RAJASTHAN HIGH COURT

Laxmichand

Vs.

Mst. Tipuri

Civil Misc. Ex. First Appeals Nos. 27 of 1950 and 8 and 10 of 1953 and Civil Ex. First Appeals Nos. 3 and 9 of 1953
(Wanchoo, C.J., Bapna, Dave, Modi and Bhandari, JJ.)

27.10.1955

JUDGMENT

Wanchoo, C.J.

1. These five appeals have been referred to this Bench for decision because of an apparent conflict between two decisions of this Court. The first of these decisions was given by a Bench of three Judges sitting at Jaipur on 31-3-1953 (See *Radhey Shiam v. Firm Sawai Modi Basdeo Prasad,* [1] The exact question, which was before that Bench for decision, was whether the ex parte decree passed in the former State of Jaipur against a resident of the former State of Dholpur in 1947 could be executed at Dholpur after 26-1-1950. The Bench took the view that even though, at the time the decree was passed, it was the decree of a foreign Court against a non-resident foreigner who had not submitted to its jurisdiction, the political changes, that had taken place in India after 1947, would make the decree executable after 26-1-1950, in what was the former State of Dholpur. The Full Bench followed the view taken in *Bhagwan Shankar v. Rajaram',* [2] and *Chunnilal Kasturchand v. Dundappa Damappa* [3] and dissented from the view taken in *H.M. Subbaraya Setty and Sons v. Palani Chetty and Sons,* [4]

2. Seven days later followed a decision by another Bench of this Court in *Prem Chand v. Dan Mal* [5] to which was a party. In that case, the exact question, which arose for decision, was whether an ex parte decree passed by a Court at Kurnool in Madras Presidency in 1948 against a subject of the former State of Sirohi could be executed after 28-1-1950, in Sirohi in spite of its being a decree against a non-resident foreigner who had not submitted to its jurisdiction.
The Bench took the view that the political changes which took place after the passing

of the decree did not affect the character of the decree, and it continued to be a nullity and in executable in the area comprised in the former Sirohi State. The view taken in the two Bombay cases referred to above was dissented from, and the Mysore case referred to above was approved. It may be mentioned that the Division Bench had no knowledge of the earlier Full Bench case, and that is how the conflict came to arise.

3. Since then there have been cases decided by other High Courts, which disclose a similar conflict of opinion. The High Courts of Hyderabad vide *Meherunnissa Begum v. Venkat Murli Monohar Rao* [6] and *Madhya Bharat vide Brajmohan Bose v. Kishorilal Kishanlal* [7] have taken the same view which has been taken in Radhey Shiam's case, while the High Courts of Allahabad (vide *Maloji Rao Narsingh Rao v. Sankar Saran* [8] Nagpur (vide *Ramkisan Jankilal v. Harmukharai Lachminarayan* [9] and *Travencore-Cochin (vide P.C. Vareed v. Gopalbai Bahubai Patel Rambai Gopalbai Patel* [10] have taken the view expressed in Shah Prem Chand's case. The decision of the Supreme Court in *Kishori Lal v. Sm. Shanti Devi* [11] was not noticed in either of the two judgments of this Court, as probably it had not been published till then, and it will also have to be considered in arriving at what is the correct view of the law in this matter.

4. I propose to consider the general question about which there is conflict of opinion first, and the individual cases will be considered after the general question has been decided. It is enough to say that the point which is common to all these five-appeals is that the appellants are the decree-holders, and the Courts below have held that as the decree was that of a foreign Court against a non-resident foreigner at the time it was passed, it cannot be executed in the State of Rajasthan. The decrees in these five cases were passed by Courts in Bombay, Beawar, Calcutta, Gauhati and Nasik, i.e. these five are all cases of Courts situated outside the boundaries of the present State of Rajasthan, and are thus more akin to Shah Premchand's case than to Radhey Shiam's case.

5. I would at the outset like to draw a distinction between (1) those cases where decrees were passed by the then foreign Courts which are situate outside the boundaries of the present State of Rajasthan, and (2) those cases where decrees were passed by the then foreign Courts which are now situate within the boundaries of the present State of Rajasthan, and shall first deal with the cases of decrees of the then foreign Courts situate outside the boundaries of the present State of Rajasthan. The

law on the subject of decrees passed by foreign Courts against a non-resident foreigner is Well settled. The leading case on the subject is *Sirdar Gurdyal Singh v. Raja of Faridkot* [12] and the following observations at p. 185 sum up the legal position :

> "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in p absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity."

He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum, by which it was pronounced."

This dictum of their Lordships of the Privy Council, is accepted by every Court which has had occasion to consider this question in India. But differences of opinion have arisen as to what happens to a decree which was originally a decree of a foreign court against a non-resident foreigner who had not submitted to its jurisdiction in consequence of the political changes that have taken place in India since 1947. The Bombay High Court in Bhagwan Shankars case took the view that though the decree might have been a nullity when it was passed in all other States except the State where it was passed yet, when the Court did not remain a foreign Court on account of the political changes that have taken place in India, and the status of the defendant altered because of that, the decree would become executable everywhere in India and no objection under Section

13, Civil Procedure Code could be taken. The reasoning behind this view was that the decree was not an absolute nullity when it was passed, and that there was only an impediment towards its enforcement in States ether than that where it was passed, and if that impediment was removed by political changes, the decree would become enforceable in other states which merged with the State which passed the decree to form the Union of India.

6. The other view, which has found favor with those Courts which do not follow the Bombay ruling, is that if the decree was a nullity so far as other States were concerned when it was passed, mere political changes resulting in the emergence of a new State and change in the status of the parties to the decree resulting in their becoming citizens of the same State would not affect the decree and it will none-the-less remain a nullity in those areas of the new State in which it was not executable on the ground that it had been passed against a nonresident foreigner who had not submitted to

jurisdiction.

7. I must say with all respect that I find it difficult to understand how what was a nullity so far as all other States were concerned would, become a valid decree on account of political changes having resulted in the State which passed the decree being amalgamated with other States where the decree is now sought to be executed. The mere fact that two States are part say of the same Union would not necessarily make the decrees of one State executable in the other State. In this connection I may refer to the instance of England and Scotland which were under the same sovereign, but where the decrees of one part were not executable in the other part till 1868 (See Dicey's Conflict of Laws, sixth Edn., p. 413, R. 88 - also Cheshire's Private International Law, Fourth Edn., p. 490 dealing with Judgments Extension Act, 1868). The general position as regards judgments of Courts of sister States in the United State of America is described in the following words in Corpus Juris, Vol. XXXIV 1924, Edn., page 1125, para 1602 : -

> "In the absence of some constitutional or statutory provision changing its status, a judgment of a sister State would stand on the same ground as a judgment of a foreign country."

But in the United States of America the judgments of sister States are now executable all over by virtue of the 'Full faith and credit clause' in the Constitution and legislation pursuant thereto.

8. In our Constitution also there is a 'Full faith and credit clause' appearing in Article 261 (1), and till the Civil Procedure Code was applied uniformly over the whole of India from 1-4-1951 it was only Article 261 (1) and 261 (3) that could be availed of for execution of decrees by Part A States in Part B States and vice versa. (See - 'Radhey Shiam's case,' - 'Shah Premchand's case, and - *'Janardhan Reddy v. The State',* [13] The facts of political changes therefore and the parties becoming citizens of one State have in my opinion, no bearing on a decree, which was a nullity, becoming executable in a certain, area, because that area, which was once an independent State, has merged with other areas to form a new State.

9. In this connection I may refer to - *'James Gardner v. Edward A, Lucas',* [14] In that case, it was held that a deed, which was void under the law of 1696, could not become valid under the law of 1874 without express words in the statute.

It seems to me, therefore, that if a decree was a nullity when it was passed, except in the State which passed it, it cannot become a living and executable decree in the areas of other States which happen to be merged with the State which passed the decree on account of political changes alone. Something more, to my mind, is required to be done by the new State in order to make such decrees, which were a nullity with respect to the areas now merged, to become of full force and effect in those areas. With respect, therefore, I must express my dissent from the view taken by the Bombay High Court in - Bhagwan Shankar's case, namely that the decree was a valid decree even for States other than that where it was passed at the time when it was passed, and that there was only an impediment to its execution. The judgment of their Lordships of the Privy Council in - Sirdar Gurdyal Singh's case, makes it abundantly clear that the judgment or decree in such a case is an absolute nullity so far as the States other than that where it was passed are concerned. To say that it was a valid judgment even as to these other States, and that there was only an impediment to its execution is to import, at the time when the decree was passed, considerations of consequences due to political changes which have come to arise long afterwards.

10. I may in this connection also refer to 'Kishori Lai's case, and the principle laid down there. There an order had been passed under Section 488, Criminal Procedure Code for maintenance in favor of a wife by a Court at Lahore before the partition of 1947. Later, after the partition, the wife applied for execution of the order in the Magistrate's Court at Delhi, and the question arose whether the order could be executed in Delhi. The Supreme Court held that it and be executed in Delhi as both the parties were in India with the following observations :

> "Confining our remarks to applications under Section 490 with which alone we are concerned, we see no reason why an order which was competent and valid at the time it was made and which could have been enforced 'in Delhi should cease to be competent simply by reason of the partition."

Then at p. 442 appear the following observations after the learned Judges had reviewed the various special laws passed to deal with the situation arising out of the partition : -

> "All those are special provisions designed to meet special cases. They do not affect the general law that an order which was competent and enforceable in a

particular Court before partition does not cease to be so simply because of the partition."

The learned Judges then referred to - 'Chunnilal Kasturchand (C) and - *'Dominion of India v. Hiralal',* [15] and certain other cases, and said that they had
not had an opportunity to analyze those cases, and all that they need say was

"that if those decisions are not based on matters which are special to them and which do not apply here, and if the learned Judges intended to enunciate a general principle which would affect the rights of the parties before us, then, with the greatest respect, we consider that they are, to that extent, wrong."

It seems to me that I can legitimately deduce from the observations in this case "that the general law is that an order which was competent and enforceable in a particular Court before partition does not cease to be so simply because of the partition," that the crucial date for determining the validity or enforceability of an order is the date when it was passed, and if the order was valid and enforceable in a particular Court at the time when it was passed, it would still be valid and enforceable now, and would not cease to be so simply because of the partition, though it may not be enforceable on account of other reasons.
Therefore if a decree was unenforceable in a particular Court at the time when it was passed, it would not, in my opinion, become enforceable and valid in that Court simply because of the political changes that might have taken place. The view taken by the Supreme Court in - 'Kishori Lal's case, in my opinion, goes to support indirectly the view taken by this Court in - 'Shah Prem Chand's case'.

11. I may now "briefly review the cases decided by other Courts after the two decisions of this Court.

12. The Hyderabad High Court has consistently followed the view taken by the Bombay High Court in the two cases mentioned above (B and C). In the latest case of this Court, the same view has been reiterated, and - 'Bhagwan Shankar's case' has been relied upon. I have already considered the reasoning in - 'Bhagwan Shankar's case, and no separate consideration is therefore required of this case.

13. In Madhya Bharat the matter came before a Bench of five Judges in - Brajmohan

Bose Benimadhav's case'. The Judges were divided in 3 to 2, the majority following the view taken in 'Bhagwan Shankar's case'. Of the minority Judges, Chaturvedi, J. went so far as to say that the decree against a non-resident foreigner who had not submitted to jurisdiction was a nullity even in the State where it was passed, and that Section 20(c), Civil Procedure Code did not give jurisdiction to the Courts of the States against non-resident foreigners.

This view, however, is not in consonance with the view of Section 20(c) taken by the Courts in India. It is settled law that Section 20(c) gives power to the Courts of a country, which pass a decree, even against a non-resident foreigner, if the cause of action arises within the jurisdiction of the Court. Dixit, J., who was the other minority Judge, did not go as far as Chaturvedi, J. He took the same view which was taken in 'Shah Premchand's case, but supported it further by observing that Section 20, Civil Procedure Code. Amendment Act No. II of 1951 gives a right to the judgment-debtor to plead the bar of Section 13, Civil Procedure Code in relation to a decree of a foreign Court passed in absentem against a non-resident foreigner.

14. The Travencore-Cochin High Court in - 'P.C. Vareed's case' relied mainly on Section 20, Civil Procedure Code. Amendment Act (No. II) of 1951, and held that the right of the judgment-debtor to plead the bar of Section 13, Civil Procedure Code was a vested right which he could exercise under Section 20 of Act 2 of 1951.

15. The Allahabad High Court in 'Maloji Rao Narsingh Rao's case' accepted the view taken in 'Shah Premchand's case, and further held that Section 20, Civil Procedure Code. Amendment Act (No. II) of 1951 could also be called in aid by the judgment-debtor, and enabled him to plead the bar of Section 13, Civil Procedure Code to the execution of such a decree.

16. The Nagpur High Court in Ramkisan Jankilal's case' did not give any reasoning of its own, but relied on 'Shah Premchand's case' and other cases holding the same view.

17. The Calcutta High Court in - *'Shah Kantilal, firm v. Dominion of India',*[16] has held that decrees, which were in executable as being those of a Court in a foreign State according to the law then in force up to the date of the Constitution, have not ceased to be so on account of the changes introduced by the Constitution or by reason of the constitutional definition of "the territory of India". It has also held that the question is not to be determined by applying the test whether at the time of execution any of the

sections of the Civil Procedure Code applies, but must be determined by the test whether such decrees by their nature of being foreign Court judgments are at all executable and this goes to the very root of their validity and enforceability. The view taken in this case thus supports the view taken by this Court in 'Shah Premchand's case'.

18. The argument on behalf of the appellants is that the Courts must look to the definition of 'foreign Court' at the time when the decree is under execution, and if at that time the Court, which passed the decree, is not a foreign Court, the decree will be capable of execution, and no objection under Section 13, Civil Procedure Code, can be raised by the judgment-debtor. It seems to me that this contention is not correct. It is true that as the definition of 'foreign Court, now stands in the Code of Civil Procedure after the Amendment Act No. II of 1951, no Court within the 'territory of India' as defined in the Constitution is a foreign Court, but that, in my opinion, does not dispose of the matter. If this view were to be accepted, it may, in my opinion, do gross injustice in many cases.

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

To make all those decrees now executable because of the political changes that have taken place in this country after 1947 would, in my opinion, be working hardship on the judgment-debtors. Unless therefore there is some compelling reason which makes it incumbent on the Courts to say that those decrees are executable, and the objections under Section 13, Civil Procedure Code, can no longer be taken, the Courts should not say so. I have already pointed out that the political changes that have taken place since 1947 do not warrant holding the view that such decrees have now become executable where they were not executable formerly when they were passed, and have given my reasons. As was pointed out by Lord Cairns Lord Chancellor in - 'James Gardner's case, such a conclusion should not be arrived at unless compelled by the strongest and clearest reasons, as it may lead to gross injustice. The mere amendment in the definition of the term 'foreign Court' in the Civil Procedure Code by Act 2 of 1951 is not, in my opinion, such a compelling reason as to lead the Courts to the conclusion that the decrees, which were in executable in certain areas when they were passed, have become executable now, and the judgment-debtors have no right to raise

objections under Section 13. Civil Procedure Code. It seems to me that the right course to adopt is to consider whether the decree was executable in a particular area when it was passed, and the crucial date for this purpose is the date on which the decree was passed, and not the date on which it is being sought to be executed. I am further of opinion that this view is indirectly supported by the view taken by the Supreme Court in - 'Kishori Lal's Case (K)'.
If this view is taken it necessarily follows that the change in the mere definition of the term "foreign court" by the Amendment Act No. II of 1951 does not warrant the conclusion that the intention of the legislature was that all such decrees would thereafter be executable in areas where they were not so executable when they were passed. I should have found some more explicit words in the amendment Act if the intention was to make these decrees executable. So far as Article 261 of the Constitution is concerned, it is enough to say that it is prospective and does not apply to decrees passed before 26-1-1950. (See Cases (1), (5) and (13)).

19. I, therefore, still adhere to the view which was expressed in - 'Shah Premchand's case, and must with great respect say that the view taken in 'Radhey Shiam's case based on 'Bhagwan Shanker's case' is not correct. This is, of course, subject to what I shall say with respect to the decrees by those foreign courts which now lie within the boundaries of the present State of Rajasthan.

20. I, now turn to the cases of those foreign courts which now lie within the boundaries of the present State of Rajasthan. Though none of the five appeals are from decrees of such courts as are now within the boundaries of the State of Rajasthan, the question must still be considered because 'Radhey Shiam's case is of such a court. In principle it must be admitted that there is no difference whether the foreign court was situated outside the boundaries of the State of Rajasthan, or within those boundaries and if the matter stood merely on principle I would say that the decrees of such courts also would not be executable beyond the areas of the State in which they were passed. But in this connection one has to see the laws of the State of Rajasthan also in order to determine whether such decrees are now executable in any part of Rajasthan without the judgment-debtor's having the right to raise any objection under Section 13. This will depend upon the laws, if any, passed by the State of Rajasthan after it came into existence. It cannot be disputed that if the new State of Rajasthan passed a law by which the decrees of the various covenanting States became executable throughout the new State, the objection under Section 13 would not be available to judgment-debtors

in such cases. Reference in this connection may be made first to the Rajasthan High Court Ordinance (No. XV) of 1949. Section 49(1) of that Ordinance reads as follows : -

> "On the date appointed in the notification issued under Sub-Section (3) of Section 1 of this Ordinance every Tribunal functioning as the High Court of a Covenanting State or any authority exercising the powers of a High Court in such State shall cease to exist, and all cases pending before the said High Court or authority at that date shall be transferred to and heard by the High Court constituted by this Ordinance, and all the records and documents of the several courts which so cease to exist shall become, and be, the records and documents of the High Court."

I wish to emphasise the last part of this Sub-Section. To my mind by this provision all the records and. documents of the courts which were abolished by this sub-section become the records and documents of the new High Court. These words are general and do not, in my opinion, refer merely to those records and documents which pertain to pending cases. So far as the records or documents of pending cases are concerned, they have been ordered to be transferred to the new High Court which has been given the power to hear the pending cases. The last provision in this Sub-Section, in my opinion, makes all the records and documents of the abolished High Courts or similar authorities to be the records and documents of this High Court. The High Court being Court of Record, the decrees of High Courts are in their records. By the last part of this sub-section therefore all decrees by High Courts or similar authorities of covenanting States become the decrees of the present High Court. As they become the decrees of the present High Court by virtue of this provision, they cannot be called decrees of foreign courts now, and must be deemed to have been passed by this High Court when they were passed.
So far therefore as the decrees of the High Courts or similar authorities of the former covenanting states forming the present state of Rajasthan are concerned, they are decrees of the present High Court of Rajasthan, and have to be executed as such, and no objection under Section 13, Civil Procedure Code can be taken to the execution of such decrees.

21. So far as the subordinate courts in Rajasthan are concerned, there is the Rajasthan Civil Courts Ordinance (No. VII) of 1950. Section 5(1) of that Ordinance reads as

follows :-

> "Until other provision is made under or in pursuance of this Ordinance, all Courts constituted, appointments, nominations, rules and orders made and jurisdiction and powers conferred under any law repealed by Section 4 shall be deemed to have been respectively constituted, made and conferred under this Ordinance."

Section 4 repeals all laws relating to the constitution, jurisdiction and powers of civil courts in force in any of the covenanting States on the coming into force of this Ordinance.

22. Now under Section 5 all courts constituted under the laws in force in the covenanting States were deemed to have been constituted under this Ordinance. Section 5(1) therefore does not merely continue the courts which were existing from before. On the other hand, it says that the courts, which were existing from before, shall be deemed to have been constituted under Mils Ordinance passed by the new State of Rajasthan. Therefore, the new State by this provision accepted the courts of the covenanting States as its own courts, and said that they would be deemed to have been constituted under the law made by it. Thus the courts of the former covenanting States were from the very beginning treated to be the courts of the new State for Section 5 save that the courts constituted by the law of the former covenanting States shall be deemed to have been constituted under this Ordinance. Thus from the very time of their constitution the courts, which were existing in the various covenanting states in Rajasthan, became courts of the new State. Therefore the decrees passed by such courts, which were deemed under Section 5(1) to be courts of the new State of Rajasthan from the very date of their constitution, became decrees of the courts of the new State of Rajasthan. It follows from this that all decrees passed by any court situated within the boundary of the State of Rajasthan become the decrees of the courts of the new State of Rajasthan. Those courts therefore no longer remained foreign courts even at the time when they passed decides before the Constitution of the present State of Rajasthan in April, 1949.
As such the decrees passed by the courts of the former covenanting States within the boundaries of the present State of Rajasthan cannot be called decrees of foreign courts at the time when they were passed, and therefore no objection can be taken by a judgment-debtor to the execution of those decrees under Section 13, Civil Procedure

Code.

23. Similarly reference may be made to the Rajasthan Small Cause Courts Ordinance (No. VIII) of 1950. Section 2 of that Ordinance repeals all laws relating to Courts of Small Causes for the time being in force in any part of Rajasthan. There is a proviso however which lays that anything done under any such law shall, unless superseded under, or in pursuance of, this Ordinance, continue and be deemed to have been done under or in pursuance of this Ordinance as if it were then in force. The words of this proviso are wide and clearly mean that any decree passed by the Courts of Small Causes of the former covenanting States shall continue and shall be deemed to have been passed under or in pursuance of this Ordinance as if it were then in force. The decrees, therefore, of the courts of the former covenanting states on the small cause court side were also made by virtue of this proviso to be decrees under this Ordinance. So far therefore as these decrees are concerned, no objection can be taken under Section 13 now on the ground that they were passed by a foreign court against non-resident foreigners who did not submit to its jurisdiction, for the decrees must be deemed to be decrees under or in pursuance of Ordinance No. VIII of 1950 as if it was in force when the decrees were passed.

24. The conclusion, therefore to which I arrive so far as those foreign courts are concerned, which are now situate within the boundaries of the State of Rajasthan, is that, by virtue of these three provisions, decrees of these courts, even if they were foreign courts at the time when the decrees were passed and even if the defendants were non-resident foreigners who had not submitted to their jurisdiction, become the decrees of the present courts of Rajasthan, and are therefore executable without the judgment-debtors having the right to raise an objection under Section 13, Civil Procedure Code In this view of the matter, I am of opinion that the decision in 'Radhey Shiam's case' was correct, though with all respect I must say that the reasons were not.

25. I do not think it necessary in view of the conclusions I have arrived at to consider whether Section 20, Code of Civil Procedure Amendment Act (No. II) of 1951 preserves the right to raise the objection under Section 13, Civil Procedure Code It is true that the Allahabad High Court and the Travencore-Cochin High Court have based their decisions on Section 20 of this Act.
But I feel that difficult questions arise in holding that the right to make an objection under Section 13 is a vested right, and I would not therefore rest my decision on

Section 20.

26. Before I turn to the individual cases, I should like to make some observations about what I consider to be a mistaken impression in the minds of the subordinate courts about the effect of the judgment in 'Shah Premchand's case. This judgment seems to have been understood by the subordinate courts as laying down that as soon as it is brought to the notice of the subordinate courts that a certain decree is an ex parte decree of a court which was a foreign court when the decree was passed, the decree becomes in executable in Rajasthan. This is not the effect of 'Shah Premchand's case. In the first place, I should like to point out in conformity with what was saidin'Shah Premchand's case' that by virtue of Section 43, Rajasthan Code of Civil Procedure Adaptation Ordinance (Amendment) Act (No. XIV) of 1950 any decree passed by any civil court in India or by a court established or continued by the authority of the Central or any State Government was executable according to law within Rajasthan.
Therefore even though the decree might have been the decree of a foreign court, it is executable within Rajasthan, though if it is a decree of a foreign court as explained by me above, it will be open to the judgment-debtor to raise the objections under Section 13, Civil Procedure Code. The subordinate courts, therefore, would have the right to refuse to execute the decree only if an objection is raised by the judgment-debtor under Section 13, Civil Procedure Code, and if they sustain the particular objection raised. Another misconception of the effect of 'Shah Premchand's case' which I find prevalent is that as soon as it is shown to the executing court that the decree was passed ex parte by a foreign court, the courts refused to execute it. This again is not quite correct. The fact whether the decree was passed ex parte is not by itself sufficient for the court to refuse execution of the decree, for a decree might have been passed ex parte by a foreign court after the non-resident foreigner had submitted to its jurisdiction. The judgment-debtors therefore have to establish that they were non-resident foreigners, and that the court, which passed the decree, was a foreign court at the time when it passed it, and they had not submitted to its jurisdiction. It is only when they prove all these things that they can ask the executing court in this State to refuse to execute the decree.

27. I now turn to the facts of each appeal separately in view of the observations made above. In appeal Case No. 27 of 1950, the decree was passed by the court of the Civil Judge, First Class, Beawar, on 23-4-1935, and the application for execution appears to

have been made on 20-1-1947, in the court at Bhim.
There does not appear to be any transfer of the decree by the Civil Judge's Court at Beawar to the court at Bhim. This is necessary under Section 38, Civil Procedure Code, for a decree can only be executed by the court which passes it, or by the court to which it is sent for execution. It seems that Bhim was formerly a part of Ajmer-Merwara and was retroceded to the former State of Mewar. For sometime, the decrees of the former courts of Ajmer-Merwara continued, to be executed by the courts established by the Mewar Government in Bhim. Later, however, on 26-3-1941, the State of Mewar issued a notification that the decree-holders of Bhim who wanted to execute their decrees, should do so within three months, and thereafter they would have to file a suit.
Consequently it was not open to the decree-holder to present an application for execution directly in the Bhim court after 26-6-1941, that right having been confined to three months after 26-3-1941, by notification No. 2107 issued by the Government of the former State of Mewar. In this view of the matter, even though the court below has not gone into the question whether the judgment-debtor Had submitted to the jurisdiction of the court at Beawar, the execution application in this case cannot proceed, for no transfer of the decree as envisaged under Section 38 and under Order 21, Rules 5, 6, 7 and 8, Civil Procedure Code has been made.

28. The appeal therefore fails, and must, be dismissed.

29. In Appeal Case No. 3 of 1953, the decree was of the Civil Judge Nasik, and was transferred for execution to the Civil Judge, Jodhpur. It was passed ex parte. The judgment of the lower court shows that it was admitted between the parties that the judgment-debtors were non-resident foreigners at the time the decree was passed, and that the judgment-debtors had not submitted to the jurisdiction of the Nasik court. The contention of the decree-holder in the trial court was that Article 261 had a retrospective effect. It is enough to say that this is not so as already held by us above. In view of the admissions of the decree-holder in this case, namely that the judgment-debtor was a nonresident foreigner and had not submitted to the jurisdiction of the Nasik court when the decree was passed, the lower court was right in refusing execution of the decree on the objection of the judgment-debtor. In view of what I have said when dealing with the decrees of those foreign courts, which were situate outside the boundaries of the State of Rajasthan, before 26-1-1950, the appeal must therefore be dismissed.

30. In Appeal Case No. 8 of 1953, the decree was passed by the Calcutta High Court on 10-1-1935, and was received by transfer eventually in the court of the Civil Judge Ratangarh for execution. The Civil Judge, Ratangarh, refused to execute the decree relying on 'Shah Premchand's case. The judgment, however, does not show that the Civil Judge appreciated the position as laid down in 'Shah Premchand's case. It was not enough that the decree under execution should have been passed by a foreign court. The judgment-debtor had also to show that he was a non-resident foreigner at the time the decree was passed, and had not submitted to the jurisdiction of the court passing the decree. The judgment of the court below says nothing on this point. Under these circumstances, I am of opinion that the appeal should be allowed, and the court below directed to decide the question whether it could execute the decree or mot on the basis of the observations made by me above.

31. In Appeal Case No. 9 of 1953, the decree was passed by the Bombay High Court on 6-3-1931, and was transferred to the court at Sirohi in July 1950 for execution. I am of opinion that as a number of points have been raised in this case, and as the rive-judge Bench only heard one point it is best that this appeal be listed for bearing before a Division Bench after the delivery of the judgment of this Bench. I would order accordingly.

32. In Appeal Case No. 10 of 1953, the decree was passed by a court at Gauhati on 31-5-1348. The decree was transferred to the court at Ratangarh for execution. The judgment-debtor raised two points against the execution of the decree –

> (1) that the decree was a nullity when it was passed, and therefore execution should be refused, and
> (2) that a suit had been filed on the basis of the decree, which had been dismissed, and therefore the decree was in executable. So far as the second point is concerned, it appears that a suit was certainly filed, but when the Rajasthan Code of Civil Procedure Adaptation Ordinance (Amendment) Act (No. XIV) of 1950 came into force, the decree-holder did not proceed with the suit, and allowed it to be dismissed for default as he could take out execution in view of the amendment. Thereafter, the decree was got transferred and execution was taken out. The fact, therefore, that the suit was dismissed would not bar the execution application.

33. The other point which was urged was that the decree was a nullity as it was passed by a foreign court. The judgment of the lower court merely relies on 'Shah Premchand's case' without understanding its full implications. There is nothing in the judgment to show that the court considered the question whether the judgment-debtor was a non-resident foreigner at the time when the decree was passed, and had not submitted to the jurisdiction of the Gauhati court. It is only after these two points ore considered and decided in favor of the judgment-debtor that the lower court can refuse execution.

34. In this view of the matter, the appeal must be allowed and the lower court directed to go into these questions in the light of the observations made by me above.

Bapna, J.

35. I agree.

Dave, J.

36. Ialso agree.

Bhandari, J.

37. I respectfully agree With My Lord, the Chief Justice, in the conclusion that he has arrived at, but as I slightly differ from him in the reasons for that, I humbly proceed to assign them.

38. I need not reiterate the facts of these appeals. Suffice it to say that the appellants in all these live appeals are the decree-holders who had obtained their decrees in the various courts in the former British India prior to the year 1949. They seek the execution of their decrees against the properties of the judgment-debtors in the State of Rajasthan after the enactment of the Code of Civil Procedure (Amendment) Act No. 3 of 1951. The judgment-debtors have raised the objection that decrees obtained against them could not be executed in the State of Rajasthan as the courts which passed the decrees against them were not the courts of competent jurisdiction, the judgment-debtors being the non-resident foreigners at the time of the passing of the various decrees. Their objections have been accepted by the lower courts who have relied on

the decision of this Court in AIR 1954 Rajasthan 4. This decision is in apparent conflict with another decision of this court in AIR 1953 Rajasthan 204 (FB). The correctness of these decisions is to be examined.

39. In the leading case 21 Ind App 171 (PC) (L) which was an appeal from India, their Lordships of the Privy Council have observed :

> "All jurisdiction is properly territorial, and extra territorium jus dicenti, impune non paretur". Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country."
> "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the Defendant has not in any way submitted himself, is by international law an absolute nullity.

He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced."
40. The law is the same In England. In Halsbury's Laws of England Third Edition Vol. 7, page 144, it has been stated as follows :

> "It is necessary to distinguish between foreign judgments valid both by the lex loci and recognized in England as giving rise to a cause of action and foreign judgments valid by the lex loci but not satisfying those requirements which are demanded by English law before it will grant recognition to the foreign judgment as possessing unquestionable international validity as well as being valid by its own local law.

A foreign country, having exclusive jurisdiction within the limits of its own territory, can; permit the presence or absence of any circumstance or preliminary that it thinks fit in defining the terms on which its courts may assume jurisdiction and pronounce valid judgments; but it cannot lay down rules for its judgments as creating obligations which their own courts must enforce, unless such judgments are obtained under conditions which the state applied to should respect."

41. The same is the position in the United States a America. The judgment passed by a court of one State in that country is treated by another State as the foreign judgment and its validity is confined within the limits of the State wherein the judgment is pronounced. Willoughby on the Constitutional Law of the United States Volume I, Second Edition page 271 has quoted the following observations in the case of - *'Public Works of Virjinia v. 'Columbia College',*[17]

> "It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that State Without service of process upon him or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the State where rendered.

Their effects are merely local. Out of the State they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such, is the settled law of this country, asserted in repeated adjudications of this court and of the State Courts." So far the matter appears to be beyond any controversy.

42. I may at this stage state certain propositions which may be taken to be equally undisputed.

43. Two sovereign States may enter into a reciprocal arrangement providing for the execution of a decree passed by the court of one country in the territory of other country. Such an arrangement is usually accompanied by certain conditions. Such conditions are under ordinary circumstances similar to those as laid down in Section 44A, Civil Procedure Code (Act 5 of 1908). Reference in this connection may be made to Section 9(2) of 'The Administration of Justice Act, 1920 (10 and 11 Geo. V. c. 81). 'Section 9(2) lays down the conditions under which such judgment may be registered and they are practically the same as are contained in Section 13, Civil Procedure Code (Act 5 of 1908). Such conditions may be varied or altered by any treaty or arrangement between the respective countries and the two countries may by appropriate legislation recognize such an arrangement. Such reciprocal arrangement may not only provide for the enforcement of any judgment that may be pronounced after such reciprocal arrangement has come into force, but may also provide for the enforcement of a judgment that had been pronounced even before such arrangement

took place. There is nothing to debar the two sovereign States from legislating and recognizing such an arrangement. Again such a reciprocal arrangement may provide for the execution of a decree which was passed against non-resident foreigner and was nullity except in the country of the forum by which it was pronounced. Such reciprocal, arrangement may be given effect to by appropriate legislation in the reciprocating countries. Merely because the decree was a nullity as understood in the international sense is no reason, for denying the power of legislation to legislature. It may be that such an arrangement shall adversely affect some of the subjects of the other country inasmuch as a decree which was a nullity at one time so far as that country is concerned, becomes enforceable against them. To deny such, powers of legislation to a sovereign country in the sphere of making appropriate law recognizing such, arrangements will mean limiting the plenary powers of legislation which every sovereign country must necessarily possess and which are inherent in the very conception of sovereignty. Such a limitation or restriction can only be placed by the constitution of that country, if the country has a written constitution. In England, where there is no written constitution, Parliament is the Supreme legislative authority. There is no legal limit Co its power of making and unmaking laws.

44. In Halsbury's Laws of England Vol. 6 page 317 para. 458, it has been stated :

> "The power of legislation thus vested in Parliament is unlimited, apart from the restrictions imposed by its own sense of fitness, and the sense of fitness of the electorate, to whose wishes the Commons and Parliament itself, are bound eventually to submit. There is thus no law which Parliament cannot make or unmake, whether relating to the constitution itself or otherwise; there is no necessity, as in States whose constitutions are drawn up in a fixed and right form and contained in written documents, for the existence of a judicial body to determine whether any particular legislative act is within the constitutional powers off Parliament or not, and laws affecting the constitution itself may be enacted with the same sense, and subject to the same procedure, as ordinary laws."

45. The only limitation on the parliament of a country in the sphere of making laws are such as are embodied in the constitution of that country.

46. In India, this matter has received consideration by the highest court of the land. In.

- *'United Provinces v. Atiqa Begum'* [18] Gwyer, C.J. observed with reference to the powers of Indian Legislatures, as follows:

> "It must always be remembered that within, their own sphere the powers of the Indian Legislatures are as large and ample as those of Parliament itself."

The above statement was accepted by their Lordships of the Privy Council in - *'Jagannath Baksh Singh v. United Provinces'*[19] which was an appeal from the judgment of their Lordships of Federal Court in - *'Jagannath Baksh Singh v. United Provinces',* [20] The point for consideration in that case was whether an Act of a properly constituted Legislature can be held to be incapable of derogating from a Crown grant assuming that the subject matter of the grant was otherwise within the competence of the Legislature. Their Lordships of the Federal Court observed as follows at page 35.

> "If once it be found that the subject matter of a Crown grant is within the competence of a Provincial Legislature, nothing can prevent that, legislature from legislating about it, unless the constitution itself prohibits legislation on the subject either absolutely or conditionally," and further "It is however, not for this Court to pronounce on the wisdom or the justice in the broader sense of legislative Acts; it can only say whether they are validly enacted".

47. Their Lordships of the Supreme Court have also accepted the principle enunciated in the above decisions. Reference in this connection may be made to the following decisions of the Supreme Court in - *'Amarsinghji v. State of Rajastnair,* [21] - *'Maharaj Umegsingh v. State of Bombay',* [22] and - *'Surya Paisingh v. State of U.P.'* [23] In 'Amarsinghji's case' their Lordships observed :

> "It cannot be disputed that it is within the competence of the legislature in the exercise of its sovereign powers to alter and abridge rights of Us subject in such manner as it may decide subject of course to any constitutional prohibition."

48. I have only cited the above authorities to show that there is no sanctity or guarantee for any right that the subject may be enjoying if the legislature decide to curtail, alter or any way modify it. It also follows from this statement of law that a decree or order which had only a limited sphere within which, it could be operative may be made enforceable in larger sphere if the legislature so enacts.

It has been argued with great vehemence at the Bar that the decree which, was a, nullity cannot be made to acquire some positive value and it must remain as dead as it was. But it is forgotten that such a decree had a spark of life in it and the legislature may make it such a living force as to become operative in any territory, for which the legislature is competent to enact. Even the dead may be revived, such is the all pervading power of the legislature. I may legist rate this further by taking up an illustration, A decree is obtained in the country A against the non-resident foreigner in an action in personam who resides in the country B. The decree under the international law is operative in the country A only and is a nullity in the country B. Now, the country B is conquered by the country A, and the legislature of the country A which becomes the sovereign legislature for the country B after it has been conquered, enacts that such a decree shall become operative, in the country B as well. It is obvious that such a law is perfectly valid piece of legislation and shall have to be obeyed by the residents of country B. In this illustration the decree, when it was passed, was a nullity in the country B. Further there is no reciprocal arrangement. In spite of all this, the decree becomes executable in the country B.

49. In India, various changes took place on account of the merger and integration of various States in various units, and various laws were passed after such merger and integration had taken place. It is to be determined what is the effect of such laws on the subject in hand proceed first to take up the various laws that were enacted pertaining to this matter in the State of Rajasthan. It is necessary to do so to examine the correctness of the decision in *'Radheyshyam v. Firm Sawai Modi Basdeo Prasad'*.

50. The United State of Rajasthan was formed on 7-4-1949 by the integration of the various States of Rajputana in a single unit and the history of such integration is given in the White paper on Indian States at page 53. Under Article 2 of the Covenant the Covenanting States agreed to unite and integrate their territories in one State with common executive, legislature and judiciary by the name of 'The United State of Rajasthan". Before the aforesaid integration each covenanting State was in the eye of law an independent State exercising its own executive, legislative and judicial powers and the judgment passed by the court in one State was foreign judgment in relation to any other State of Rajputana. Each State had its own Code of Civil Procedure or analogous law and the law provided that the judgments obtained in a court of one covenanting state shall be treated as foreign judgment in the other covenanting State. On 7-4-1949 the Rajasthan Administration Ordinance No. 1 of 1949 was promulgated

by His Highness the Raj Pramukh in whom the legislative authority of the United-State of Rajasthan was vested under Article 10(3) of the Covenant which may be taken to be the Constitution of the United State of Rajasthan, Section 3 of the Ordinance provides for the continuance of existing laws and runs as follows :

> "All the laws in force in any Covenanting, State immediately before the commencement of this Ordinance in that State shall, until altered or repealed or amended by a competent legislature or other competent authority, continue in force in that State subject to the modification that reference therein to the Ruler or Government, of that State snail be construed as a reference to the Rajpramukh or as the case may be to the Government of Rajasthan".

Thus, even after the formation of the State of Rajasthan the various provisions of the Code of Civil Procedure in force in the various covenanting States continues to remain in force with the result that in the matter of treating the judgment of the court of one of the covenanting States, as foreign judgment in the area of the rest of the covenanting States, the law remained unaltered.

Merely because of the integration no change can be said to have taken place in this matter as in respect of all other matters so far as they affected the rights of the subjects inter se. Because of integration there might have been a change in the citizenship rights of the subject but in all other matters he continued to be governed by the law under which he had been so governed prior to the formation of the State of Rajasthan. This remained the position up to the passing of the Rajasthan Civil Procedure Code (Adaptation) Ordinance No. V of 1950 published in the Rajasthan Gazette Extraordinary dated 25-1-1950. This Ordinance applied subject to certain adaptations Indian Civil Procedure Code (No. V of 1908) of the Central Legislature to Rajasthan. Sections 5 and 6 of the Ordinance provided general adaptations for the purpose of the application of that Code to Rajasthan and read with these general adaptations, the definition of foreign courts and foreign judgment under Section 2 of the Indian Civil Procedure Code, 1908 would read as follows :

> "Section 2(5) "Foreign Court" means a court situate beyond the limits of the United State of Rajasthan which has no authority in the United State of Rajasthan and is not established or continued by the authority of the Government of the United State of Rajasthan.

Section 2(6) "Foreign judgment" means the Judgment of a foreign court."

51. I have to examine what is the effect of this change of the definition on the execution of the decrees that had been passed by the courts of the various covenanting States, in the areas in which they were not executable previous to the passing of the Ordinance No. V of 1950. As I have stated above, even without integration in one unit, the Rulers of the various covenanting States of Rajasthan could have entered into a treaty for the limited purpose of providing for the enforcement of a decree passed in any of the courts of the Covenanting States in the whole of the area under such Rulers. They could enact appropriate laws for that purpose. This they could do not only with respect to the decrees that may be passed in future but also with respect, to the decrees that had already been passed. By integration the power of legislation was conferred on the Rajpramukh and he enjoyed full plenary powers of legislation and even if the exercise of his legislative powers adversely affected some of the citizens of Rajasthan that would not in any way affect the validity of the law enacted by the Rajpramukh. This being the position I have only to see whether under the provisions of the Rajasthan Code of Civil Procedure (Adaptation) Ordinance, a decree which had been passed by a court of any of the covenanting States before the aforesaid Ordinance came into force; became executable against the judgment-debtor, who was not the resident of the country, the court of which passed the decree in the rest of Rajasthan What is the effect of the change in the definition of the foreign court ? I may at this stage examine the relevant provisions contained in the Code of Civil Procedure of 1908 relating to execution. They are contained in Part II and I may confine for the present to Sections 37 to 39.

52. Section 38 provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 37 defines the expression 'court which passed a decree' in an extended manner so as to include in case the court which actually passed the decree has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit. Thus, whatever changes in the constitution of the court might have taken place, either it continued as hitherto fore or the new court might have come into existence in that area, there is always a court which passed the decree according to Section 37, Civil Procedure Code and such a court has power to transmit the decree for execution to any other court inside Rajasthan under Section 39, Civil Procedure Code. The court to which the decree has been so transferred cannot

refuse to execute the decree on any of the grounds contained in Section 13 which was applicable to a foreign judgment. Section 44A had no applicability inasmuch as it provided for the execution of decrees passed by any reciprocating territory and the objections that are available to a judgment-debtor under Section 44A(3) are not available to the person against whom the decree is sought to be executed, now after the coming 7lnto force of the Ordinance No. V of 1950. Unless I take that the decree passed by the court of any of the covenanting State, contained a condition that it shall be executed only in the territory of that particular covenanting State, there is nothing under the provisions of the Code of Civil Procedure to debar the decree-holder executing the decree, even outside the area of that, Particular covenanting State. Formerly the decree might have been a nullity in that area but the legislature brought about a change which made it executable even in the area in which it was sought to be executed. The Full Bench decision of the Rajasthan High Court in the case of - *'Radheyshiam v. Sawai Modi Basdeo Prasad'*, was a case of a decree passed by a court of one of the covenanting States of Rajasthan which was sought to be executed after the coming into force of the Ordinance No. V of 1950 against the judgment-debtor in an area of another covenanting State, and in my humble opinion that decision is sound for the reasons discussed above.

53. The next Important change which took place was coming into force of the Constitution on 26-1-1950 under which the present State of Rajasthan under the Covenant was formed as a part B State of the first Schedule under Article 1 of the Constitution of India. Under Article 372 of the Constitution, all the laws in force in the territory of India immediately before the commencement of the Constitution continued in force subject to the other provisions of the Constitution. But under Article 261(3) of the Constitution, final judgments or orders delivered or passed by civil courts in any part of the territory of India became executable anywhere within that territory according to law. This Article applied to judgments or orders passed after the coming into force of the Constitution. Thereafter the Code of Civil Procedure (Amendment) Act, 1951 Act 2 of 1951 was enacted by the Parliament, which came into force on 1-4-1951. Section 4 of this Act amended Section 2(5) of Act 5 of 1908 which related to 'foreign court' as hereunder.

54. Section 2(5) 'Foreign Court' means a court situate outside India and not established or continued by the authority of the Central Government'. If it were not for the previsions contained in Section 20 of Act 2 of 1951, which shall be discussed

hereinafter the consequence of such a change in definition would be same as in the case of Rajasthan Civil Procedure Code (Adaptation) Ordinance No. V of 1950 and what has been stated in connection with that Ordinance shall, apply with equal force to this change in the definition of the foreign court. While providing for the repeal of the corresponding law in force in any part B State, Act 2 of 1951 further provided in Section 20 that the repeal shall not affect-

> (a) .....
> (b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or
> (c) any..... .remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such remedy may be continued or enforced..... .as if this Act had not been passed.

55. Thus, there are express savings contained in above Act in regard to any right that the judgment-debtor enjoyed under the repealed law and his remedy when his right is infringed is also kept intact. Considerable arguments have been addressed at the Bar that no one has vested right in the matter of procedure. The distinction between substantive and procedural law sometimes tends to be very fine.....A particular legal enactment may style itself as relating to procedure but it may contain in it provisions of varying complexity which may affect the substantive rights of the subject. The Code of Civil Procedure (Act No. V of 1908) is such an enactment. The right to appeal is a substantive right though the provisions relating to right to appeal are contained in the Civil Procedure Code. The following passage in - *'Colonial Sugar Refining Co. Ltd. v. Irving'* [24] lays down that the right vested in a suitor is a substantive right and is not in the result of procedural law.

> "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

Section 13 of the Code of Civil Procedure , Act No. V of 1908 defines the conditions under which the foreign, judgment is conclusive and Section 44A provides that the foreign judgment shall be executable only if such judgment satisfies the conditions laid down in Section 13 of the Civil Procedure Code.
Thus, what is recognized by the Private International Law is recognized by the Civil Procedure Code Act No. V of 1908. The judgment-debtor enjoys immunity from

attachment and sale of his property unless the foreign judgment that has been passed against him is of that quality and character that H can be executed under Section 44A. Such an immunity available to the judgment-debtor is a substantive right. In law a right is that which a man is entitled to have and which can be enforced by appropriate action before a court. It may also be available to a person as an immunity which shall be complete answer to an action brought against him. Deprivation of a right is a matter which cannot be said to be merely procedural. As held by the Full Bench of Travencore-Cochin High Court in the case of AIR 1954 Travancore Cochin 358 (J) such right of the judgment-debtor is of substantive character. I respectfully agree with the observations contained in that judgment. Then it is argued that such a right is not a right which have accrued to the judgment-debtor under the repealing law. It was merely the power to take advantage of an enactment which has been repealed. I am aware of the observations of their Lordships of the Privy Council in the case of - *'Abbott v. Minister for Lands',* [25] which may appear to support this argument. Before the Privy Council the appellant claimed that the right to make an additional conditional purchase accrued to him at the time when the repealed Act was in force and that notwithstanding such repeal, it remained unaffected by such repeal by virtue of the saving clause in the repealing Act. Their Lordships rejected the contention of the appellant and observed :

> "It may be, as Windeyer, J. observes, that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to the advantage of an enactment, without any act done by an individual towards availing himself of that right cannot properly be deemed a right accrued within the meaning of the enactment."

But that case is distinguishable inasmuch as the right to make additional conditional purchase enjoyed in the repealed law was not considered to be a right accrued to the appellant under that Act. It was merely a concession or an advantage enjoyed by him. This case was considered, in the case of - *'Hamilton Gell v. White',* [26] In that case a tenant was entitled to claim compensation by the Agricultural Holdings Act, 1914, when the tenancy of a holding is determined by a notice to quit. One of the conditions of tenant's right to compensation was that he should give notice of his intention to

claim compensation within a specified time. The tenant duly gave notice of his intention to claim the compensation. Meanwhile, the Agricultural Act 1920 was passed which repealed the Agricultural Holdings Act, 1914. Under the repealed law, it was necessary for he tenant, that he should make his claim for compensation within three months after vacating the holding. Before the three months had expired, the repealing Act was passed and the tenant made his claim within three months under the repealed Act. It was held that the tenant had acquired a right under Section 11 of the Act of 1908 and under Section 38 of the Interpretation Act of 1889 such a right was saved. It was observed in that case :

> "This is not like the case which was cited to us ***'Abbott v. Minister for Lands'*** in argument where the tenant's right depends upon some act of his own. Here it depends upon the act of the landlord in which event the section itself confers a right to compensation subject to the tenant complying with the conditions therein specified and so far as it was possible to comply with them down to the time when the section was repealed he did in fact comply with them."

For a similar decision, reference may also be made to the case of - *'Briggs v. Thomas Dryden and Sons',* [27]

56. The judgment-debtor in a foreign judgment which is not conclusive in the international sense is entitled to treat it as a nullity whenever it is sought to be enforced against him in any court except the court of the country which passed it. In a civilized country a foreign judgment is enforced by virtue of some legislation and that legislation grants that immunity to the defendant.
The right that he thus enjoys is absolute right under the International Law and recognized by the law of the country in which that judgment is sought to be enforced. That is a right available to him under the International Law and that exists in him under the legislative enactment of that country. For example, Section 44A of the Civil Procedure Code, 1908 does recognize the right of the judgment-debtor to question the execution of foreign judgment. In recognizing that right the legislature vests in him the right to challenge the enforcement of the foreign judgment. What was granted to him by the International law has been recognized by the legislature of the country and this is a right which had accrued to him under Section 44A, Civil Procedure Code. In my humble opinion, Section 20 of Act No. II of 1951 expressly saves such right and gives him remedy to raise objections in execution in a court of law.

57. In this view of the matter, I need not discuss all the authorities cited at the Bar. I may add that I do not agree with the observations contained in some of the cases, that mere change in the nationality of the person affected by the decree may be the ground for changing the character of the decree. Cheshire on Private International Law, 4th Edition, page 607 may be quoted; in this connection.

> "Nevertheless it is submitted with some confidence that nationality per se as not a reason which, on any principle recognized by private international law, can justify the exercise of jurisdiction. The argument usually advanced in its favor, namely that a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign courts', is surely, out of touch with the known facts of modern life. Moreover, to make allegiance the basis of jurisdiction is scarcely practicable in the case of the British Commonwealth. A British subject resident in New Zealand owes allegiance to the Crown, but that fact alone cannot render him liable on a judgment given against him in England."

In my opinion, in India, the various legislative enactments referred to above brought about the change in the law relating to the execution of the foreign decree and not the mere change in the nationality.

58. It may also be submitted that my examination of the various provisions is confined to the execution of a foreign decree. In other matters that is the enforcement of such a judgment by a separate suit or treating it as res judicata in any claim brought by the opposite party, other considerations may arise. I do not express any opinion on those points.

59. Now what remains to be examines is how far the pronouncement of their Lordships or the Supreme Court in the case of AIR 1953 SC 441 affected the correctness of the decisions of the Bombay High Court in the cases AIR 1951 Bombay 180 and AIR 1951 Bombay 125 (FB). The case before their Lordships of the Supreme Court related to the enforcement of the order for the payment of maintenance passed under Section 488, Criminal Procedure Code in the Court of Magistrate at Lahore before the partition of India which could be executed under Section 490, Criminal Procedure Code in the court of First Class Magistrate at Delhi, where the respondent's

wife sought to enforce it.
Their Lordships confined themselves to the examination of Section 490, Criminal Procedure Code and observed that there was no reason to hold that an order which was valid at the time when it was made and which could have been enforced at Delhi, could not be enforced simply by reason of partition. Various authorities were cited before their Lordships of the Supreme Court including Chunnilal's case'. Regarding these authorities their Lordships observed:

> "We do not intend to examine them because they are not cases under Sections 488 and 490, Criminal Procedure Code and it may be that special considerations apply in the provisions of law which the learned Judges had to apply in those cases. We think it would be undesirable to comment, on them without a careful analysis of all the factors, which obtained, there. Such an analysis is not feasible in a case which relates to a different set of circumstances. All we need say is that if those decisions are not based on matters which are special to them and which do not apply here, and if the learned Judges intended to enunciate a general principle which could affect the rights of the parties before us, then, with the greatest respect, we consider that they are, to that extent wrong."

It is clear from the above observations that their Lordships did not express any opinion as to the correctness of the authorities cited before them. They merely expressed their disapproval of any observations contained in those cases contrary to the general law that order which was competent and enforcible in a particular court before the partition, does not cease to be so simply because of the partition. In my humble opinion these remarks of their Lordships of the Supreme Court cannot be construed as indicative of expressing any opinion relating to the execution of the foreign judgment.

60. In conclusion, I am in agreement with my Lord the Chief Justice in the conclusion to which he has at rived and I am of opinion that both the cases of *'Radhey Shiam v. Firm Sawai Modi Basdeo Prasad'* and *'Shah Premchand v. Shah Danmal,* are correctly decided. I also agree with him in the orders proposed to be passed in each appeal.

Modi, J.

61. I have carefully perused the judgment prepared by my Lord the Chief Justice and

about to be delivered by him on behalf of the majority and the judgment of my learned Brother Bhandari, J., and as I find myself in the unfortunate position of not being able to go the whole way these judgments go, it has become necessary for me to express my opinion separately.

62. The question raised before this five-judge bench is interesting and of great importance. Briefly put, that question is as to the precise effect to be given to decrees of erstwhile, foreign courts passed in absentem against defendants who had not submitted to the jurisdiction, of those courts, it now being that those courts, are no longer foreign and are courts situate in the Union of India. This question has occasioned a sharp cleavage of opinion in our High Courts and, by what seems to be a pure accident, has been differently answered by two benches of this Court within a week of each other, first, by a full bench sitting at Jaipur in AIR 1953 Rajasthan 204 (FB) and 33 then by a division bench sitting at Jodhpur in AIR 1954 Rajasthan 4 to which I was a party, the , latter bench not being aware of the full bench decision. The case before the full bench was as respects the excitability of the decree of a then foreign court which now forms part of this State, while the question before the division bench was as respects the effect of the decree-also of a then foreign court but which even at this date forms part of another State, albeit in the territories of India.

Broadly speaking it may be stated at once that on the reasoning of the full bench in 'Radheysham's case the division bench case must be held to have been erroneously decided.) That reasoning, succinctly put, is that even though the court passing the decree was at the time a foreign court and such decree was an ex parte one and the defendant had never submitted to the jurisdiction of that court, and, therefore, by virtue of the principles of private international law, such a decree was of no effect in the ordinary course of things except in the State-where it was pronounced, still such decrees must receive full effect throughout India after the passing of the Constitution as such courts can no longer be said to be foreign and the parties have now become citizens of one and the same State and are subject to a common sovereignty. The full bench was evidently considerably impressed by the view taken by the Bombay High Court in AIR 1951 Bombay 125 (FB) and AIR 1951 Bombay 190, and the latter decisions have since been followed by the Hyderabad High Court in AIR 1955 Hyderabad 184, the Madhya Bharat High Court in AIR 1955 Madhya Bharat 1 (FB) (G) and the Saurashtra High Court in - *'Kala Bechar v. Mohan Bhagwan',* [28] also. On the other hand, the view which found favor with the division bench was that the effect of a foreign decree passed in absentem against a defendant not submitting to the jurisdiction of the foreign court passing the decree must be governed by the principles

of private international law, according to which such decrees were nothing but nullities except in the State where the decree was pronounced in conformity with the law of that State and as the defendant, in such cases, need not have paid any heed to the proceedings in the foreign court and could have completely disregarded them, it would not be in consonance. with the principles of the said law to invest such decrees with greater potency than they were inherently entitled to merely because certain "political" changes have since taken place in the country. The view taken by the division bench was in accord with that of the Mysore High Court in AIR 1952 Mysore 69 and has since been adopted in Nagpur vide AIR 1955 Nagpur 103, Travencore-Cochin vide AIR 1954 Travencore Cochin 358 (J) and Allahabad vide AIR 1955 Allahabad 490.

63. The question is which of these two views is the sounder one My lord the Chief Justice has come to the conclusion that as a matter of principle the decision of the Division Bench of this Court in 'Premchand's case' is correct, with which part of his judgment, with respect, I am in entire agreement. My lord is, however, of the opinion that by virtue of certain laws of our State, decrees of courts of States which now form part and parcel of this State are taken out of the operation of this principle. Before I address myself to that question, I wish to say a few word's on the general question. At the very outset I seek liberty to say that where we have such a sharp divergence of opinion, no great purpose will be served by discussing individual cases of the various High Courts, one by one, and the best course appears to me to arrive at a solution on first principles and by weighing the opposing opinions on Some crucial test or tests and finding out the true principle which should govern the decision in such cases. I submit that the difficulty I envisaged in Premchand's case in subscribing to the Bombay view, I am still not able to get over, notwithstanding the full-dress arguments which were addressed to us at the bar of this Court. That difficulty, briefly put is how a foreign decree which was utterly ineffective and a waste-paper in every other State except in the courts of the State where it was pronounced before the Constitution came into force and which a defendant could have flatly disregarded and was under no legal obligation to obey can be of binding force after the advent of the Constitution, unless the State legislature or the Indian Parliament in their plenary authority plainly and in unmistakable terms invest it with such efficacy. The acceptance of the contrary view would amount to this that we would be inflicting a most unjust surprise and an unsustainable burden on the defendants in such cases for no fault of theirs, and I feel impelled to enter an emphatic protest against the adoption of such a view unless we are driven to such a conclusion by "compelling" circumstances. To my mind, there is

nothing in the Constitution which may support such a conclusion. Article 261 gives full faith and credit to the judgments of courts in what are now the territories of India. I am prepared to accept that this article puts the judgments of sister States on a somewhat different basis from that of foreign judgments but I have no hesitation in saying, and it is almost settled law at this date, that this clause cannot have a retrospective operation and, therefore, judgments of courts in India which were foreign at the time of passing them cannot become effectual under this article throughout what is now the territory of India. Then, Article 5 which introduces the conception of a single citizenship throughout India also, in my humble judgment, cannot produce that effect. It must be remembered that the Indian Constitution is federal in character though it is true that the framers of our Constitution did not consider it wise to introduce the conception of dual citizenship in India as in the United States of America.

It seems to me clear that our Constitution-makers sought to strike a just balance between the autonomy of the several units composing the federal State and the solidarity of a unitary State which is best engendered on the foundation of a single citizenship. Be that as it may, there is authority for the proposition that the ties of a common citizenship or common sovereignty by themselves which appear to have in some judgments been referred to as an "act of state" do not and cannot give that status to the foreign ex parte decrees of the erstwhile separate units to which they were not entitled at the time they were passed. Let us take the example of the United Kingdom and consider it in some detail as it has an apt bearing on the question before us. Scotland and Ireland became part of the United Kingdom with England under a, common sovereign. Yet it admits of no questioning that the former from the view point of private international law were foreign countries until 1868 and a person who had obtained a decree in and of those countries and who wished to enforce if against the defendant in England was in no better position than if he had obtained his judgment in some country which did not form part of the United Kingdom, and his only course was to bring a fresh suit in England. Then was passed the Act of 1868 which a known as the Judgments Extension Act, 1868 and by that the judgments obtained in the superior courts of England, Scotland and Ireland became effectual in any other part of the United Kingdom. This Act still did not apply to judgments of inferior courts which stood in the same position as before, and then came the Inferior Courts Judgments Extension Act, 1882, by which the judgment, say, of a county court in England became effectual in other parts of the United Kingdom including Ireland and Scotland also. Now the King of England was also the sovereign of all territories which formed

part of the British Dominions - but notwithstanding such common sovereignty - the judgments obtained in one part of these territories could not be executed in any other part until the Administration of Justice Act was passed in 1920, and it was by virtue of that Act that a system of registration was introduced according to which a judgment passed in any of these territories was made effectual in the United Kingdom provided the High Court in England or Ireland or the Court of Session in Scotland thought it just and convenient that the judgment should be enforced in the United Kingdom. These conditions are, generally speaking, the same as prescribed in Section 13, Civil Procedure Code. The final position in the United Kingdom is reflected by the Foreign Judgments Reciprocal Act, 1933, according to which judgments of foreign countries have also been made effective on registration which however, has been made compulsory but may be set aside under certain circumstances. I have dealt at some length with these developments in the United Kingdom as they throw a flood of light on the validity or otherwise of some of the assumptions which appear to me to underlie the one class of judgments on the point before us which have taken a contrary view to that in 'Premchand's case'. I am clearly of opinion, with utmost deference, that the circumstance of common citizenship or of a common sovereign which has sometimes been referred to as an act of State is per as not a sufficient warrant for the proposition that the decree obtained by a plaintiff in one part of the country which was foreign as respects a non-resident defendant at the time the decree was passed and later became united with certain other parts becomes thereby effectual in other parts of the united territory. My view, therefore, is that the learned Judges who have been led to the conclusion of effectualness of foreign decrees on the ground of political changes in our country have fallen into a fallacy, and I still adhere to the opinion expressed by me in 'Premchand's case' that that conclusion is not correct. The argument that the courts whose decrees are sought to be executed are no longer foreign now at the time their execution is sought, must in the light of the discussion made above, be also rejected. In my opinion, the correct approach to the question before us is to have regard to the state of the court at the time it passed the decree. If the decree was passed by a court of competent jurisdiction, and was good at the time it was passed, it does remain good and effectual. If it was subject to infirmity at the time of its pronouncement in all other countries except where it was passed, neither common citizenship nor common sovereignty supervening subsequently can make it good and effectual in those other countries.

64. Throughout the discussion made above, I have assumed that a decree passed by a

foreign court in absentem against a non-resident defendant who has not submitted to the jurisdiction of the court passing the decree is a nullity and that he is under no kind of obligation to obey it, and the courts of every country must so regard it except the courts of the country where it was pronounced and where they were authorized to do so by the law of such country. Is this assumption incorrect ? I submit not. I am aware of certain observations in the judgment of the full bench of the Bombay High Court in 'Bhawani Shanker's case' and the cases following that opinion. In the Bombay case, the learned Chief Justice "while delivering the opinion of the full bench observed that

> "the true view of the matter is not that the decree passed by the foreign court was a nullity but its enforcement or excitability was limited to the Sholapur court."

In the next sentence, the learned Chief Justice himself accepted that for the purpose of competence in private international law a court Is never competent when it passes a judgment against a non-resident foreigner who has not submitted to its jurisdiction, and that being so, the decree could not be executed in the Akalkot court so long as the Sholapur court was or continued to be a foreign court. The learned Chief Justice, however, went on to observe that

> "once it was conceded that the decree was not a nullity and it was valid and binding so far as the Sholapur court was concerned there was no difficulty....."

The meaning of this sentence is not quite clear to me. Perhaps it had been conceded by learned counsel on behalf of the respondent in the Bombay case that the decree was not a nullity in which event the judgment would appear to have been based upon the concession made in the case and cannot furnish a sound authority on the important question raised before ns. Having referred to the circumstance of concession, the learned Chief Justice observed further that if the character of the Akalkot court, changes and if the status of the defendant alters, then the impediment, which, was initially there, disappears and the decree which was unenforceable till the change came about, becomes enforceable in the Akalkot court.

65. I have already dealt with the fallacy involved in this reasoning so far as it is founded, on the conception of common citizenship and common sovereignty. These considerations are, with great respect, of no materiality. I have also shown above that the crucial time for determining the character of the decree, in the sphere of conflict of

laws, is the time of the rendition of the decree and not the time when its execution is sought. I further wish to say that the analysis made in the above judgment of the view expressed by their Lordships of the Privy Council in the leading case of 21 Ind App 171 (PC) (L) seems to me to go too far indeed and imposes too great a strain on the language employed by their Lordships and imputes a meaning to them which in all humility it does not seem to me to bear. What their Lordships said in 'Gurdayal Singh's case' was as follows :

> "In a personal action, to which none of these causes of jurisdiction apply a decree pronounced in absentem by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself is by International Law an absolute nullity.

He is under no obligation of any kind to obey it and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

66. According to the Bombay view, this was really to say that a decree of this character was not a nullity and that it was a valid decree but that there was merely an impediment in the wav of its execution. This is, with very great respect, putting something in the mouths of their Lordships which they never said or as I consider they hardly intended to say.

On the reasoning of the Bombay judgment, one is tempted to ask, if the decree was a valid decree, it should be binding everywhere in its due and lawful course and why at all should there be any impediment in the execution of the decree?

The impediment, or call it what you like, is traceable to the basic, fundamental infirmity of such decrees according to the private international law that such decrees are a nullity and the one exception only is that they may be executed, where special local legislation so permits, in the country where they were pronounced. That is the correct statement of the law as found in 'Gurdayal Singh's case'. That is equally the correct law which well-known jurists-such as Dicey (See Dicey's Conflict of Laws-Chapter 16, - Effect of foreign judgments in England, and Chapter 12 - Jurisdiction in actions in persona) and Cheshire (See Private International Law, Part VI, Chapter 16, heading "Actionability of foreign judgments" at page 598) and others have consistently laid down in their celebrated works. To sum up, therefore, the correct position seems to me to be this that in personal actions private international law does not recognize the accrual of cause of action as any ground for valid jurisdiction, and,

therefore, where a foreign court assumes jurisdiction over a defendant in such an action when he is not within the jurisdiction of such a court and is in fact absent when the suit is commenced, or where he does not submit to the jurisdiction of the court, the defendant is under no obligation to obey the decree of the court, but this is subject to one exception which is that such a decree may be effective in the State where it was rendered provided the legislature of that State so permits; but in no other place whatever; and, apart from this solitary exception, such a decree was and would be an utter nullity in all other countries or states, and the defendant would be well within his rights in disregarding such a decree in his own State and every other, the principal reason being that the defendant was not bound to obey the summons of the foreign court and if he disobeyed it, he could not be subjected to any adverse consequences in any other country except the one where the decree was rendered. In other words, the requirement is that a foreign court, in the domain of conflict of laws to which sphere such decrees must pertain, should have been a court of competent jurisdiction in the international sense, and if the foreign court is not competent in this sense, its decrees are a nullity subject to the single exception referred to above.

67. This, then, is the unquestionable position as to the action ability or effectiveness of foreign decrees against non-resident foreigners, and I wish to repeat that this position does not admit of any alteration because at some date subsequent to the passing of a decree of such a character, certain political changes have taken place and the foreign court has, therefore, become a municipal court. In my opinion it is one thing to say that such a court has become a municipal court at the time of execution, but it would be quite a different thing altogether to say that it was a municipal court at the date the decree sought to be executed was passed. Putting it in another way I would say that we cannot give that court the status of a municipal court and its decrees, passed as such, the character of the decrees of domestic courts with retrospective effect. In this view I have no hesitation in saying that the view adopted by my Lord the Chief Justice and myself in 'Shah Premchand's case' was correct and I fail to see any justification for altering that view on first principles.

68. This brings me to the next question which relates to the foreign decrees of the States which now form part of our own State i.e., the integrated State of Rajasthan. My Lord the Chief Justice has arrived at the conclusion that the decrees passed by the courts of those States which were foreign before, but which now form part of our own State, stand on a different footing and appear to his Lordship to be outside the

operation of this principle by virtue of certain laws of our own State. Now, I may state at once that it is open to the legislature of a State in its wisdom and within its plenary powers to make such ineffective decrees effectual; but I take the opportunity of pointing out that having regard to the nature of such decrees and the basic infirmity which attaches to them, we would be justified in coming to such a conclusion only where the legislature has plainly and in unmistakable terms said so. I am definitely of opinion that if such is not the case, we would be creating a serious anomaly and causing gross and palpable injustice to non-resident defendants in such cases. Having given my most anxious consideration, to this class of cases, and such a one was under consideration in 'Radheshyam's case' before the full bench of this Court, I am not at all convinced that our own laws speak with that certainty or clarity that we may feel justified in holding that the "foreign" decrees of States, which before merger were foreign but which now have become part of this State must receive effectualness throughout the boundaries of the integrated State, no matter that such decrees were nullities every where except in the State where they came to be pronounced in accordance with the law of that State.

69. It may be mentioned at once that the various covenants entered into between the former princely States which have gone to form, the present State of Rajasthan make no provisions whatever as regards the force to be given, to the decrees of the courts of the integrating States. These covenants are contained in the White Paper on Indian States issued by the Government of India and appear at pages 27 to 282 and 282 to 285. It is also worthy of mention that the Rajasthan Administration Ordinance (No. 1) of 1943 which was enacted to provide for a unified administration of the component units of the new State contains no provision regarding this matter. On the contrary Section 3 of this Ordinance provided that all the laws in force in any covenanting State immediately before the commencement of this Ordinance shall, until altered or repealed by competent authority, continue in force-in that State. It appears to me to be interesting and instructive in this connection to invite attention to the States Merger United Provinces Order, 1940 which while making provision for certain things in connection with the administration of the States of Banares, Rampura and Tehri Garhwal as components parts of the United Provinces, now known as Uttar Pradesh, provided in clause O as follows :

> "all decrees passed and orders made before the appointed day by the High Court of Rampur or by any of the existing Civil Courts and all sentences or orders

> passed in the exercise of criminal jurisdiction by the High Court of Rampur shall be deemed, for the purpose of execution, to have been passed or made by the corresponding court established under and in accordance with the provisions of this Article."

(See Appendix XLV in the White Paper on Indian States at page 307).
Similarly, the States Merger (West Bengal) Order, 1949, which provided for the unified administration of the State of Cooch-Behar as part of the province of Bengal also made an explicit provision with respect to the execution of the decrees of the Cooch-Behar State and provided that every decree passed by the courts of that State shall be deemed for the purpose of execution to have been passed by the corresponding court established under and in accordance with the provisions of that article of the order. (See the same White Paper at pp. 310-11).
Unfortunately, there is no such specific provision available in any covenant or administration ordinance or any other order relating to this State.

70. I now come to the enactments referred to by my Lord the Chief Justice in his judgment. The first in this series is the Rajasthan High Court Ordinance, 1949, (No. 15) of 1949 Section 49 of this Ordinance provides, first, for the abolition of the pre-existing High Courts in the former States, and, secondly, it provides for the transfer of cases pending in the pre-existing High Courts or similar tribunals to the new High Court of Judicature for Rajasthan, and lastly, it says :

> "that all the records and documents of the several courts which so cease to exist shall become and be the records of this High Court."

My Lord the Chief Justice has held that this part of Section 49 makes the decrees of the preexisting High Courts to be the decrees of this Court. I am willing respectfully to concur in this view as this is a sufficiently clear provision although I feel it might well have been made more specific which makes the decrees of the former High Courts decrees of this Court.
I may point out, however, that this provision will really be applicable to a very limited class of decrees which have been passed by the former High Courts or equivalent tribunals in the exercise of their original jurisdiction inasmuch as by far the largest bulk of ex parte decrees passed against non-resident defendants could have scant chance of being taken up to the High Courts on appeal in the very nature of things.

This provision will be found in practice to be shot of any great value or benefit for our present purposes, and I consider it unnecessary to say anything more on this point. Then we come to the Rajasthan Small Cause Courts Ordinance (No. VIII) of 1950. The relevant provision contained in Section 2 is in these terms : All laws relating to Courts of Small Causes, for the time being in force in any part of Rajasthan are hereby repealed.

> Provided that anything done or action taken under any such law shall, unless superseded or withdrawn under or in pursuance of this Ordinance, continue and be deemed to have been done or taken as the case may be, under or in pursuance of this Ordinance as if it were then in force.

The underlining (here in ' ') is mine).
The provision as it is worded, in my judgment, is very general and ambiguous one, and neither so clear nor so impelling that we should be justified in holding or must necessarily hold that the decrees passed by what were foreign courts at the time they were passed against nonresident foreigners have been invested with the status and force of decrees of the new State with the result that they should be held to be executable without the possibility of any challenge being raised against them under Section 13, Civil Procedure Code. We should remember, I submit, the back ground against which a provision like this must have been necessitated in the very nature of things. A number of old independent States had been integrated into the new State of Rajasthan. The authorities that were, and be it remembered in this connection, that there was no elected legislature functioning in the State at the time, were called upon to provide for a certain continuity of things and they were not to write on a clean state. The unsatisfied decrees and orders in their respective States, and elsewhere if the general principles of law so permitted, has to be given effect to and respected as good. The section was merely enacted, in my opinion, to preserve some such effect, and no more. I am unable to hold that such an equivocal provision is a sufficient warrant for us to give ex parte decrees against non-resident defendants who were foreigners at the time such a tremendous effect that decrees which were utterly value-less at the time they were rendered should spring into life once again and become good and effectual all over Rajasthan over and above their former areas. In my humble judgment, a far more explicit expression of the intention of the legislature was and should be required to place them on the footing desired to be given to them so that they cannot be challenged under Section 13, Civil Procedure Code.

71. The third and the last provision relied on in the majority judgment is, in my humble opinion, perhaps of a still weaker character. That is contained in Section 5 of the Rajasthan Civil Courts Ordinance (No. VII) of 1950. This section reads as follows :

> "Until other provision is made under or in pursuance of this Ordinance, all courts constituted, appointments, notifications, rules and orders made and jurisdiction and powers conferred under any law repealed by Section 4 shall be deemed to have been respectively constituted, made and conferred under this Ordinance".

The key to the probable meaning of this provision is perhaps to be found in the opening phrase "until other provision is made under or in pursuance of this Ordinance." This provision again is extremely ambiguous, and all that I have said with respect to decrees of small cause courts above applies with even greater force to this provision. I have grave doubts that in enacting this provision the legislature had ever contemplated that the ex parte decrees passed in absentem against non-resident foreigners which were nullities in every other place except in the State where they were pronounced were henceforward to be effectual and good throughout the length and breadth of the new State. I do not deny at all that the State Legislature could have, if it so wished, made this result possible. But I do strongly feel that it would De straining the language of these provisions, which, is of so general and ambiguous a character, to impute such an intention thereto which would be productive of such serious results. With great respect, therefore, I am unable to go so far as to hold on the strength of the provisions referred to above that the decrees or the subordinate courts of the former States passed against non-resident foreigners at the time they were passed can be considered to be good and effectual throughout the united territory, in the absence of a clear, unambiguous and express provision to that effect, and there is no such legislation, in my opinion, which exists up to the present moment which would justify us in investing such decrees with effectualness outside their former bounds. In other words, I am of opinion that decrees of foreign States which now form part and parcel of the United State can properly be executed in the areas of their original effectiveness and no more. I am certain that in so deciding we do not deprive them of their intrinsic value which they at any time possessed while at the same time by so restricting their effectiveness, we do nothing to inflict any unmerited surprise and consequent injustice on the non-resident defendants who were not at all bound to

obey them in their own States as they existed before or anywhere else apart from the State where they were rendered.

I may add that I am not impressed with the argument that this will lead to any practical difficulties so far as the execution of such decrees at this date is concerned. In the first place this limitation applies only in the case of ex parte decrees passed in absentuin against persons who were foreigners qua the courts passing them at the time they were passed. Secondly, the boundaries of the former States are neither so old nor so unknown at this distance of time that I should consider this argument insurmountable. We are even now called upon to administer different laws in different parts of Rajasthan which have to be considered with reference to the former boundaries of the erstwhile separate States. Such boundaries would certainly be ascertainable although this may cause some inconvenience and trouble in a particular case. But a far greater difficulty in my view is created by giving such decrees an effect which they never possessed and which they should not receive unless there is clear law sanctioning and compelling such, a course. In this connection I am tempted to invite attention to the observations made by the House of Lords in the case of 1878-3 AC 582 to which my Lord the Chief Justice has also made a reference in his judgment. There a dispute arose with regard to the validity of a document which was executed in Scotland in 1823. According to the statute of 1696 Ch. 15, a document which consisted of more than one page to be valid1 should have been signed on each page by the executants or executants with his or their usual and accustomed form of signature, but the document in this case had been signed by the grantors on the last page only, the previous sis pages being initialed only. The trial court held that the document was of no effect and force whatever, and that the Convincing (Scotland) Act of 1874 which dispensed with certain requirements essential to the validity of documents in Scotland under previous statutes could not remedy the defect. Lord Cairns L.C. in delivering his opinion made the following observations :

> "If the construction contended for by the appellant is correct, the consequence is that this section, by words which at the outset are ambiguous, must have the effect of bringing again into existence without limit as to time every instrument which had failed of validity by want of compliance with the formalities of the Act of 1696 and must have the effect of setting up every such instrument, notwithstanding the titles and the arrangements of property which might have been made up on the assumption that those instruments were absolutely invalid .....

The thing might have passed out of their recollection. It might have been treated1 years before the Act of 1874 had passed as a document which went 'pro non scripta' and yet they might find that under the ambiguous words of this 39th section the instrument came again into validity" and' then followed the words to which I wish to invite special attention :

> "The proposition only requires to be stated in that way to show that this is a construction which your Lordships would not arrive at 'unless compelled by the strongest and clearest words of the Statute'. (The underlining (here in ' ') is mine).

I submit that the language of the provisions in our own Acts discussed above is Wholly general and at the outset ambiguous and neither so clear, nor so cogent or compelling, so that, to use again the words of the noble and learned Lord Chancellor, we may safely adopt a construction thereof ignoring completely "the gross injustice and the gross anomalies" to which the defendants would doubtless be subjected by the larger construction sought to be given to such decrees. I would further point out that what was said to be true of the improperly executed instrument by the House of Lord's in the above case applies with the fullest force to the imperfect decrees we are asked to give effect to, notwithstanding that they were utter nullities in the areas where they are now sought to be held as effectual.

72. My learned brother Bhandari seems to have mainly relied on two grounds in arriving at a different conclusion from the one which I have felt persuaded to accept on this branch, of the case. I propose briefly to deal with them now.
The first consideration which has found favour with him is grounded on the altered definitions of the terms "foreign court" and "foreign judgment" introduced in this State by the Rajasthan Code of Civil Procedure (Adaptation) Ordinance (No. V) of 1050. As contained in Clauses (5) and (6) of Section 2, these definitions are as below : Section 2(5) "Foreign Court" means a court situate beyond the limits of the united State of Rajasthan which has no authority in the united State of Rajasthan and is not established or continued by the authority of the Government of the United State of Rajasthan. Section 2(6)"Foreign Judgment" means the judgment of a foreign court. The argument obviously seems to be that the effect of these definitions as altered is that the decrees of courts of those States which are now part and parcel of the new

State of Rajasthan do not fall within the category of foreign courts at so after the ordinance was passed. I greatly regret that I am unable to share this view.

The simple reason is, as it must be, that according to well established principles of interpretation of statutes, the new definitions, which are sought to be relied upon, can possess only a prospective operation and not a retrospective one, - unless the statute so ordains in plain and unmistakable language or by necessary implication. To my mind, the Ordinance under consideration does nothing of the kind. Such courts, when they passed the impugned decrees, were unquestionably foreign and their decrees so rendered were equally foreign and no amount of argument can alter that, and, therefore, such decrees fall to be considered from the conflict of laws point of view, and I see no escape from such a position. In the second place my learned brother has placed his reliance on Sections 37 to 39 of the Code, and arrived at the conclusion that a court to which a decree may have been transferred for execution, as it must be in such cases generally, is incapable of refusing to execute the decree on any ground such as might be raised under Section 13, Civil Procedure Code and consequently decrees passed by courts of those States which now fall within the boundaries of the United State of Rajasthan are, as it were, sacrosanct and do not admit of being questioned on the ground of jurisdiction of the court passing the decree or similar other ground, and therefore, the decrees of such courts stand on a different footing from foreign decrees of other States. To my mind, this proposition is of doubtful validity and cannot be relied upon to produce the desired result. I say so because there is considerable authority for the view that a challenge as to inherent lack of jurisdiction of the court passing the decree, may be raised in the executing court passing the decree as also in the court to which such a decree may have been transferred for execution. In - *'Sheo Tahal Ram v. Binaek Shukul',* [29] Sulaiman Act, C.J. held that it was open to a judgment-debtor who was a resident of British India against whom a decree had been passed by a native State court to object to its validity on the ground of want of jurisdiction and to raise that objection in the court to which the execution had been transferred. The learned Judge further doubted the view that the court to which the decree has been transferred cannot entertain an objection as to jurisdiction on account of the omission of the words "or the jurisdiction of the court" from the section corresponding to Order 21 Rule 7, C.P.C. In - *'Radha Kishen Sohan Lal v. Bihari Lal Asa Nand',* [30] a decree passed by a British Indian court was transferred to another court in British India. The judgment-debtor's objection was that the decree was a nullity having been passed against a person who was dead at the time the decree was passed. It was held that such an objection could be raised and that

there was no justification for drawing any distinction in this respect between the powers of the executing court passing the decree and those of the court to which a decree is transferred for execution

The same view appears to me to have been upheld' in - *'Sadashiv Mahadeo v. Mahomed Yakub',* [31] It may lastly be pointed out that the very principle is deducible from the decision of their Lordships of the Privy Council in - *'Jnanendra v. Rabindra Nath',* [32] as it was held in that case that a decree passed without jurisdiction is a nullity and would not be capable of execution at all.

73. I am, therefore, definitely of the opinion that the provisions discussed above do not furnish any valid justification for the view that the decrees of the former foreign courts are incapable of being challenged on the grounds under Section 13, Civil Procedure Code, merely because such courts are now part of our State and no longer foreign or because the transferee courts have no power to entertain any objection as to inherent want of jurisdiction of the courts passing the decrees.

74. To sum up, therefore, my conclusions are as follows :

> (1) that the view taken in 'Shah Premchand's case' that ex parte decrees passed before the advent of the Constitution in absentum against non-resident defendants, in personal actions by courts in other States which are now the territories of India and which may now be sought to be executed in this State are foreign decrees and are open to challenge under Section 13, Civil Procedure Code and must be held to be in executable here if inter alia they have not been passed by a court of competent jurisdiction in the international sense.
>
> (2) The same principle must be held to apply to the execution of such decrees passed by courts of even those States which now fall within the boundaries of this State but which were foreign at the time of the passing of the decrees in the absence of any clear legislative provision to the contrary. Their excitability should be held to be limited to the State or the territory of their original effectiveness.

In this view of the matter, with the greatest respect, it seems to me that our full bench case of 'Radheshyam (A)' was not correctly decided both in its reasoning and the ultimate conclusion reached.

> (3) The only exception to the proposition enunciated in the preceding clause is

that where a foreign decree sought to be executed in this State is that of the High Court or the equivalent court of any covenanting State, then it must be given effect to throughout Rajasthan and no challenge can be raised against such a decree under Section 13, Civil Procedure Code

75. In conclusion it only remains for me to add that all the cases before this bench fall within the ambit of clause (1) above and I entirely agree in the orders proposed to be passed in these cases for the reasons mentioned in the judgment of my Lord the Chief Justice.

Order accordingly.

Cases Referred.

1. AIR 1953 Raj 204 (FB)
2. AIR 1951 Bom 125 (FB)
3. AIR 1951 Bom 19
4. AIR 1952 Mys 69
5. AIR 1954 Raj 4
6. AIR 1955 Hyd 184
7. AIR 1955 Mad Bha 1 (FB)
8. AIR 1955 All 490
9. AIR 1955 Nag 103
10. AIR 1954 Tra Coc358 (FB)
11. AIR 1953 SC 441 (decided on 18-9-1951)
12. 21 Ind App. 171 (PC)
13. AIR 1951 SC 124
14. 1878-3 AC 582
15. AIR 1950 Calcutta 12
16. AIR 1954 Calcutta 67
17. (1873) 17 Wall 521
18. AIR 1941 FC 16
19. AIR 1946 PC 127
20. AIR 1943 PC 29
21. AIR 1955 SC 504

22. AIR 1955 SC 540
23. AIR 1952 SC 252
24. 1905 AC 369
25. 1895 AC 425
26. 1922-2 KB 422
27. 1925-2 KB 667
28. AIR 1953 Saur16'- (FB)
29. AIR 1931 All 689
30. AIR 1934 Lah 117
31. AIR 1943 Bom 404
32. AIR 1933 PC 61