of the Court as to discovery, as to process and as to costs". The Mikado made a conditional appearance in the action and applied to be added as a defendant for the purpose of relieving his own property from a fetter which had been put upon it by the order of injunction. In the circumstances, it was held that by this limited submission to jurisdiction the Mikado did not lose his rights to claim immunity from the processes of the Municipal Courts, in respect of the public property of his country.

47. In the case of AIR 1962 Calcutta 387 to which reference has already been made, this question of waiver also came up 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. Lahiri, C.J. held that he was unable to accept the conclusion of the learned trial Judge and observed :

"Under the law of our country therefore whatever may be the 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. The inference may be possible under the English law which provides for conditional appearance but not under the law of our country'.

48. Then in dealing with the question whether making of an application under Order 7 Rule 11 of the Code of Civil Procedure amounted to submission to jurisdiction, the learned Chief Justice after considering certain authorities to which I have also made reference and some statements of law made in Cheshire's Private International Law and Dickey's Conflict of Laws came to the conclusion that there was no waiver or submission to jurisdiction by reason of such an application (p. 390).

49. In the case before us in the Written Statement that was filed on behalf of the defendant it is stated that the defendant Corporation is not a body corporate and at the date of the suit and at all material times the defendant was functioning under the direct supervision and control of the Government of Nepal through a Governing Body and an Ambassador and in the premises the suit in its present form is not maintainable and should be dismissed (paragraph 2). Then in paragraphs 26 and 27 it is pleaded that this Court has no jurisdiction to entertain and try the suit and that the suit is not maintainable. This written statement was filed on or about the 19th February 1962 and the application

<sup>13</sup> AIR 1955

<sup>14</sup> 1878-9 Oh D. 351

for trying certain issues as preliminary issues were made about two years after the filing of the written statement. In the case of 1957-1 QB 438 the summons praying that all further proceedings in the action be stayed was issued about 18 months after the entering of appearance by the defendants in the action, but this delay was held as not precluding the defendants from raising the question of immunity. Moreover, there is nothing to show that the Administrative Officer Divakara Bickram Rana of the Administrator of the defendant Corporation was acting with the knowledge and authority of His Majesty the King of Nepal or the Ministry of Transport and Communication of the Government of Nepal in giving instructions for entering appearance to the writ or making any applications for discovery or in complying with order for discovery

obtained against the defendant. There is nothing on record to show that there was any unmistakable election to submit to the Court's jurisdiction of there was deliberate abandonment of this right to claim sovereign immunity from which an unequivocal intention to submit to jurisdiction can be inferred.

50. In my view there has been no waiver of immunity or submission to jurisdiction which disentitles the defendant to claim the sovereign immunity which it asserts in the present proceedings before us.

51. On behalf of the plaintiffs an objection was raised as to the maintainability of these two appeals on the ground that the orders made by the learned trial Judge dated the 26th May 1964 and 17th June 1964 are not judgments within the meaning of clause 15 of the Letters Patent and so they are not appealable and reliance has been placed on behalf of the parties to the cases reported in 26 Cal WN 242 : AIR 1922 Calcutta 172 *Gour Mohan Mullick v. Nayan Manjuri Dassi*<sup>15</sup>; *Asrumati's case*<sup>16</sup>; *M.B. Sirkar's Case*<sup>17</sup> and Shorab Modi's case.

52. Now so far as appeal No. 156 of 1964 is concerned what the defendant was asking for was trial of certain issues as to the jurisdiction of the Court to entertain and try the suit and as to whether the suit was maintainable because of the sovereign immunity claimed on behalf of His Majesty the King of Nepal inasmuch as it was claimed that the suit was in reality against the King of Nepal or against a sovereign State. The learned Judge held that these issues are mixed issues of law and fact and it is not desirable that they should be tried as preliminary issues particularly in view of the decision of the Judicial Committee which has expressed its disapproval of piecemeal trial of appealable cases and Order 14 Rule 2 of the Code of Civil Procedure did not permit trial of issues of fact but permitted only issues of law to be tried as preliminary issues. It will not be out of place to refer in this connection to Chapter 14 Rule 8 of the Original Side Rules of this Court which makes provisions for settlement of issues where it is desirable that any question of law should be decided before the issues of fact or that any of the issues of fact should be tried before the others or where it is shown that the settlement of issues could simplify the trial, or expedite the termination or materially diminish the costs of the suit. It has been urged that the order of the learned trial Judge refusing to try the issues as to jurisdiction or the maintainability of the suit on the ground of sovereign immunity has the effect of compelling the defendant to submit to a regular trial of the suit on all the issues involved in the case including its merits and thereby submitting to the jurisdiction of the Court

<sup>15</sup> AIR 1953 SC 198

<sup>17</sup> AIR 1957 Cal 727

<sup>16</sup> AIR 1956 Cal 630

which may amount to waiver of the immunity claimed from the processes of the Courts in this Country. So inasmuch as the order of the learned Judge affects the question of jurisdiction, that on the authority of the principles enunciated in the various cases cited, the order of Mallick, J, is a judgment within the meaning of clause 15 of the Letters Patent. It appears to me that this question whether the order of Mallick, J. dated the 26th May 1964 is appealable or not is not free from difficulty.

53. But in the case of *Ebrahim v. Fuchrunnissa Begum*<sup>18</sup>, it was held by Garth, C.J. that no appeal lay from a decision upon the settlement of issues that a certain hibbanama relied upon by the appellant was invalid. This question arose in a suit for construction of a will and hibbanama. On the case coming on for settlement of issues, Pontifex, J. held that the hibbanama was invalid

and he raised two issues :

- (1) Did the testatrix execute that instrument propounded as her will ?
- (2) If she did so execute it, have her heirs assented to the provisions thereof and to what extent; and in what manner ?

Two of the defendants who claimed under the hibbanama appealed on the grounds : (1) that the learned Judge was in error in holding that the hibbanama was valid and (2) that he should have raised an issue as to the due execution thereof and of its legal effect according to Mohamedan law. On the case being opened Garth, C.J. Said :

"Does any appeal lie in this case ? The suit has not been dismissed. The Judge has raised certain issues. Can you appeal because he refuses to raise another issue ? If you can appeal in a case of this kind, you can appeal in any case where a Judge refused an issue which you tender ?"

Then in the course of the argument of Mr. Phillips the learned Chief Justice said :

"If you have a dozen defence, you might have a dozen appeals, if this appeal is allowed". Mr. Phillips then referred to the case of *Hadjee Ismail v. Hadjee Mohamad* to show that an appeal was allowed against an order granting leave to the plaintiff to institute a suit. Garth, C.J. replied :  
"That went to the whole subject matter of the suit. It decided the question whether the suit was to go on or not".

Then at p. 534 the learned Chief Justice in course of his judgment made the following observations :

"I consider that in this case the appeal ought not to be heard. The decision of the learned Judge which is appealed against, is not a judgment or decree which determines or affects the entire claim of the plaintiff. It is a decision which he arrived at on the settlement of issues upon the validity of a hibbanama which was set up by the defendant as an answer to a portion of the plaintiff's claim.

As regards the rest of the claim which is not affected by this hibbanama, the Judge has framed certain issues which will go on to be tried in due course; but the defendant has

<sup>18</sup>(1878) ILR 4 Cal 531

thought proper in the meantime to appeal from this partial decision. No authority has been adduced by the defendant's counsel to justify an appeal under such circumstances and I consider that looking to the language of the Charter as well as upon grounds of judicial convenience the appeal ought not to be allowed".

**Markhy, J.**

54. however, observed that he would have been inclined to think that in this particular case the appeal might be conveniently heard at that stage, but as the Chief Justice thought that it could not be heard until the other issues were decided in the court below, he did not like to differ from the learned Chief Justice (p. 535).

55. In the case of *Tuljaram Row v. Alagappa Chattiari*<sup>19</sup>, this Calcutta decision of ILR 4 Cal 531 (supra) was approved and it was held that an order of a single Judge on the Original Side refusing to frame an issue asked for by one of the parties is not a judgment within the meaning of clause 15 of the Letters Patent and is not appealable. In this case the order of reference to the Full Bench was made by Sir Arnold White, G.J. and Abdur Rahim, J. in the following terms :

"In this case an objection has been taken that no appeal lies against the order of a fudge on the Original Side declining to frame additional issues for which one of the parties asked. We are disposed to uphold this objection on the ground that such an order is not a judgment within the meaning of Section 15 of the Letters Patent."

Then after referring to some authorities the order concluded with the following words :

"We refer to a Full Bench the question whether an appeal lies to this Court from an order of Judge on the Original Side declining to frame an issue which is asked for by one of the parties to the suit".

Sir Arnold White, C.J. in delivering the judgment of the Full Bench, after discussing the various authorities cited, concluded his judgment with the following observation :

"I agree with the view expressed by Garth, C.J. in (1878) ILR 4 Cal 531 on the point which has been referred to us and I think our answer to the question referred should be in the negative."

The other learned Judges consisting the Full Bench agreed with the view expressed by the learned Chief Justice.

56. Upon these authorities my present inclination is to hold that the order of Mallick, J. refusing to try certain issues as preliminary issues is not a judgment within the meaning of clause 15 of the Letters Patent and is as such not appealable. But so far as the order of the 17th June 1964 is concerned, there is very little room for doubt that by refusing the application asking for dismissal of the suit on the ground that the Court had no jurisdiction to entertain the suit because of the sovereign immunity claimed by the defendant Corporation which is a Department of the Government of Nepal and/or by His

<sup>19</sup> ILR 35 Mad 1 (KB)

Majesty the King of Nepal and/or the Government of Nepal, the learned Judge has certainly determined a right or liability affecting the merits of the controversy between the parties and as such the order of the learned trial Judge is a judgment within the meaning of clause 15 of the Letters Patent and as such is an appealable order. This decision affects the whole subject matter of the suit. The order decides the question whether the suit is to go on or not.

57. In the circumstances, as my view is that in Court has no jurisdiction to entertain and try the suit in question on the ground that the claim for sovereign immunity must be sustained and the defendant Corporation is a Department of the sovereign State of Nepal, this suit must be dismissed or must not be proceeded with. The fact that the Ambassador of Nepal is not actually a party to the suit is immaterial. His application was to intervene in the suit for the purpose of obtaining dismissal of the suit on the ground of sovereign immunity. The authorities show that the Ambassador need not necessarily be a party to the suit for the purpose of claiming the immunity asked for.

58. In the result, the appeal No. 165 of 1964 must be allowed and the judgment and order of Mallick, J. dated the 17th June 1964 are set aside and there will be an order that the suit No. 1678 of 1961 should not be allowed to be proceeded with and it is dismissed on the ground that the suit is not maintainable in this Court and this Court has no jurisdiction to entertain and try the suit.

59. So far as Appeal No. 156 of 1964 is concerned, the same is dismissed.

60. There will be no order for costs in these two appeals and of the trial Court.

**Mitter, J.**

61. These two appeals arise out of two orders made in the same suit. The first application is on a petition of the defendant verified by an affidavit of Divakar Bickram Rana affirmed on February 20, 1964 and the second is based on a petition of Yadu Nath Khanal, ambassador to the Republic of India of His Majesty the King of Nepal verified by his affidavit affirmed on May 21, 1964. The prayers in the first application were :

(a) The issues as to whether this Court has jurisdiction to entertain and try this suit and whether this suit is maintainable as stated in paragraph 23 hereof be tried and determined as preliminary issues :

(b) Directions be given for the trial of the said preliminary issues and a special date be fixed for the hearing of the said issues :

(c) If necessary, the petitioner's witnesses on the preliminary issues from Nepal be examined de bene esse. The prayers in the application of the ambassador are :

(a) The said suit be dismissed having regard to the facts stated and the sovereign immunity claimed.

(b) If necessary, leave be given to the petitioner on behalf of His Majesty King of Nepal to intervene in this suit for the purpose of claiming Sovereign Immunity.

62. The plaintiffs in this suit are Manorama Meher Singh Legha and her minor children, Pan tab Singh Legha, Aruna Legha and Prithvy Singh Legha by their mother and next friend the first plaintiff, all residing at 58/1, Ballygunge Circular Road, Calcutta. The defendant is the Royal Nepal Airline Corporation, described in the cause title of the plaint as a body Corporate incorporated under the laws of Nepal, having its head office at Kathmandu, Nepal and inter alia

carrying on business at No. 42. Chowringhee Road, Calcutta, within the jurisdiction of this Court. The cause of action for the suit is laid in the plaint as follows :-

63. The deceased was a pilot employed by the defendant on a total emolument of Rupees 2500 per month. On November 5, 1960 he was in-charge of a Dakota Aircraft belonging to the defendant which took off from Bhairwa Aerodrome in Nepal for Pakhra also at Nepal at about 2 p.m. The aircraft instead of proceeding to its destination was attempting to return to Bhairwa and in such attempt it crashed near the aerodrome as a result of which the said pilot lost his life. The accident occurred through and the death of the pilot was caused by the negligence and/or breach of duty on the part of the defendant by reason of the mechanical and/or structural failure of the aircraft and/or its engines due to inherent and/or concealed defects which could not be reasonably detected by the said deceased before the take off from Bhairwa. By the death of the pilot Mohan Singh Legha in the circumstances of a case the plaintiffs suffered loss and damages assessed at Rs. 8,42,500 as per particulars given in paragraph 15 of the plaint. The suit was filed on October 3, 1961. The defendant filed its written statement on February 16, 1962. The material averments in the written statement are as follows :

(1) The defendant does not carry on business at No. 42 Chowringhee Road. It has no office there. One Jamair Company Private Ltd. acts as an agent of the defendant in Calcutta for the limited purpose of handling ground services and general sales. The said Company is an independent contractor and has its own independent business in Calcutta and other places.

(2) The Royal Nepal Airline Corporation was not a body corporate incorporated under the Laws of Nepal or otherwise. Provision had been made in the Royal Nepal Airline Corporation Act 2014 S. Y. Promulgated by His Majesty the King of Nepal for the formation of a corporate body to be known as the Royal Nepal Airline Corporation. The material provisions of the said Act have not yet been brought into force. At the date of the institution of the suit and thereafter the defendant was and still is functioning under the direct supervision and control of the Government of Nepal through a Governing body and an administrator. In the premises, the suit in its present form is not maintainable.

(3) The allegations with regard to negligence and/or unairworthiness of the aircraft were denied.

(4) By and under the terms of the employment the deceased and/or his estate was in any event not entitled to receive from the defendant any compensation beyond the sum of Rs. 35,000.

64. The written statement is signed by Oivakara Bickram Rana the constituted attorney of the Administrator of Royal Nepal Airline Corporation Hem Bahadur Gadtaula.

65. The terms of employment of the deceased pilot are set out in a letter signed by the Administrator of the Royal Nepal Airline Corporation and addressed to the deceased pilot. One of the terms shows that the pilot was to be under the immediate control of the Operations Manager of the Corporation subject to the overall control of the Administrator.

66. On February, 24, 1962 the defendant was directed to file its affidavit on an application made by the plaintiff for the purpose. Such affidavit was filed on the same date. On March 30, 1962 the plaintiffs were directed to file their affidavit of documents on a similar application made by the defendant. On December 14., 1962 notice was given by Messrs. T, Banerjee and Co. to Messrs. H.N. Dutta and Co. solicitors for the defendant informing them that the suit would be mentioned on December 18, 1962 for fixing a date for early hearing. On January 4, 1963 the suit was mentioned by the plaintiff and directed to appear on the list on January 7, 1963. On the last mentioned date the suit went out of the list on the defendant's representing that inspection of documents was not complete Thereafter the suit was mentioned on diverse occasions for fixing a date for hearing. It appeared on the list on January 2, 1964, when it was adjourned till January 16, 1964. On February 5, 1964 the suit was adjourned for a fortnight to enable the defendant to make an application to examine certain witnesses on commission. On February 20, 1964 the first notice of motion was taken out by the defendant.

67. In the petition filed in support of the notice of motion it was stated that me suit was ready for hearing and the issues which arose on the pleadings were the following :

- (1) Is the defendant a body corporate as alleged in paragraph 1 of the plaint ? If not, is the suit maintainable ?
- (2) To whom did the plane belong at the time of the alleged accident ? Did it belong to His Majesty's Government of Nepal ? If so, has this Court any jurisdiction to entertain and try this suit ?
- (3) Did the defendant at the date of the institution of the suit carry on business at premises No. 42, Chowringhee Road, Calcutta ? It M/s. Jamair Co. Private Ltd. an independent contractor ? If so, has this Court any jurisdiction to entertain and try this suit ?
- (4) Did the air crash occur due to any negligence and/or breach of duty on the part of the defendant, as alleged in the plaint ?
- (5) To what damages, if any are the plaintiffs entitled ? The petition may be summarized as follows :

68. In or about the year 1958 His Majesty's Government of Nepal decided that a Nepalese Airline would be started on a commercial basis and for that purpose it purchased a few aircrafts and started running the same under the name and style of Royal Nepal Airline Corporation through its Ministry of Transport and Communication. The aircraft which met with the accident was one of those received by way of aid and gift from the United States Government to the Government of Nepal and at all material times was the property of His Majesty's Government of Nepal. To run and manage the said aircrafts a statute known as The Royal Nepal Airline Corporation Act 2014 S. Y. was promulgated by His Majesty the King of Nepal by publishing the same in the Nepal Gazette. Provision had been made in the said Act for the formation of a corporate body to be known as the Royal Nepal Airline Corporation. The section of the Act namely Section 1 providing that the Act was to be called The Royal Airline Corporation Act 2014 came into force immediately upon the promulgation thereof. All the other provisions of the said Act, by the very terms of the Act itself, were to come into force from a date to be specified in a notification by the Government in the Nepal Gazette. As a matter of fact, no such notification was ever published and the Act except Section 1 never became operative. The aircraft which crashed as well as the

other aircrafts continued to remain the property of His Majesty's Government of Nepal and the Airline continued to operate under the direct supervision and control of the said Government through a governing body and an administrator. Royal Nepal Airline Corporation was merely an undertaking or organ of the said Government. The expenses of the airline were met from out of Government Revenues and all receipts and profits similarly formed part of Government Revenues. The plaintiffs' cause of action if any, was in reality against the Ruler of a foreign State and/or a foreign State. No permission of the Central Govt. of India had ever been obtained by the plaintiffs to institute the suit. The Government of Nepal and/or its Ruler enjoys full and complete immunity and exemption from the processes of civil courts in this country. Consequently, the suit cannot be heard on its merits. The petitioner never submitted nor intends to submit to the jurisdiction of this Court. The defendant would be seriously prejudiced if the merits of the suit were gone into before the decision on the question of jurisdiction and maintainability of the suit.

69. As against this, the first plaintiff affirmed an affidavit in opposition on March 2, 1964. She denied that the Government of Nepal ever decided that a Nepalese Airline would be started on a commercial Basis or that it started running under the name and style of Royal Nepal Airline Corporation through its Ministry of Transport and Communication. The deponent denied that the object of Royal Airline Corporation Act was to run and manage the said aircrafts as alleged in the petition. She stated further that the said Act as a whole, at all material times, was duly in force in Nepal and the defendant was incorporated under the said Act. She denied that the plaintiffs' cause of action was in reality against a Ruler of a foreign State or the State itself. No permission of the Central Government was necessary for the institution of the suit. The defendant had submitted to the jurisdiction of this Court as it was bound to do.

70. An affidavit in reply was affirmed by Divakara Bickram Rana on March 9, 1964 to which no particular reference is necessary.

71. On hearing the application the learned trial judge was of the view that the defendant was not entitled to the order asked for. He observed that the issues suggested for trial as preliminary issues were whether this Court had jurisdiction to try this suit and whether this suit was maintainable. These issues were admittedly not pure issues of law and as such were not covered by the provisions of Order 14 Rule 2 of the Code of Civil Procedure. He noted the submissions made by counsel for the defendant that if the question of jurisdiction was decided as a preliminary issue considerable costs and trouble could be saved. He was however not inclined to accept this because that would in effect be deciding a case piecemeal. His view was that he would determine at the time of trial in what order evidence was to be tendered on the different issues raised and the defendant would then have an opportunity to make its submission. He also recorded "both the parties agree that an early date should be fixed for the hearing". Accordingly he fixed June 16, 1964 for the hearing of the suit.

72. In the grounds of appeal urged against this order it was stated that the learned Judge had erred in considering the issues as to jurisdiction based on Sovereign Immunity as an issue in the suit and that he should have held that the question as to whether the appellant was a department of the Government or Nepal should be decided first and irrespective of the merits of the case and overlooked the fact that if the defendant was forced to go to trial on the merits of the case its contention regarding sovereign immunity and jurisdiction would be irreparably prejudiced.

73. The notice of motion dated May 26, 1964 was taken out by the Ambassador of the King of Nepal to the Republic of India based on a petition signed and verified by himself and supported by a certificate of the Secretary to the Government of India in the Ministry of External Affairs that Shri Yadu Nath Khanal is the accredited representative of His Majesty the King of Nepal and is His Majesty's Ambassador to the Republic of India. The material averments in the said petition are as follows :

(1) The Royal Nepal Airline Corporation was never a body corporate. His Majesty's Government of Nepal acquired and/or purchased a few aircrafts and started running the same under the name and style of Royal Nepal Airline Corporation. In or about 1959 several aircrafts including the one which crashed were received by way of gift from the United States Government by the Government of Nepal and added to the already existing fleet of the said Government.

(2) To run and manage the said aircrafts a statute known as the Royal Nepal Airline Corporation Act 2014 S. Y. was promulgated by His Majesty the King of Nepal by publishing the same in the Nepal Gazette, Provision had been made in the said Act for the formation of a corporate body known as the Royal Nepal Airline Corporation. Only the first section of the Act providing that it was to be called "The Royal Nepal Airline Corporation Act 2014 S. Y." came into effect immediately on the promulgating thereof and the other provisions were to come in force on a date to be specified later in the gazette. No such notification was ever published and no other provision of the Act except section I ever came into force.

(3) The said unfortunate aircraft along with others continued to remain the property of His Majesty's Government of Nepal and the Airline continued to be operated under the direct supervision and control of His Majesty's Government through a governing body and an Administrator appointed by His Majesty's Government. Royal Nepal Airline Corporation at all material times was merely an undertaking and an organ of His Majesty's Government, the expenses of the same being met out of the Government Revenues and all receipts and profits forming part of the said revenue.

(4) Even assuming but not admitting that the Royal Nepal Airline Corporation was a body corporate no one other than the Government of Nepal was financially or otherwise interested in or concerned with the said undertaking which is a public one run by His Majesty's Government for the benefit of the subjects of the King of Nepal.

(5) Nepal has at all material times been and still is recognized by the Government of India as a foreign State and His Majesty the King of Nepal has at all material times been and still is recognized as the Head of the Kingdom of Nepal. The deponent is the accredited representative of His Majesty the King of Nepal and is His Majesty's Ambassador to the Republic of India.

(6) No permission of the Government of India was ever obtained by the plaintiffs to institute this suit.

(7) The petitioner claimed for and on behalf of His Majesty the King of Nepal and His Government, Sovereign immunity in this suit which should therefore be dismissed.

74. There were two prayers in the petition the first being that the suit be dismissed on the claim of sovereign immunity and secondly leave be given to the petitioner to intervene in the suit for the purpose of claiming sovereign immunity.

75. The affidavit-in-opposition of the first plaintiff is merely a denial of most of the averments made in the petition. The deponent denied;

(1) That no notification was ever published in the Nepal Gazette or otherwise as a result of which the provisions of the Royal Nepal Airline Corporation Act apart from section I never became operative.

(2) That the unfortunate aircraft as well as the others continued to remain the property of His Majesty the King of Nepal or the Airline continued to be operated under the direct supervision and control of His Majesty of Nepal or the Governing Body and an Administrator appointed by His Majesty the King of Nepal.

(3) That the defendant was an organ of the Government of His Majesty the King of Nepal.

(4) That the expenses of the Airline were met out of Government revenues or that all receipts and profits formed part of the said revenue.

76. She stated further that only the foreign sovereign and its Ambassador were entitled to immunity. In the circumstances, it was not necessary to obtain the permission of the Government of India to institute the suit. The defendant was a body corporate. The properties of the defendant Corporation were not in possession or control of the King or the Sovereign of Nepal. In any event, there had been a submission to the jurisdiction of this court and the immunity, if any, had been expressly or impliedly waived.

77. On June 17 last the application of the Ambassador was dismissed with costs. The learned trial Judge was of the view that as there was no provision in the Code of Civil Procedure whereby a transfer to the suit who did not want to be added as a party could ask for a dismissal of the same the petitioner was not entitled to the order prayed for. With regard to the question of international law raised by counsel for the petitioner the learned Judge's view was that the same would have to be gone into at the appropriate time in the suit but it was not necessary to decide any such question on the application.

78. Counsel for the appellant thus put his case in the first appeal. The Royal Nepal Airline Corporation was not a body corporate. It was an undertaking or organ of the Government of Nepal of which the head was His Majesty the King of Nepal. Nepal was a monarchical State, all the judicial, legislative and executive functions being vested in the Ruler himself. All the aircrafts of the defendant belonged to His Majesty the King of Nepal and the income and outgoings of the said Airline were respectively credited and debited to the revenues of the Kingdom. The Royal Nepal Airline Corporation Act never came into operation except the first section by which the Act was named. The King of Nepal enjoys sovereign immunity accorded to sovereign princes and independent States and their property by international law. As soon as it is claimed that the defendant is an undertaking or organ of a foreign State and as such entitled to immunity under international law the Court must try that issue on evidence, if necessary and proceed with the

hearing of the suit only after it has found that sovereign immunity was not properly claimable.

79. With regard to the second appeal his contention was that a foreign State which is even indirectly impleaded can come in and claim immunity at any time before the suit is heard on its merits and it is the duty of the Court to examine the contention and give its decision as to whether the suit ought to be allowed to proceed.

80. According to counsel for the appellant the first appeal was not incompetent on the ground that there was no judgment within the meaning of clause 15 of the Letters Patent of this Court nor was there any question of waiver. There being no provision in the Code of Civil Procedure for entering a conditional appearance and taking out a summons for setting aside the service of the writ upon the defendant as there is in the Rules of the Supreme Court of England under Order 12 Rule 30 a written statement has to be filed and all kinds of available defenses raised. Consequently the filing of the written statement of the subsequent conduct of the defendant in obeying or making for orders for discovery or obtaining adjournment of the date of hearing or even agreeing to the fixing of a particular date for the trial does not amount to waiver of the objection as to jurisdiction. The provisions of Order 14 Rule 2 of the Code of Civil Procedure are not apposite to a case of this type. Counsel submitted that Order 14 Rule 2 was not in terms applicable but as the defendant raised the question of sovereign immunity it became an issue which had to be tried at the outset on such evidence as the parties might choose to adduce and it was for the court to direct this question to be determined first. By his failure to accede to the prayer in the first application the learned trial Judge had fallen into error. If the defendant had to prepare for the hearing of the suit on all the issues raised not only would serious inconvenience be caused to it but the same would amount to a negation of the right to claim sovereign immunity.

81. We have therefore to ascertain (i) the nature and extent of sovereign immunity, (ii) who can claim it and (iii) how it is claimable.

82. Our accessibility to principles of international law being limited to English and American text books and the decisions of the English and American Courts, we must examine these authorities for finding out the nature and extent of immunity claimable by foreign States and foreign sovereigns in litigation affecting them. It is not possible to examine in detail all the English cases on the point but a note may be made of the more important ones and the principles laid down therein.

83. As far back as 1878 an action of damage was instituted on behalf of the owners of the Steamship Daring against the steamship Parlement Belge and her freight in the Admiralty jurisdiction of the High Court in England, See (1880) 5 PD 197. The writ was duly served on the ship but no appearance was entered in the action and the plaintiffs delivered their statement of claim. In answer to a motion to direct that judgment with costs be entered for the plaintiffs and that a warrant be issued for the arrest of the Parlement Belge, the Attorney General of England filed an information and protest asserting that the Court had no jurisdiction to entertain the suit. The learned Judge of the Admiralty Division, Sir Robert Phillimore overruled the protest and allowed the warrant to issue. The Attorney General appealed. The protest alleged that the Parlement Belge, was a mail packet-running between Ostend and Dover and one of the packets mentioned in Article of the Convention of the 17th of February, 1876, made between the

sovereigns of Great Britain and Belgium that she was the property of his Majesty the King of the Belgians and in his possession control and employ as reigning sovereign of the state and was a public vessel of the sovereign and state. In answer it was averred on affidavits, which were not contradicted, that the packet boat besides carrying letters, carried merchandise and passengers and their luggage for hire. The main question argued before the Court were : (1) Whether irrespective of the express exemption contained in Article 6 of the Convention, the Court had jurisdiction to seize the Belgian vessel in a suit in rein : (2) whether any exception from the jurisdiction of the Court, which the vessel might otherwise have had, was lost by reason of her trading in the carriage of goods and persons. Delivering judgment of the Court of Appeal, Brett, L.J. (the future Lord Esher) remarked :

"It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any Court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain or of a foreign sovereign can be seized by any process whatever, exercised for any purpose, of any court of this country".

Discussing the principles on which the exemption of the person of sovereigns and of certain public properties had been recognized the learned Lord Justice referred to the American case of *The Exchange*, (1812) 7 Cranch 116 where Marshall, C.J. had stated,

"the world being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers . . . . . This perfect equality and absolute independence of sovereigns have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory ..... .A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity on his nation". Relying further on the opinion of Marshall, C.J. his Lordship (Brett, L.J.) took the view that the immunity extended to the person of a sovereign would also apply to ships of war. Taking note of another American case *Briggs v. The Lightships*<sup>20</sup>, and several English decisions His Lordship remarked (at page 214) :

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the International

<sup>20</sup>11 Alien 157

comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any states which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its

jurisdiction." "His Lordship held that the fact that the action one in rein did not mean that the owner of the property was not indirectly impleaded. According to his Lordship in every such action the owner had a right to appear and show cause even though the notice or citation was not personally served for unless the owner had an opportunity of protecting his property from a final decree by the Court the judgment in rein of a Court would be manifestly contrary to natural justice. This was held to be conclusive to show that the liability to compensate must be fixed not merely on the property but also on the owner through the property. His Lordship further remarked (at page 219),

to implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this condition of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any Court".

84. With regard to the point as to whether the immunity was lost by reason of the ship having been used for trading purpose, the question which arose was how the ship must be considered to have been employed. According to his Lordship,

"the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an enquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that such a declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the Exchange.....

But if such an enquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails and only subserviently to that main object for the purpose of trade. .... It has been frequently stated that an independent sovereign cannot be personally used, although he has carried on a private trading adventure ..... If the remedy sought by an action in rein against public property, is, as we think it is an indirect mode or exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. .... We are of opinion that the mere fact of the ship being used subordinated and partially for trading purposes does not take away the general immunity.' In the result the protest was upheld and the appeal was allowed.

85. An instance of recognition of the personal immunity of a foreign sovereign from the jurisdiction of the Courts in England occurred in the case of 1894-1 QB 149 where a motion was taken out for setting aside an order for substituted service of a writ of summons in an action for breach of promise of marriage and to stay all proceedings therein. The motion was granted in the Queen's Bench Division and upheld in the Court of Appeal. Lord Esher who delivered the leading judgment in the Court of Appeal relied on the principle laid down by himself in the case of (1880) 5 PD 197 (at page 214 of the report).

86. A motion to dismiss an action of damage by collision on the ground that the vessel proceeded against was the property of a foreign sovereign state (the Roumanian Government) and destined to its public use was upheld in the case of 1906 P 270. There in spite of the undertaking to put in bail and the entering of an appearance by an agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a foreign state in respect of the immunity of its public vessel from arrest the principle laid down in the Parlement Beige was applied and the action was dismissed with costs.

87. *Compania Mercantil Argentina v. United States Shippings Board*<sup>21</sup>, was a case where the defendant entered a conditional appearance to the writ in an action for the return of freight overpaid and applied to set the same aside on the ground that they were a sovereign body, being a department of the Government of the United States of America and as such exempt from the process of English Courts. Having lost before the Master and Roche J. at Chambers, the plaintiff appealed to the Court of Appeal. It appears that the materials before the Court in aid of the defendant's claim were a certificate of the American ambassador and an affidavit of Mr. Gregory, legal adviser to the defendants. The affidavit of Mr. Gregory was to the effect that the commissioners constituting the United States Shipping Board were as provided by the United States Shipping Act, 1916, nominated by the President of the United States by and with the advise and consent of the Senate and no private interests of any kind were administered by the Board which was solely an executive branch of the Government of the United States constituted for the purpose of acquiring and controlling a mercantile marine fleet in the interests of the state. The certificate by the American ambassador showed that the United States Shipping Board was not a corporation or partnership but was solely a department of the State and was administered by commissioners nominated by the President of the United States by and with the advice and consent of the Senate as directed by the Acts of Congress mentioned. According to Bankes, L.J.

"the question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken in personam and it is established to the satisfaction of the Court that the body against whom the proceedings are taken is a Body representing a sovereign State".

On the evidence before the Court, the learned Lord Justice said that,

"This Shipping Board is just as much a representative of the United States as the ambassador himself."

<sup>21</sup>(1924) 131 LT 388

88. In the year 1938 two cases of considerable importance were decided by the English Courts. The principle of sovereign immunity was laid down in the House of Lords by Lord Atkin in terms which had been applied in most of the later cases. 1938 AC 485 was a case where the appellants a Spanish Company owning the "Cristine", registered at the port of Bilbao, issued a writ in rem claiming possession of the said vessel which had been requisitioned by the Spanish Government and put in charge of a new Master by the Spanish consul at Cardiff. The Government of the Spanish Republic entered a conditional appearance and claimed to have the writ and arrest set aside. In upholding the claim of the Government Lord Atkin said :-

"Two propositions of International Law engrafted into our domestic law. .... seem to me

..... 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 his 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 of which he is in possession or control. There has been some difference in the practice of nations as to possible limitation of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both".

89. Lord Macmillan was not willing to lay down that under the English law "an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international Law and there is no proved consensus of international opinion or practice to this effect". His Lordship remarked "the subject is one on which divergent views exist and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the courts of this country was first formulated and accepted it was a concession of the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances." On the facts of the case however as the ship was requisitioned for public purpose by the duly recognised Government of Spain his Lordship held that the action ought not to be allowed to be proceeded with.

90-99. According to Lord Wright the rule of immunity might be based on the principle that

"no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal Court could not be enforced against a foreign sovereign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity ..... The rule is naturally subject to waiver by the consent of the sovereign".

After referring to the earlier cases in most of which the immunity was claimed with regard to ships of war and public ships his Lordship said

"times are however changed and the general principle must override the particular instance and be adapted to the new conditions .....

The most signal development of the principle has been during the Great War, during which the importance to the State of trading vessels become fully realised".

Quoting from the decision of the Supreme Court of the United States in *Berrizzi Brothers Co. v.*

*Steamship Pesaro*<sup>22</sup>, at p. 574 his Lordship said

"the principles of immunity are applicable to all ships held and used by a Government for public purpose and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a Government acquires, means and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international visage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

Referring to this judgment and several of the English Courts his Lordship was of the opinion that the decision correctly stated the English law on the point.

100. According to Lord Moungham (at page 515)

"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. The rule was founded on the independence and dignity of the foreign Government or sovereign and the exercise of such Jurisdiction would be incompatible with his legal dignity (of the foreign state)."

His Lordship however was of the view that

"there is neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by one of his servants would be sufficient to bar the jurisdictions of the Court, except in such cases as ships of war or other notoriously public vessels or other public vessels or other public property belonging to the State". His Lordship seemed to be of the view that the immunity of foreign Governments ought not to be extended to cases of trading ships and observed that the practice as to the immunity of State-owned merchant ships had been and still was far from uniform. In the United States the practice of granting immunity to foreign state owned ships still prevailed.

<sup>22</sup>(1926) 271 US 562

101. 1938 Ch 839 was a case where the Emperor of Ethiopia sued the company for recovery of a sum of money under a contract relating to the transmission of wireless messages between an Ethiopian State Radio Telegraphic Station and another telegraphic station of the defendant in Great Britain. The defendants pleaded that the Italian ambassador in London had given them notice that the moneys claimed by the plaintiff were payable to the Italian Government which was recognised by Great Britain as de facto sovereign of Ethiopia at the time when the action was commenced. By an amendment of the defense, the defendants further pleaded that the alleged cause of action of the plaintiff had passed to and become vested in His Majesty the King of Italy and the Italian Government by reason of the conquest of the armed forces of Ethiopia. Bennet, J. made an order that the defendants having proved that a claim to the moneys had been made on behalf of His Majesty the King of Italy, all further proceedings in the action should be

stayed. The appeal by the plaintiff was allowed by the Court of Appeal. According to the unanimous judgment of the Court of Appeal,

"The fact that His Majesty the King of Italy cannot be brought before the Court cannot deprive the plaintiff of his right to have his claim adjudicated upon by the Courts of this country in his absence unless there be some rule of English law which precludes the Courts from entertaining the claim, in our opinion no such rule of law exists. It is unquestionably true that the Courts of this country are not competent to entertain an action which directly or indirectly impleads a foreign sovereign state..... But it has never been extended to cover the case where the proceedings do not involve either bringing of the foreign sovereign before the Court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained ..... Where the property which is not proved or admitted to belong to or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party and the plaintiff claims it from that third party and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favor of the sovereign's title before it can be asserted that the title is being questioned".

The judgment of Barnett, J. was upset because the Court of appeal took the view that a mere claim by a sovereign to property in the hands of a third party was not enough to attract sovereign immunity where the title to the property itself was questioned. Such immunity would in the view of the Court of Appeal be only allowed where the sovereign proved his title. Reliance was placed on the judgment of Lord Maugham in the Spanish case at page 516 where it was said that

"the property in the goods and chattels would have to be established if necessary in our Courts before the immunity could be claimed. The ambassador could not be sued in *trove* or *detinue*, but, if the property were not in his possession and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property".

102. The case of 1949-2 All ELR 274, affords valuable guidance for our decision. In the case the plaintiff issued a writ claiming damages for an alleged libel in an article in a weekly newspaper published by the first defendant. After entering a conditional appearance the first defendant applied to the Court to set aside the writ on the ground that they were a department of the Soviet States and as such immune from suit. In support of the application the Tass Agency (first defendant) filed an affirmation by a Mr. Andrienko, the legal adviser of the trade delegation of the Union of Soviet Socialist Republics in the United Kingdom, which contained a summary of some of the provisions of the statute concerning Tass and there was exhibited to it an extract from the Statute which contained the first of its sixteen clauses. In the said affirmation Tass was described as "the central information organ of the Union of Soviet Socialist Republics and as coming under the Council of Ministers of the Union of Soviet Socialist Republics. "There was no definite statement as to the legal position of Tass and the only other evidence before the Master at first hearing was an extract under the heading "Tass Agency" from the register kept under the

Registration of Business Names Act, 1916. Thereafter an affidavit by one Percy Charles Smith was filed to which was exhibited a certificate from the Soviet Ambassador to the effect that "Tass Agency constituted a department of the Soviet State exercising the rights of a legal entity". Neither the Master nor Birkett, J. gave any reasons for upholding the order for setting aside the writ but according to Cohen, L.J. they had followed the case of (1924) 131. LT 388. When the appeal came on for hearing before the Court of Appeal counsel for the plaintiff put in further evidence consisting of the full text of the statute establishing the Tass Agency. The learned Lord Justice Cohen, L.J. observed that although there was some discrepancy between the translation of the plaintiff and that in the exhibit to Mr. Andrienko's affirmation with regard to clause 1 of the statute.

"It seems clear that, in the light of the ambassador's certificate, we are bound to come to the conclusion that the Tass Agency is a department of the Soviet State, but whether that State has given this department a separate juridical existence is another matter." It was contended by counsel for the plaintiff on the strength of the difficult clauses of the statute that the effect of it was that Tass not only had the right of a legal entity but was also a legal entity which distinguished it from the United States Shipping Board which had no separate legal existence. It was further urged that the nature of the activities of the Tass was such as to deprive it of sovereign immunity. Referring to the observation of Lord Maugham in the *Cristina* case it was submitted that the status of the Tass Agency was ambiguous and self contradictory and that, as the onus of establishing their right to immunity was on the defendants, their application must fail. According to Cohen, L.J.

"unless the evidence made out a prima facie case that Tass was a separate legal entity for, if it was not it was plain that the evidence established that Tass was a department of the Soviet State the appeal must fail."

The burden of proof that Tass was a legal entity rested on the plaintiff. The conclusion of his Lordship on the evidence was that it did not establish that Tass was a separate legal entity. According to his Lordship there was nothing which amounted to a declaration that Tass was a corporation sole and the evidence fell far short of that which would be necessary to establish that Tass was a legal entity and the Union of Soviet Socialist Republics by procuring its incorporation, had deprived that particular department of the immunity which normally attaches to a department of a sovereign State in accordance with the principles of comity established by International Law and recognised in England. His Lordship went on to say that even if he had come to the conclusion and been of opinion that the evidence did establish that Tass was given the status of a separate judicial entity it did not necessarily follow that it would thereby be deprived of its immunity. The history of the legislation in England as regards the departments of State showed that it was quite possible that a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit. In his Lordship's opinion the defendants did establish that Tass was a department of State to the necessary extent to shift the onus of proving that they were a separate legal entity to the plaintiff which the latter had failed to discharge.

103. In the opinion of Tucker, L.J. the evidence adduced on the question of Russian law was

scanty. The onus was on the plaintiff having regard to the statement of the ambassador that by Russian law the Tass Agency was a separate legal entity. His Lordship concluded that on the materials before the Court it was not possible to say whether the Tass might be sued or what were the essential requisites of a separate juridical existence in Soviet law.

104. Singleton, L.J. who was of the same Opinion that there was no evidence as to Soviet law except for a translation of the statute concerning the Tass and certificate of the ambassador. The last mentioned document, according to his Lordship, did not establish that Tass was a legal entity for if they were, the position might be different. His Lordship remarked,

"so far as I can see, there is no precedent for extending immunity to a corporate body carrying on business in this country and I should wish for further argument before deciding that It could be so extended. The decision in the present case I regard as being based on a certificate of the ambassador that Tass is a department of the Soviet State".

105. In (1952), AC 582 the Government of the United States of America and the Republic of France presented a petition to the House of Lords for leave to appeal although they were not originally parties to the action out had been added as defendants after the decision of the Court of Appeal. The action was filed by the French Company Dollfus Mieg against the Bank of England claiming 64 numbered bars of gold which in 1944 had been forcibly and wrongfully removed by German troops from a French Bank then holding them, on behalf of Dollfus Mieg. The bars were eventually recovered in Germany and lodged with the Bank of England by the Governments of the United Kingdom, France and United States for safe custody pending their ultimate disposal. In the action the company claimed delivery of the bars, an injunction restraining the bank from parting with possession of them and alternatively damages. The Bank applied by motion to have the writ set aside and all the subsequent proceedings in the action stayed on the ground that the bars were in the possession or control of the three Governments and the action impleaded two foreign sovereign states which declined to submit to the jurisdiction of the Court. The Company moved an interlocutory application for restraining the bank from parting with the bars. The practice of the Bank in case of deposit of gold bars was to weigh and assay the same after which the customer had no right to any specific gold but could only demand the number of fine ounces of gold comprised in his deposit. In this case, however, the gold bars were dealt with on a different basis the Bank being asked to preserve the bars in their original form and to keep them temporarily segregated pending the receipt of instructions as to their disposal. By mistake on the part of some officers of the Bank, 13 of the gold bars were sold after the issue of the writ. But the balance of the 51 bars were preserved. Jenkins, J. who heard the application by the Bank as also by the company ordered all further proceedings in the action to be stayed. Before the court of appeal further evidence on behalf of the Bunk was adduced to show that 13 of the gold bars had been sold by mistake. The Court allowed the appeal from order of Mr. Justice Jenkins and gave the company leave to apply for an injunction with respect to the 51 remaining bars. Subsequently, the Bank applied to the court of appeal for postponement of the drawing up of its order to enable the Governments of the United States of America and the Republic of France to be joined as defendants in the action. The Court declined and the defendants presented a petition to the House of Lords for leave to appeal the alternatively for an order adding them as defendants. The appellate Committee of the House of Lords ordered the petition to stand over generally with liberty to any party to apply to restore it on the footing that the Governments

should apply to the Court for leave to be joined as defendants. On their application Wynn-Parry, J. subsequently ordered that they should be so joined. The Governments moved Romer, J. for a stay of all further proceedings in the action, or alternatively of all such further proceedings as related to the 51 bars. He dismissed the application and the Court of Appeal affirmed his decision. The Government then appealed to the House of Lords. The House came to the conclusion that the action should be allowed to continue as to the 13 bars only. Substantially the decision of their Lordships was based on the consideration that there was a bailment of the 64 bars of gold by the three Government concerned to the Bank of England and the Governments retained sufficient control over the bars (at least with respect to 51 of them) to be able to claim immunity from the process with regard to them under the principle laid down in (1880) 5 P.D. 197, 1938 AC 485 and other cases.

106. Lord Radcliffe quoted with approval the rule laid down in Dicey's Conflict of Laws, 6th Edition, p. 131 :

"The Court has no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign ..... Any action or proceeding against the property of (a foreign sovereign) is an action or proceeding against such person". The action was one in personam and his Lordship remarked that

"decisions of our courts as to how to apply the principle of immunity to such a case are curiously lacking."

His Lordship felt no doubt that the suit which began as a claim in detinue and was later sought to be altered to a claim for damages on conversion offended the principle of sovereign immunity for if the court could not make a direct order upon the bank to hand over the bars it was impossible that it could have any jurisdiction to award damages for a failure to do that very thing but the claim for damages for conversion of the 13 bars did not trench on the sovereign immunity of the Governments.

107. (1957) 1957-1 QB 438 was another case where the claim of sovereign immunity by a corporate body was examined at length by the Court of Appeal in England. The plaintiffs were a limited company formed under the Italian Laws carrying on business there. The defendants carried on business in Spain. They entered into two c.i.f. contracts for the sale by the defendants to the plaintiffs of 26,000 tons of rye, each contract containing a term the translation of which provided that

"for any divergence which may arise ..... both parties submit to the jurisdiction of the technical courts at London".

Disputes having arisen the plaintiff issued a writ out of the jurisdiction claiming damages for breach of contract. An appearance was entered for the defendants by their solicitors in London. Thereafter the statement of claim was delivered and an order was made by consent for security for the defendants' costs on the latter's application. In the sum of pounds 150, Subsequent to this summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and the writ and statement of claim be set aside on the ground that the

defendants were a department of the State of Spain which State through its ambassador claimed sovereign immunity. The defendants admitted that they possessed a legal entity, had power to make contracts on their own behalf for sale and purchase and to sue and be sued in their own name. It was not disputed that apart from the effect of their incorporation the defendants would be a department of the sovereign state of Spain. Further, the head of the defendants had given instructions to the defendants' solicitors to enter appearance and ask for security for costs without the knowledge or authority of the Spanish Minister of Agriculture, to whom the head of the defendants was directly subordinate and who, apart from the Cabinet or Head of the State of Spain, was the only person with authority to decide whether the defendants should submit to the jurisdiction of a foreign court. The Court of Appeal by majority held that the defendants were entitled to claim sovereign immunity notwithstanding that they were a corporate body and a separate legal entity and there could be no submission to the jurisdiction unless it were made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign. Singleton, L.J. took a contrary view. On the evidence adduced by affidavits including those of a member of the Spanish bar and the Spanish ambassador Jenkins, L.J. was of the view

"that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded that status for the purpose for which they were formed. .... .briefly, the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government ..... Although their status was a corporate status, their functions were wholly those of a department of State....."

The Government of a sovereign State is not as a rule reposed in one personal sovereign - it is necessarily carried out through a complicated organization which ordinarily consists of many different ministers and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery.... Once it is found on the evidence that the party sued is in truth a department of a sovereign State, albeit itself a corporate body, then the suit becomes, or it becomes apparent that the suit in truth is one, between the plaintiff and the foreign sovereign state or the part of the foreign sovereign state represented by the departmental body concerned".

108. Parker, L.J. placed considerable reliance on the ambassador's evidence and relying on the dictum of Tucker L.J. in the Tass Agency case, 1949-2 All England Reporter 274 said that

"although that evidence is of course, not conclusive, it is entitled to considerable weight." On a reading of all the affidavits his Lordship's view was that the defendant was a department of the Minister of Agriculture and the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued was not necessarily inconsistent with it remaining and being a department of State. According to his Lordship if the defendant was a company limited by shares in which the State held the whole or a controlling interest it was a body wholly distinct from the State and the principle of the American case in *Wollen and Co. v. Polish Economic Bank*<sup>23</sup>, might apply. On the question of waiver Jenkins L.J. referred to the case of 1906 P 270 and (1914) 1 Ch. 139

and said that the evidence of the ambassador made it plain that Mr. Cavero the head of the defendants on whose instructions an unconditional appearance to the writ was entered into and an application made for security for costs, had no idea that by entering an appearance the defendants would be giving up any advantage or in particular, any right to claim immunity which they might otherwise have. Parker, L.J. who was of the same view said that "there can be no submission in such a case as this unless it is made by a person with knowledge of the right to be waived with knowledge of the effect of our law of procedure and with the authority of the foreign sovereign." His Lordship added that it required some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead and although there was no affidavit from Senor Cavero his Lordship felt unable to impute to him knowledge of the effect of entering an unconditional appearance.

109. The case of 1955 AC 72 is mainly of interest in illustrating the nature and sufficiency of evidence necessary to satisfy the Court that a claim of sovereign immunity is based on solid foundation. This case has come up for criticism in reputable Law Journals. The facts which came to light were as follows; The appellants were a company incorporated under the laws of the Philippine Islands which owned the steamship Tasikmalaja before the year 1952. The vessel was under a charter to the respondent government which ran out on June 30, 1952. An agent of the appellant, whose authority, known to the respondent did not include the power to sell, purported to sell the vessel to the respondent for a certain sum of money. The vessel was flung Indonesian flag and had put in the port of Hong Kong for repairs. Before the expiry of the period of charter and at the time when she was still under repairs the appellant issued a writ in rem against the steamship towards all parties interested in her and by the statement of claim endorsement thereon the appellant claimed to have legal possession of the vessel decreed to them. The Indonesian Government entered an appearance under protest in the Supreme Court of Hong Kong and then gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the ground of sovereign immunity. Affidavits were sworn in support of the motion by various persons including the Counsel General for the Government of Indonesia at Hong Kong. Leave was given to cross examine these deponents but the Government of Indonesia claimed diplomatic privilege. This was overruled and a Judgment was given dismissing the motion of the Government claiming

<sup>23</sup>24 NY 2d 201

immunity from suit. Thereafter it came on for hearing and possession of the vessel was decreed in favor of the appellants. The Appeal Court upset the judgment of the trial Judge and the matter was taken to the Judicial Committee. According to the judgment of the Board

"A mere assertion of a claim by a foreign Government to property the subject of an action did not compel the Court to stay the same and decline jurisdiction".

In their Lordships' opinio" a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the Court that its claim is not merely illusory, nor founded on a title manifestly defective. The Court must be satisfied that the conflicting rights have to be decided in relation to the foreign Government's claim. When the Court reaches that point it must decline to decide the rights and

must stay the action but it ought not to stay the action, before that point is reached. "On the evidence their Lordships" conclusion was that the title to the ship set up by the Government appears to be manifestly defective and the Government of Indonesia had not established that they possessed such an interest in the steamship as would show that they were impleaded.

110. The facts in 1958 AC 379 do not resemble the facts of the case before us but there are observations in the judgment of the learned Judges which afford us some guidance. There the Nizam had sued Rahimtoola and the Westminster Bank Limited claiming payment of a large sums of money under three alternative heads (a) as money held in trust for the Nizam, (b) as money due and owing to the Nizam and (c) as money had and received to the use of the Nizam in the following circumstances. The sum of money claimed originally belonged to the Nizam and was kept in deposit with the Westminster Bank, London. The account could be operated on by his Finance Minister and his agent general in London there being no ostensible limit to their authority. On the eve of the invasion of the State of Hyderabad by Indian troops one or other of the last mentioned persons entered into an oral agreement with Rahimtoola (the then High Commissioner for Pakistan in London) that the money should be transferred to an account in the name of the latter. According to Rahimtoola, though himself unwilling to take part in this transaction, he had been induced to so do on the instruction of Md. Zafrullah Khan (the then Foreign Minister of Pakistan). The Nizam filed this suit alleging that the action of his agents in transferring the fund was unauthorised by him. A motion was taken out for setting aside the writ issued in the action on the ground that it impleaded the Government of Pakistan or alternatively that it sought to interfere with the right or interest of the said Government to or in the sum of money claimed. After a chequered career the matter came before the House of Lords. All the Law Lords took the view that the appeal should be allowed although they expressed themselves differently. According to Viscount Simonds the first question was in what capacity did the appellant accept the transfer of the fund in question and become the customer of the bank, three views being possible viz. (1) he was acting as a private individual (2) he was acting as agent for Pakistan and (3) he was acting as an organ alter ego of Pakistan. According to Romer, L.J. in the Court of Appeal the Appellant had accepted the transfer in his official capacity as servant or agent of Pakistan. Viscount Simonds was of opinion that if the words "Organ" or "alter ego" connoted that a High Commissioner was to be identified with the Government he represented and was a department of State he was not prepared to take a different view from that of Romer, L.J. he observed that

"no doubt, if a defendant, by whatsoever name he is called, can be identified with the sovereign State, his task is easy; he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject matter of the action the defendant is the agent of a sovereign state that, in other words, the interests or property of the State are to be the subject of adjudication, the same result is reached".

According to his Lordship it is unnecessary to consider who had a beneficial interest in the fund as once it is shown that a foreign government had a legal title the same could be displaced except by litigation which it was entitled to decline. His lordship further said that the principle which obtained in the case of bailor and bailee in the *Dollfus Mieg* case should extend to the right of the foreign Government to deny the jurisdiction of the Court in regard to a chose in action. Lord Reid assumed that the appellant was to be regarded as merely to agent or servant of Pakistan, it

being unnecessary to consider whether he should be regarded as the representative of the State so that to implead him is to be equivalent to impleading the State itself. According to his Lordship if the State could not have been made a party to the action against its will it followed that the State was entitled to object to its agent being made a party as the agent could merely defend the action on behalf of his principal.

111. While agreeing with the decision of Lord Reid, Lord Somervell said that it was not sufficient for a foreign sovereign, in cases where the facts do not speak for themselves, simply to claim immunity while on the other hand there was no immunity if the foreign sovereign had to prove its title. To this extent his Lordship was not prepared to accept the statement of Lord Maugham in *The Christina*, 1938 AC 485 at page 516. According to his Lordship "the foreign sovereign must establish an arguable issue".

112. Lord Denning felt that there were difficulties in accepting the broad proposition as laid down by Lord Atkin in the Spanish case. At the same time if the foreign Government had to prove its title as suggested by Lord Maugham there was no point in a state claiming sovereign immunity. According to his Lordship the principle behind the doctrine of sovereign immunity was "each State ought to have proper respect for the dignity and independence of other State. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way and each has applied it differently. Some have adopted a rule of absolute immunity which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts but not for private acts, which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule". According to his Lordship the transaction between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan was more in the nature of it treaty than a contract or a trust.

113. The principles deducible from all these cases seem to be as follows :

- (1) A foreign sovereign cannot be impleaded directly in respect of his person and property : a suit will not lie where damages are claimed against the sovereign personally. A foreign sovereign cannot even be impleaded indirectly, viz. by a proceeding in rem against a public vessel which would include a vessel which was also used for commercial purposes.
- (2) A proceeding with the object of seizing or detaining property in the possession or control of a foreign sovereign will not be allowed to go on. A foreign Government will be allowed to intervene in such an action. So far as property used only for commercial purposes of the sovereign is concerned, although there is some difference in the practice of nations immunity is granted by the English Courts.
- (3) A suit will not lie against the agent of a foreign State where the act complained of is purported to be done as such agent.
- (4) A suit will not lie against a department of a State. It is doubtful whether immunity can be claimed when the department is a corporation sole with power to hold and acquire property and the right to sue and the liability to be sued. So far as the English Courts are concerned the mere incorporation of a body will not deprive it of immunity if it is a department of State. An incorporated body which is a juristic personality carrying on business in the country where proceedings are started against it, will be outside the

"protective umbrella" of immunity.

(5) As immunity can be claimed even when the foreign sovereign does not figure as a defendant a notice of motion to set aside the writ based on the certificate or affidavit of the ambassador of the foreign State to the effect thus the defendant is a department of State and is not a corporation will be disposed of in favour of the applicant. The effect of incorporation under a foreign law will have to be considered by the Court on the materials presented.

(6) If the title to property, the subject matter of the suit, is in dispute the claim to immunity will not be given effect to before the Court is satisfied that the claim is not illusory nor founded on a title manifestly defective.

114. Reference may usefully be made to the summary of the law as laid down on Oppenheim's Treatise on International Law. 7th Edition, edited by 11. Lauterpacht in Chapter II Part II Article 115a

"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 foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the Court concerned. This rule applied not only to actions brought directly against foreign States, but also to indirect actions as when, for instance, a suit *in rem* is brought against a vessel in possession of a foreign state."

115. Article 115ab :

"British and American courts have rigidly adhered to the principle of jurisdictional immunity and have declined to modify it either by distinguishing between activities of the State in the field of private law and activities *jure imperil* or by readily implying waiver of immunity. On the other hand it must be noted that the mere claim by a foreign State, which is neither an actual nor a necessary party to the proceedings, that it has an interest in the case will not prevent the Court from adjudicating the action as between the parties to it..... The mere assertion, unsubstantiated by proof, by a foreign Government that it is the owner of the property which is the subject of controversy between the parties does not oust the jurisdiction of the Court".

116. In this branch of the law English judges have freely referred to American decisions from very early times. Even in the case of (1880) 5 PD 197 Brett, L.J. quoted extensively from the judgment of Marshall, C.J. in (1812) 7 Cranch, 116 corresponding to United States Supreme Court, Reports, 3 Law Ed 287, 11 Alien (Massachusetts) p. 157. There are copious reference to American decisions in the case of *Baous S. R. L. v. Servicio Nacional Del Trigo* already noted. *In*<sup>24</sup> - a decision of the Court of Appeal of the State of New York - it was observed that

"a corporation organized by either a domestic or a foreign government for commercial objects in which the government is interested does not share the sovereign's immunity

from suit. A bank created by the Republic of Poland as a State institution, but as a distinct legal person possessing the right of autonomous legal representation, whose stock was owned by the State, municipalities and State and municipal enterprises, was not immune from suit on interest coupons attached to bonds issued by it and guaranteed by the Polish Government".

117. In *Coale Societe Co-op. Suisse Des Charbons, Basle, D. C.* 21 Fed. 2d. 180 the defendant corporation formed by the Swiss Government for the importation of coal was held not to be immune from suit on the contract, A similar decision was arrived at in *United States v. Dentsches Kalisyndik at Gesellschaft*<sup>25</sup>, where the defendant was a corporation formed and controlled by the French Government for exploiting potash mines in Alsace. This case may be contrasted with *Oliver American Trading Co. v. Govt. of United States of Mexico*<sup>26</sup>, where it appeared that there was no corporation or legal person existent under the name of the National Railways of Mexico being a designation for a system of railroads, directly owned and controlled by the Mexican Government. The claim to sovereign immunity was upheld. A similar conclusion was reached in *Dexter and Carpenter v. Kunglig Jarnvagstyrelsen*<sup>27</sup>, where the Swedish State Railways was involved.

118. On the authorities it must be held that if the defendant is not a body corporate but is a department of a state, sovereign immunity can be claimed on behalf of His Majesty the King of Nepal. So far as the second appeal is concerned, the affidavit of the ambassador makes it clear that there was no incorporation of the defendant which is a mere department of the State of Nepal in charge of an Administrator. It is true that no copies of the Act or of the Nepal Gazette in which the first Section of the Act was published have been annexed to any of the affidavits. On the authorities however the affidavit of the ambassador is enough to conclude the point unless a strong case to the contrary is made out by the plaintiff. The plaintiff however has failed to bring anything before the Court except her mere denial of the statement made in the affidavit of the ambassador. The burden of disproving the presumption raised by the affidavit of the ambassador has not been discharged by her. She has not used any affidavit of any lawyer of Nepal or annexed any copies of the Nepal Gazette or of the Royal Nepal Airline Corporation Act 2014 S. Y.

<sup>24</sup>24 NY 2d 203

<sup>26</sup>(1924) 5 Fed 2d 659

<sup>25</sup>(1929) 31 Fed 2d. 199

<sup>27</sup>(1930) 43 Fed 2d 705

to contradict the averments in the affidavit of the ambassador. The Court therefore must act on the said affidavit and hold that the defendant is a department of the Government of His Majesty the King of Nepal entitled to claim sovereign immunity. It was not necessary for the King of Nepal to be added as a defendant to the suit. As a matter of fact, he has been impleaded through the defendant on record the Royal Nepal Airline Corporation. The case of the (1924) 131 LTR 388 and that of 1949-2 All E R 274 considered along with other authorities noted above make it clear that without being impleaded as a defendant immunity on behalf of a foreign sovereign can be claimed by the ambassador of the State concerned.

119. In my opinion the learned trial judge was not right in coming to the conclusion on the second application that a stranger to the suit could not ask for a dismissal of it. Normally that is the position but this will not hold good where sovereign immunity is claimed. It is true that there is no provision to the effect in the Code of Civil Procedure but the claim of sovereign immunity which is well established in private international law must be upheld even though there is no

provision in that respect in the Code of Civil Procedure. There is no provision of this nature in the rules of the Supreme Court in England and yet English Courts have freely entertained applications for setting aside the service of the writ under the provision of Order 12 Rule 30 and the dismissal of the action when sovereign immunity was claimed. It was never considered necessary for the sovereign ruler or State to be joined as a party to the suit before a dismissal could be asked for.

120. With due respect the learned Judge's observation that substantial questions of international law would have to be decided at the appropriate time of the suit does not appear to lay down the proper procedure to be followed in such cases. A question of immunity under international law in such case as this is not an issue in the suit. Except in a case where title to property is in dispute this question has to be decided at the outset as soon as an application is made and before the merits of the suit are gone into.

121. It was argued that immunity had been waived by submission to jurisdiction. The acts and conduct relied on for this purpose are the following :

1. There was unconditional appearance by the defendant in the suit. There was no protest in the written statement nor any point taken therein that the defendant was a "alter ego" of the King of Nepal and no denial of jurisdiction based on the claim of sovereign immunity.
2. By the first application the defendant merely wanted trial of two issues as preliminary issues in the suit itself which meant that the defendant wanted the suit to go on but pressed for the trial of the preliminary issues before the merits were gone into.
3. The defendant had obtained an order for discovery against the plaintiff.
4. The defendant had from time to time appeared and asked for adjournment of the suit on various grounds including a prayer that it would have to make an application for examination of witnesses on commission in Nepal.
5. The defendant had agreed to an early date being fixed for the hearing of the suit as the judgment of the learned trial Judge dated May 26, 1964 shows.

122. Before dealing with the above it is necessary to take note of a few decisions on this point. The plea of waiver of privilege was put Forward in the case of 1906 P 270. The Jassy was arrested at Liverpool at the instance of the owners of the Greek Steamship Constantines in an Admiralty action in rein on the ground of causing damages by collusion. The ship was released on an undertaking to put in bail for pound 1000 given by a firm of Liverpool solicitors acting for the vessel under the instructions of William Johnston and Co. Ltd. the Liverpool representatives of the Government of Roumania. Thereafter an appearance was entered on behalf of the owners of the Jassy by the London agents of the same Liverpool firm of solicitors. The London Agents wrote to the plaintiffs' solicitors informing them that the Jassy was owned by the Roumanian Government and that the plaintiffs should not prosecute the action. On the plaintiffs declining to do so the Charge d' Affairs in England of the Roumanian Government addressed a letter in the nature of a certificate, to the Secretary of State for Foreign Affairs setting out the facts as to the arrest of the Jassy and stating that, as the Jassy was a public vessel of the Roumanian Government, held and worked by the State for the Public purpose including the carriage of mails, passengers and cargo in connection with the national railways of the State of Roumania proper steps should be taken and a termination put to the proceedings against the Jassy and that owing to some misapprehension on the part of the local agents of the Jassy in Liverpool and to secure her immediate release an undertaking to give security on her behalf had been given, but that this was

done without the knowledge or authority of the Roumanian Government and as soon as the facts were brought to the notice of the Government he had been instructed to intervene. Opposing the motion to set aside the writ counsel for the plaintiffs contended that by unconditional appearance the privilege claimed had been waived. Overruling the objection Sir Gorell Barnes, President, observed that the principle laid down in the *Parlement Beige* applied "in spite of the undertaking to put in bail and appearance entered by some agents in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a foreign State in respect of the immunity of its public vessels from arrest".

123. In (1914) 1 Ch. 139 a misfeasance summons issued by the liquidator of a company against several of its directors including a second Secretary' of the Peruvian Legation diplomatic privilege was claimed in the proceeding by the said Secretary. The liquidator while admitting that the Secretary was entitled to the diplomatic privilege contended that he had waived it by unconditional appearance, asking for time to file evidence, actually filing evidence on the merits, stating his official position but not raising any question of privilege, Astbury, J. observed that he was not satisfied that the Secretary when he entered appearance and took the subsequent steps was aware of his privilege. Nor was he satisfied that a subordinate Secretary could effectually waive his privilege without the sanction of his sovereign or legation and it was clear that whatever knowledge the Secretary possessed the objection on the ground of privilege was taken with the sanction and at the instigation of the Peruvian Legation.

124. The matter came up for rather elaborate discussion in the case of (1957) 1 QB 438. In this case in an action in which a writ was issued claiming damages for breach of contract the defendants, a department of the State of Spain, entered appearance by their solicitors in London. On their application an order was made for security of the defendant's costs. It was then that a summons was issued on their behalf praying for stay of all further proceedings and is setting aside of the serving of the writ on the ground of sovereign immunity. Jenkins and Parker L.J. both took the view that there was no waiver of the privilege but Singleton L.J. took a different view. Jenkins L.J. said that though at first sight it would appear that a formidable case had been made out by the plaintiffs he had come to a different conclusion on the material before it on the authority of the *Jassy* and the judgment of Astbury J. in 1914-1 Ch 139. He relied on the evidence of Spanish ambassador to the effect that Mr. Cavero the head of the defendants knew nothing about the sovereign immunity, or, at all events, had no idea that by entering an appearance the defendants would be giving up any advantage or, in particular, any right to claim immunity which he might otherwise have. According to his Lordship Mr. Cavero's superiors knew nothing about the matter at all until after the acts relied on as submissions to the jurisdiction had taken place and it would appear that what was done by Mr. Cavero was without the knowledge of his rights and without actual authority of the Minister of Agriculture which would in fact have been necessary to enable Mr. Cavero to submit to the jurisdiction. Parker L.J. stated that

"there can be no submission in such a case as this unless it is made by a person with knowledge of the right to be waived with knowledge of the effect of our law or procedure and with the authority of the foreign sovereign, x x x In these circumstances it does seem to me that it requires some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead; and without referring to the cases, I think that the

Jassy and the case before Astbury J. .... support that view.

So far as this case is concerned, it is true that we have not had the benefit of an affidavit from Senor Cavero, but for my part I cannot impute to him knowledge of the effect of entering an unconditional appearance. Quite apart from that, it seems to me that the evidence is clear that although he is the person, the intermediary, to pass on instructions to English solicitors to deal with a case in England, he is bound to consult the appropriate minister as to whether sovereign immunity should be waived or not".

125. The observations of Sir Lancelot Sanderson in (1938) 65 Ind App, 182 deal with later much to the same effect.

126. According to Cheshire, (Private International Law) 6th edition page 100

"Proceedings brought against a foreign State must be stayed if he remains passive or if he moves to set the writ aside, but it is always open to him to waive his immunity and to submit to the jurisdiction. A submission is ineffective unless it is made by some persons with the authority of the foreign sovereign, who has knowledge of the right to be waived and who appreciates the effect of the English law of procedure..... Waiver, in fact, is effective only 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, or where he is bound by treaty to submit to the particular proceedings that have been brought against him".

127. In my view, as there is no provision for entering appearance either conditionally or under protest an unconditional appearance and the filing of a written statement will not amount to waiver of the privilege of a sovereign. Although an attempt was made by learned counsel for the defendant to spell out a pleading of sovereign immunity in the written statement that document hardly suggested that the administrative officer of the Royal Nepal Airline Corporation had any such plea in his mind. All that he stated in paragraph 2 of the written statement was that the defendant at the date of the institution of the suit was functioning under the direct supervision and control of the Government of Nepal through a governing body and an administrator. This objection was raised with reference to the cause title and paragraph 1 of the plaint wherein the defendant was described as a Corporation incorporated under the laws of Nepal and carrying on business at Calcutta through an agent. The said paragraph of the written statement shows further that there was no incorporation of the defendant. The submissions made in paragraphs 26 and 27 of the written statement that the Court had no jurisdiction and the suit was not maintainable are not, in my view suggestive of the absence of jurisdiction on the ground of sovereign immunity. In the petition in support of the first application for the first time the case is sought to be made out that the defendant was an undertaking and an organ of the Government of the King of Nepal. The first application was really misconceived inasmuch as the claim to sovereign immunity cannot be raised as an issue in the suit. By the first application the defendants wanted two issues as to jurisdiction and maintainability to be tried as preliminary issues on evidence to be adduced and arguments of law to be based thereon. In my opinion, the learned trial Judge was right in holding that when issues of fact were involved he could not try them as preliminary issues. It

does not appear that any argument was addressed before the learned trial Judge that the plea of sovereign immunity was not to be considered as an issue in the suit but ought to be given effect to if there was sufficient material to establish the same.

128. The petition of the administrative officer does not show that he was applying on instructions received from the sovereign of Nepal or any of his ministers. Neither does the affidavit in reply of the said officer show that the administrative officer was given any instructions in this regard. There is nothing before us to show that the written statement was made by a person with knowledge of the right to be waived or that it was tiled with the authority of the King of Nepal. Further it would be difficult to impute to the administrative officer the knowledge of the effect of filing a written statement without taking a plea of sovereign immunity. On the dicta of Jenkins and Parker, L. JJ. in the case last cited as also of the observations of the Judicial Committee in the Gaekwar of Baroda case I would hold that the privilege of sovereign immunity has not been waived in this case. In the absence of anything to show that the administrative officer was taking the different steps in the suit namely the filling of the written statement, applying for an order for discovery against the plaintiff or for adjournment of the suit from time to time to the knowledge of the King of Nepal or any of his ministers having the necessary authority to sanction the course of action it is not possible to hold that the privilege of a foreign ruler had been waived.

129. The question still remains as to whether the orders made by the learned trial Judge were judgments within the meaning of clause 15 of the Letters Patent. The order on the first application in my opinion does not amount to a judgment according to the test laid down by Couch C.J. in the *Justices of Peace for Calcutta v. The Oriental Gas Co. Ltd*<sup>28</sup>, at p. 452 as meaning "a decision which affects the merits of the question between the parties by determining some right or liability." By the first application the defendant merely wanted the issues as to the jurisdiction and maintainability to be tried and determined as preliminary issues in preference to several other issues which would have

<sup>28</sup>(1872) 8 Beng LR 433

to be tried if the suit was heard to a conclusion. No doubt if these issues were merely preliminary issues to be heard on evidence to be adduced on them the learned trial Judge was justified in his view that the defendant was not entitled to the order asked for but that the Court itself would determine the order in which evidence was to be tendered on the different issues raised at the hearing of the suit. The learned Judge did not hold that the issues did not arise but merely observed that he might try these issues along with others in such order as he thought best at the time of the trial.

130. The application of the ambassador however stands on a different footing. There the order asked for was a dismissal of the suit on the ground of sovereign immunity, this application was dismissed outright. If the King of Nepal has the right to claim sovereign immunity as in my view, he has, the dismissal of his application is a decision which touches the very foundation of the controversy between the parties amounting to a judgment within the meaning of clause 15 of the Letters Patent.

131. In my opinion, the plea that the suit is not maintainable in the absence of consent of the Central Government to its institution under Section 56 of the Code of Civil Procedure cannot be raised at this stage. This is a plea available by way of defiance to a suit. If the suit is ex facie against a foreign ruler or an ambassador or an envoy the plaintiff may have to satisfy the court as

to why Section 86 will not be attracted. Section 86(1) bars all suits except with the consent of the Central Government unless it is by a tenant of immovable property against a ruler from whom he holds or claims the property. Sub-Section (2) of the Section shows that consent of the Central Government may be given at its discretion in circumstances prescribed in sub-clauses (a) to (d) of the Sub-Section.

132. Section 87 of the Code of Civil Procedure prescribes that the ruler of a foreign State can only be sued in the name of his State unless the Central Government directs while giving consent under Section 86 that the ruler may be sued in the name of an agent or in any other name.

133. Under Section 87A the ruler in relation to a foreign State means the person who is for the time being recognized by the Central Government to be the head of that State. This group of Sections does not, in my opinion, abrogate the rules of private international law as to sovereign immunity. They impose conditions and limitations with respect to suits against foreign rulers de hors any question of private international law. They do not appear to affect suits against foreign States.

134. When the plaintiff does not in plain terms sue a foreign ruler, ambassador or envoy Section 86 will not stand in his way but it will be open to the defendant to show that as a matter of fact the defendant is an alter ego of a ruler. A case of this type occurred in (1938) 65 Ind App 182 where the plaintiff brought a suit against the Gaekwar Baroda State Railway through its manager and engineer-in-chief. It was held by the Privy Council that the defendant was not a juristic person and the suit was in reality though not in form a suit against H.H. Gaekwar of Baroda. It was further held that the provisions of Sections 86 and 87 of the Code of Civil Procedure being imperative the suit could not succeed. This case also deals with the question of waiver of privilege, it had been argued before the Allahabad High Court that the Gaekwar of Baroda had waived his privilege by allowing the defendant Railway to defend the suit on its merits and produce evidence and take the chance of getting a judgment in his favour. This was rejected by the Judicial Committee and Sir Lancelot Sanderson observed "In the first place it appears that the summons was addressed to and served upon the manager of the State Railway. He filed a written statement containing the plea which has already been set out in full whereby he alleged that the suit was not filed against the proper party and was not maintainable. He applied without success that this issue should be tried as a preliminary issue. No one purported to appear in the suit on behalf of H.H. the Gaekwar of Baroda and there is no ground for saying that he waived his privilege".

135. Quite recently sovereign immunity was claimed on behalf of a foreign State namely the United Arab Republic in a suit filed in this Court against it by one Mirza Ali Kasani. No consent had been obtained from the Central Government under Section 86 of the Code of Civil Procedure to sue the ruler of the said State. The defendants pleaded Sections 86 and 87 of the Code of Civil Procedure in bar of the suit besides the claim to sovereign immunity under private international law. The learned trial Judge held that the State had waived its right of immunity by entering an unconditional appearance and by filing an application for revocation of leave under clause 12 of the Letters Patent wherein the above preliminary points were also put forward. This judgment was upset in appeal. After examining the group of Sections 86-87 etc. Lahiri C.J. held that the Code of Civil Procedure authorized the suit against a foreign State recognized by the Central Government independently of the ruler of such State and the absence of consent under Section 86

was not a bar to a suit against the State. Bachawat, J., who dealt with the history of these Sections at some length came to the same conclusion.

136. It is to be noted that no plea was taken in the written statement that the suit was against a ruler of a State and as such not maintainable in the absence of consent of the Central Government to the institution of the suit. Speaking for myself I would not allow the matter to be put in issue unless the written statement was amended. If the plea had been put forward in the written statement an issue as to maintainability would have arisen which might be tried as a preliminary issue in the suit itself. Although akin to the plea of sovereign immunity allowable in private international law it ought not to be treated on the same footing and dealt with in an application by affidavit evidence. The position would be different if the suit was in form against the ruler of a foreign State and the plaint did not show that the plaintiff had obtained the consent of the Central Government. Where the suit in form is not against a Ruler disputed questions of fact hardly fit for determination on an application might arise and such questions should best be left for adjudication at the hearing of the suit. Having taken out a notice of motion with a prayer that the issue as to jurisdiction and maintainability of the suit be tried as preliminary issues the defendant should not be allowed to urge that the plaint should be thrown out because the plea had not been satisfactorily answered.

137. In the result the first appeal fails. The second appeal succeeds and the further hearing of the suit must be stayed.

Appeal allowed.