
(1956) 01 P&H CK 0001
In the Punjab And Haryana At Chandigarh
Case No : Exn. First Appeal No. 201 of 1952

Firm Radhe Sham Roshan Lal

APPELLANT

Vs

Kundan Lal Mohan Lal

RESPONDENT

Date of Decision : 19-01-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(5), 43, 44
Constitution of India, 1950 — Article 261(3)

Citation : AIR 1956 P&H 193

Hon'ble Judges : Khosla, J;Dulat, J;Bishan Narain, J

Bench : Full Bench

Advocate : H.R. Sodhi and C.L. Lakhanpal, for the Appellant; F.C. Mital and S.C. Mital, for the Respondent

Judgement

Kapur, J.—This matter has been referred to a Division Bench by my learned brother Harnam Singh J., because of the conflict of opinion between the Bombay High Court in -- " Bhagwan Shankar Vs. Rajaram Bapu Vithal, and the Rajasthan Court in -- " Shah Premchand Vs. Shah Danmal, The appeal in this Court was brought by the decree holder against an order of the Senior Subordinate Judge, Ludhiana, dated 14-5-1952 dismissing the application for execution.

2. On 17-2-1948 firm Radhe Sham-Roshan Lal obtained a decree for Rs. 14,000 against firm Kundan Lal-Mohan Lal from the Court of a Subordinate Judge at Indore. The Maharaja of Indore signed a covenant with the Dominion of India on 18-4-1948 and on 28-5-1948 the State of Madhya Bharat was created by the merger of several States including Indore: Appendix XXXVII at page 252 in the White Paper on Indian States issued by the Ministry of States.

There is no term in this covenant in regard to pending proceedings. I should have mentioned that although firm Kundan Lal-Mohan Lal was served but they never submitted to the jurisdiction of the Indore Court. On 21-9-1950 the decree-holder obtained a transfer certificate for execution to the Ludhiana Court and on 10-1-1951 he made an application for execution. The execution Court held that

although the decree could be transferred it was a decree of a foreign Court and could not therefore be executed.

3. According to Dicey on Conflict of Laws "foreign Judgment" means a judgment, decree, or order of the nature of a judgment which is pronounced or given by a foreign Court (page 345), and in an action in personam the Courts of a foreign country have jurisdiction where the party objecting to the jurisdiction of the Courts of such country has precluded himself from objecting thereto * * * * (b) by voluntarily appearing as defendant in such action (page 352). In the Indian Civil Procedure Code, Section 2(6), also "foreign judgment" means the judgment of a foreign Court which is defined in Section 2(5) to mean:

"2(5) "foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government." Therefore when the decree was passed it was the Judgment of a foreign Court as defined in Private International Law or in the Indian CPC and this was not controverted by the learned Advocate for the appellant. The question which has to be seen is whether a judgment which had not an Indian nationality at the time when it was passed changes its nationality by anything which has subsequently happened or there is any provision for its naturalisation as an Indian judgment.

In a case where an order was passed in Lahore before the partition of India and was sought to be executed after the partition in Delhi, it was held that it continued to be an Indian judgment -- " Kishori Lal Vs. Sm. Shanti Devi, A judgment therefore continues its old nationality until by statute or otherwise there is a change.

4. It was submitted by the appellant that u/s 43, Civil P. C., the decree of the erstwhile Indore Court could be executed in Ludhiana. It may be necessary to give the history of Section 43 from 1947 till today. Before the Adaptation Order of 1948 the words used were-

"Any decree passed by a civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Central Government or the Crown Representative in the territories of any foreign Prince or State may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India."

After the Adaptation Order of 1948 these words were as follows: --

"Any decree passed by a Civil Court established in any area within the Province of India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Central Government or the Crown Representative in any Indian State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in the Provinces."

After the Constitution there was Adaptation Order and then the words used were-

"Any decree passed by a civil Court established in any area within the States to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in the States."

There was another Adaptation Order and then Section 43 came to read as under:
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"43. Execution of decrees passed by civil Courts in part B States, in places to which this part does not extend or in foreign territory-

Any decree passed,

(a) by a civil Court in a Part B State, or

(b) by a civil Court in any area within a Part A State or Part C State to which the provisions relating to execution do not extend, or

(c) by a Court established or continued by the authority of the Central Government outside India"

5. This amendment thus made the decrees passed by Courts in the newly created B States to be executable in India even though the Code had not been extended to these States. This section was again amended by Section 8 of Act II of 1951 and now the section reads as under:--

"Any decree passed by any civil Court established in any part of India to which the provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends."

It is submitted that it was the section as amended by the second Adaptation Order after the Constitution which governed the case because it was that section which was applicable on 10-1-1951 when the execution started, but pending the execution on 19-2-1951 the present section came into force in India.

6. As I understand Section 43 as it stood before the Act of 1951, it made the decrees of Courts of B States executable. But part B States themselves were the creation of the Constitution and the reference in my opinion was to decrees passed after the Constitution. And if the section is merely procedural and therefore retrospective then from 19-2-1951 a new section was substituted and from that date the new Section 43 becomes applicable which does not have any reference to Part B States, and therefore the only decrees executable would be those for areas mentioned in Section 2 of the Act (II of 1951).

7. Similarly Section 44 has undergone several changes and, at the time when the application for execution was made it read as follows:--

"44. Execution of decrees passed by Revenue Courts in part B states-

The Government of a Part A State or Part C State may, by notification in the Official Gazette declare that the decrees of any Revenue Courts in any Part B State or any class of such decrees may be executed in the Part A State or Part C State as the case may be as if they had been passed by Courts of that State." And now under Act II of 1951 it reads as under: --

"44. Execution Of decrees passed by revenue Courts in places to which this Code does not extend.

The State Government may, by notification in the Official Gazette, declare that the decrees of any revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, may be executed in the State as if they had been passed by Courts in that State."

8. The history of Section 43 shows that originally, i.e., up to 1947 the decrees of Court in three portions of British India to which the Code was not applicable were executable in the rest of British India. the Adaptation Order of 1948 only made verbal changes as they wanted to substitute British India by Provinces of India which by the Constitution became States. But even after the Constitution the CPC did not become applicable to the newly created States which came into existence as a result of their merging into groups. They had become India and were no longer princely States with a semi-independent Status.

Decrees of these Courts of these States as created by the Constitution of 1950 were decrees "passed by Civil Courts established in any part of India" and not British India as it was in 1947 and therefore they were executable in exactly the same manner as decrees mentioned in the Code in 1947. And that was the reason for this Adaptation. And when the Act of 1951 came into force the Code became applicable throughout India and the need for Section 43 was reduced to the decrees of areas mentioned in Section 2 of the Act of 1951.

9. The history of Section 44 of the Code shows that it has always been complementary with Section 43. Before 1937 the words used were "in the territories of any native Prince or State" which would have included Indore. In 1937 these words were replaced by "in any Indian State". And Section 44A was introduced to reciprocate the policy contained in Foreign Judgments (Reciprocal Enforcement) Act 1933.

But for the decrees passed toy Courts in Indian States section was applicable. The language used in the section after the Adaptation Order of 1948 produced no real change. The first Adaptation of 1950 introduced the words Part B States and they still required a notification u/s 44 to make the decrees of Courts in Part B States executable.

But when Section 43 was amended lay the second Adaptation Order of 1950 so as to give executability to decrees of such Courts, Section 44 was further amended to restrict the necessity of a notification to decrees of Revenue Courts of Part B States. And the position is practically the same after the Act of 1951. Decrees of all Courts in India to which the Code applies are executable in any part of India except those covered by Section 2 of the Act of 1951 and therefore Section 44 is restricted to decrees of Revenue Courts.

10. Now the defendants never submitted to the jurisdiction of the Court at Indore and therefore the Court had no jurisdiction over them. As is said in Cheshire on Private International Law at page 779: --

"A foreign judgment is actionable only because it imposes an obligation upon the defendant, it follows that any fact which negatives the existence of that obligation is a bar to the action. One of the negating facts must necessarily be that the defendant owes no duty to obey the command of the tribunal which has purported to create the obligation. There must be a correlation between the legal obligation of the defendant and the right of the tribunal to issue its command."

11. As the Indore Court had no jurisdiction under Private International Law over the defendant firm, it owed no duty to obey the order of that Court. Nor could the Ludhiana Court therefore act as its enforcing agent.

12. The form of the transfer certificate to be sent under Order 21, Rule 6, Civil P. C. is given at page 1333 of Mulla's Civil Procedure Code. Thus the Executing Court in Ludhiana had to execute the decree of Indore of 1948. This decree remains the decree of that Court which was not a Court of a Part B State as Part B States did not exist then. It continued to be a decree of a Court of Indore State which was a foreign Court.

13. The next question which arises for decision is whether Section 43 is merely procedural or also creates rights. The question whether the decree-holder can enforce his rights under the decree by execution as also by suit or only by a suit u/s 13 of the Code is not a question of procedure but is a question of substantive law as it is a question of right of a decree-holder and if he has the right to enforce his rights under the decree of the Court at Indore by means of execution, the applicability of Order 21 is a question of procedure in which no one can have a vested right. See Maxwell on Interpretation, page 201 (8th Edn.) and In re Hales Patent (1920) 2 Ch. 377 (D), where this distinction between rights and procedure, is shown.

Therefore what decrees can be enforced by execution and which by suit is not a procedural matter but one relating to rights of decree-holders and cannot, in my view, be affected by change in the law unless it is expressly retrospective.

14. If the contention that Section 43, as it was before the Act of 1951, is retrospective, were to be accepted, on a foreign judgment the status of a Judgment of an Indian Court would be conferred. Therefore an erstwhile British

Indian subject who did not submit to the jurisdiction of a foreign Court would become bound by that decree and no defence on the merits of the case would be open to him and thus his vested rights would be affected by a subsequent change in the law. This would be sufficient to meet the argument in favour of re-prospectively.

15. It is to avoid hardships to decree-holders who had obtained decrees from Indian States that Section 44 existed, the object of which was to give executability to decrees of Indian States so as to put them on a par with decrees of Indian Courts and I have no doubt that the object was to apply this section to those cases where the Standards of the judiciary approximated to Indian Standards or at least were not subject to the defects mentioned in Section 13 of the Code, It was, in my view, for that reason that two sections in the Code were enacted one dealing with Indian States i.e. Section 44 and the other with foreign countries i.e., Section 44A.

16. Several cases have been relied upon by the appellant. Reliance is placed in the first instance on Chunnilal Kasturchand Vs. Dundappa Damappa, where it was held that a decree passed by a Belgaum Court could be executed in Jamkhandi which at the time the decree was passed was an Indian "native" state but which became merged later on in the Province of Bombay and it was further held that the decree of a competent Court could be executed in Jamkhandi because it had become an Indian Court.

This judgment was approved of by a Pull Bench of that Court in Bhagwan Shankar Vs. Rajaram Bapu Vithal, where a decree passed by the Sholapur Court against a resident of Akalkot was held to be execut able in the latter Court because Akalkot had merged with Bombay and qua Akalkot the decree of the Sholapur Court was no longer a foreign judgment. But how far Kishori Lal Vs. Sm. Shanti Devi, would affect the correctness of this judgment will have to be considered. In this Court in Dalel Singh v. Dhan Devi, Letters Patent Appeal No. 24 of 1952 (F) a decree passed by a Court in Nabha was held to be executable in the Punjab because of Section 43 of the Code of Civil Procedure as it existed before Act II of 1951, on the ground that Section 43 as it existed after the second Adaptation Order is retrospective

But this section itself has been repealed by Act II of 1951 & has been substituted by the present section which I have already given. If Section 43 is to be retrospective then as at the time the judgment-debtors appeared in the Ludhiana Court the present section was in force the execution will be governed by that law, which provides for the execution of decrees of Courts in areas to which CPC does not apply. Therefore the section as it stands today would not be applicable to the decrees passed by Courts in Part B States and the very notion of B Class States is a creation of the Constitution which it has been held by their Lordships of the Supreme Court to be prospective.

If the view taken in the Letters Patent Appeal is made applicable then we would

be giving re-trospectivity to the Constitution which is contrary to the view taken by the Supreme Court amongst others in Syed Qasim Razvi Vs. The State of Hyderabad and Others, and Habeeb Mohamed Vs. The State of Hyderabad,

17. Besides a judgment which was a foreign judgment would not, except under any express provision to that effect be turned into an Indian judgment which is the rule laid down by their Lordships in Kishori Lal Vs. Sm. Shanti Devi, The Calcutta High Court in The Owners and Partners of the firm named Shah Kantilal Vs. Dominion of India owing East Indian Railway, has discussed all these questions at a great length. Besides that there are the judgments of the Rajasthan and Mysore Courts in AIR 1954 Raj 4 (B) and Subbaraya Setty & Sons v. Palani Chetty & Sons AIR 1952 Mys 69 (J).

18. There is also another question which arises and that is which law would be applicable to executions. The appellant submits that it would be the law at the time when the application was made which is contrary to the judgment of the Federal Court in AIR 1941 5 (Federal Court) where reference is made to other judgments -- Quilter v. Mapleson (1882) 9 QBD 672 (L) and AIR 1936 49 (Privy Council)

19. I may here deal with two arguments which would arise as a result of the coming into force of the Constitution of India. One arises from Article 261 which deals with Public acts records & proceedings. The Constitution is prospective & therefore it must be read in that light. This article reads as follows:

"(1) Full faith and credit shall be given throughout the territory of India to Public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in Clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law."

20. Now all these clauses deal with something which is to be done in future & the use of the words "Union & every State" can be referable to judicial acts performed after the Union or States came into existence. And even Clause 3 must be applicable to parts of territories of India and Part B States have become parts of India as a result of the Constitution and not because of the Instruments of Accession or the Covenants as given in the white paper or Indian States.

21. The second argument is based on Article 375 which may be quoted:

"All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution."

22. This article continues the Jurisdiction of all courts wherever they may in the territories of India and the argument of prospectively will be equally applicable to this article. Besides in Section 2(5) the reference is to courts outside India e.g., the Court of the Political Agent at Sikkim & Section 43 of the Code also refers to Courts outside India which are established or continued by the Central Government.

This article therefore which deals with Courts in India would not affect the argument as to the foreign nationality of the decree sought to be executed.

23. As the questions are of great importance and as a Division Bench of this Court has taken a view to the contrary, I must refer this case to a Full Bench, and I direct that papers be placed before the Hon'ble the Chief Justice for the constitution of a Bench to decide this matter.

Bishan Narain, J.

24. I agree that this case should be referred to a larger Bench.

JUDGMENT OF THE FULL BENCH

Khosla, J .

25. This case has been referred to a Full Bench by Kapur and Bishan Narain JJ. because of the divergent views which some of the High Courts have taken regarding the interpretation of certain provisions of the law which are relevant for the decision of Execution First Appeal No. 201 of 1952.

26. The case has arisen in the following manner. Messrs. Radhe Sham Roshan Lal, a firm of Indore which is now part of the State of Madhya Bharat, brought a suit in the Court of the Additional District Judge, Indore, against Messrs Kun-den Lal Mohan Lal, a firm of Ludhiana. Notices were sent to the defendant firm but there was no appearance on its behalf at Indore.

The Court of Indore passed an ex parte decree on 17-2-1948. Soon after this an application for the transfer of the decree to a Court at Ludhiana was made and a transfer certificate was granted on the 21st of September 1950. An application for execution of this decree was presented before the Senior Subordinate Judge, Ludhiana, on 10-1-1951.

Objection was taken by the judgment-debtors that this decree could not be executed because the Court which passed the decree being a foreign Court to whose jurisdiction the defendants had not submitted the decree was a nullity, and the matter for our consideration is whether this ex parte decree passed by a Court at Indore on the 17th of February 1948 is capable of execution through a Court in the State of Punjab.

27. The decision of this matter raises the questions what is a foreign decree and what is a foreign Court, and what is the nature of the decree passed by a foreign Court and whether that decree is good against a person who does not submit

himself to the jurisdiction of that foreign Court. There has been a change in the political complexion of the different states and Indore which was originally a native State became part of what are now known as Part B States, and in April 1951 the provisions of the CPC were extended to all Part B States.

The question is therefore not free from difficulty, and it was argued before us at considerable length and a large number of decided cases were cited before us. The main arguments advanced on behalf of the decree-holder may be analysed as follows: --

1. The Court of Indore may have been a foreign Court vis-a-vis the defendants on the date the decree was passed but by subsequent legislation the Court ceased to be a foreign Court and therefore this decree can be executed by a Court at Ludhiana. The consideration of this point will involve a reference to the definition of a "foreign Court" as given in Section 2(6) of the Civil Procedure Code;

2. Section 43, Civil P. C. was amended and by virtue of the provisions of the amended section this decree can be executed in the Punjab; and

3. Article 261(3) of the Constitution makes the decree of the Indore Court capable of execution at Ludhiana.

28. It is quite clear that a decree passed by a Court in one country is of no effect in another country if the first country is to be considered a foreign country vis-a-vis the second one. For instance, a decree passed by a Court in France cannot be executed in India for the simple reason that France is a foreign country and, unless there is some special provision in the law of India, decrees passed by Courts in France may be treated as wholly null and void in this country. This is one of the first principles of International Law. The matter is discussed in Dicey's Conflict of Laws, Chapters 11 to 17. Rule 68 stated in Chapter 12 is in the following terms-

"Rule 68. In an action in personam in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases:

First Case.-- Where at the time of the commencement of the action the defendant was resident or present in such country, so as to have the benefit and be under the protection, of the laws thereof.

Second Case. (Semble) where the defendant is, at the time of the Judgment in the action, a subject or citizen of such country.

Third Case. Where the party objecting to the jurisdiction of the courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto-

(a) by appearing as plaintiff in the action or counter claiming; or

(b) by voluntarily appearing as defendant in such action; or

(c) by having expressly or impliedly contracted to submit to the jurisdiction of such courts."

29. It is quite clear that if the Court at Indore is to be treated as a foreign Court rule 68 applies and the decree at the time it was passed could not have been executed in Ludhiana because the defendants were not resident in Indore they did not by their own conduct submit themselves to the jurisdiction of the Indore Court, nor did they voluntarily appear as defendants in the suit.

It is not necessary to dilate upon this point further because the definitions of a "foreign judgment" and a "foreign Court" as given in Section 2 (5) and (6) of the CPC make the point quite clear. Section 2(6) says that "foreign judgment" means the judgment of a foreign Court, and Section 2(5), says that a "foreign Court" means a Court situate beyond the limits of the Provinces which has no authority in the Provinces and is not established or continued by the Central Government. (I am giving the definition of the "Foreign Court" according to the law as it stood on 17-2-1948, the date when the decree was passed.)

The term "Province" has been defined in Section 3(45) of the General Clauses Act and means "a Presidency, a Governor's Province, a Lieutenant Governor's Province or a Chief Commissioner's Province". Indore at that time was not part of the territory of any such entity and therefore Indore was situated beyond the limits of the Provinces. The Court of Indore was admittedly not established or continued by the Central Government on 17-2-1918 and therefore the Court of the, Additional District Judge of Indore was clearly a foreign Court qua Ludhiana on the date of the decree. Therefore, on that date the decree could not have been executed at Ludhiana.

It is to be observed that there were no reciprocal arrangements whereby the decree passed by the Court at Indore could be executed at Ludhiana or the decrees passed by a Court at Ludhiana could be executed at Indore. Such reciprocal arrangements are sometimes made under the provisions of Section 44A, Civil P. C., but there being no reciprocal arrangement in the present case the decree of the foreign Court of Indore was not capable of execution at Ludhiana on the date it was passed.

30. The question, however, arises whether any subsequent change in legislation removed the disability attaching to the decree and made it capable of execution in Ludhiana. The point urged is that the amendment of Section 2 and Section 41, Civil P. C. removed that liability. The execution application was made on 10-1-1951. On that date Section 2(5) ran as follows: --

" "foreign Court"s means a Court situate outside India and not established or continued by the authority of the Central Government."

It is alleged that Indore is not outside India & therefore it is no longer a foreign Court. It is further contended that the change in Section 43 also had the effect of removing this disability. The change in the law, however, was not retrospective

and it did not alter rights and liabilities which existed prior to the change. In order to determine whether a certain decree is or is not the decree of a foreign Court we have to determine its nature at the time of its birth and not at some subsequent date.

Admittedly, the decree was passed on the basis of a foreign judgment and the subsequent change in the definition of a "decree" which came about on account of the rearrangement of territories cannot alter its character. Procedural law no doubt operates retrospectively but substantive law does not unless the statute specifically so provides. The rights to execute a decree and the right to raise an objection to a decree are substantive rights. The right of the judgment-debtor to plead that a certain decree is a nullity cannot by any stretch of meaning be described as a procedural matter.

It is a vested right in the judgment-debtor and it cannot be taken away by a provision of law which is not retroactive. On the date the decree was passed the judgment-debtor could have raised the objection that the decree was a nullity because it was a decree of a foreign Court. Any subsequent change in the law could not take away that right. The right which had accrued to the judgment-debtor continued after the law was changed and the old provisions were repealed.

31. At the time the suit was brought against the defendants they knew that unless they submitted themselves to the jurisdiction of the Court at Indore no decree passed by that Court could be effective against them and their liability as determined by the Indore Court could have no consequences detrimental to them. They were therefore justified in ignoring the summons issued to them. They stayed away and felt no necessity to defend the plaintiff's claim. This was not a matter of procedure.

By the subsequent change in law a person who was not liable under a decree could not become liable. The subsequent change in the law had the effect of unifying the area which now forms part of the territory of India, but there is no indication either in the Constitution or in any of the amending statutes which would show that the Legislature intended to upset existing rights and liabilities or create fresh ones. The defendants were not therefore deprived of their right to plead that the decree of Indore was a nullity.

32. The various changes which took place in the wording of Section 43 of the CPC have been set out in the referring order of Kapur J. and it is not necessary for me to set them out again. I have indicated quite clearly that these changes did not act retrospectively and did not adversely affect the right of the judgment-debtors to plead the defect in the decree passed by the Court of Indore.

33. A matter of a similar nature came up before the Supreme Court in Janardan Reddy and Others Vs. The State, In that case a judgment was passed by the High Court of H.E.H. the Nizam of Hyderabad in December 1949 i.e., before coming into force of the Constitution. An application to the Supreme Court was made for leave to appeal against that judgment and their Lordships of the

Supreme Court held that no leave could be granted under Article 136 of the Constitution because the judgment and sentence of the Court of Hyderabad could not be considered a judgment and sentence passed by a Court within the territory of India".

The application for leave to appeal was made after the Constitution came into force. Their Lordships observed-

"The territory of the Government of H.E.H. the Nizam was never the territory of India before 26-1-1950 and, therefore, the judgment and sentence passed by the High Court of H.E.H. the Nizam on the 12th, 13th and 14th December 1949, cannot be considered as judgment and sentence passed by a Court within the territory of India." The rule laid down in this judgment applies to the case before us and applying this rule it is clear that the decree of the Court of Indore cannot because of the amendments in Section 2 and Section 43 of the Civil Procedure Code, be considered a decree by a Court in India or even by a Court of a Part B State because at the time the decree was passed there was no such thing as a Part B State.

34. The learned counsel for the appellant relied upon a number of cases of which only one or two are really relevant. The others are clearly, distinguishable. Bhagwan Shankar Vs. Rajaram Bapu Vithal, is not a case in point because there a decree was passed by a Court at Sholapur ex parte against a resident of Akalkot. Execution at Akalkot was sought after the Constitution came into force when Akalkot had become merged in India.

The distinguishing feature was that the decree was passed by a Court in India or in British India or in the Provinces of India, whichever definition of Section 43 be taken. This decree was therefore capable of execution in the Provinces or the States. After the merger Akalkot became a part of the territory of India and therefore the decree was clearly capable of execution at Akalkot.

The Pull Bench decision of the Madhya Bharat High Court in The Stae Vs. Rashid and Others, which approved of the earlier decision Firm Lunaji Narayan v. Purshottam Charan 1953 MP 225 (P), was a case of a similar type. There too the decree was passed by a Court situate in British India and execution was sought in Gwalior State after the Constitution,

Indeed, all the cases cited in support of the decree-holder's claim were cases in which the decrees had been passed by Courts which were situated in what was originally British India and was subsequently Part A States. Execution of these decrees was sought in the area which was foreign territory before 1947 and which became Part B States after the Constitution. There is in my view an essential difference in the nature of the reverse case which is under consideration before us.

I have stated above what the distinguishing feature is. A decree passed by a Court where the CPC applied could be executed throughout the territory of British

India or Provinces as defined in Section 3 (45), General Clauses Act (10 of 1897) or Part A States as defined in the Constitution. This decree was therefore executable anywhere in India. The territory of India was extended by the merger of the native States and those States became subject to the law which prevailed in India. In course of time the provisions of the CPC were extended to them and therefore a decree which was a good decree in India became a good decree in the area of native States also, whereas the opposite case was quite different.

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

35. There are two cases which are on all fours with the present case, and in both of them it was held that the decree could not be executed in India. In *The Owners and Partners of the firm named Shah Kantilal Vs. Dominion of India owing East Indian Railway*, Mukherji J. was considering an ex parte decree passed by a Court in Baroda State in October 1948. He held that this decree could not be executed in Calcutta. The matter is discussed at great length in this judgment and the law has been stated by Mukharji J. in very clear terms. While dealing with the provisions of Section 43, Civil P. C. he observed:

"It provides that such decrees may be executed in the manner provided by the CPC within the jurisdiction of any Court to which the Code extends. I am satisfied on the construction of Section 43, Civil P. C., that it does not help execution of Okhamandal Court decree by this High Court."

The learned Judge refers to the principles of private international law relating to decrees of foreign Courts and then he goes on to deal with Article 261 of the Constitution with which I shall deal presently. I find myself in complete agreement with Mukharji J. upon all the points stated by him.

36. Another case is *Maloji Rao Narsingh Rao Vs. Sankar Saran and Others*, which is also a Single Bench case heard by the Allahabad High Court on the original side, Brij Mohan Lall J. discussed the whole question very thoroughly and cited almost all the rulings having a bearing on the point. He was dealing with the case of an ex parte decree passed in November 1948 by the District Judge of Gwalior. This decree was transferred to Uttar Pradesh for execution and he held that the decree could not be executed because it was a decree of a foreign Court when it was passed and the disability was not removed by any subsequent change in law. While dealing with Section 43, Civil P. C. and the amendment made by Act 2 of 1951 the learned Judge observed:

"In view of this section, as it stood prior to the amending Act 2 of 1951, the decree-holder had a right, subject to the safeguards hereinafter mentioned, to

put the decree in execution in the State of Uttar Pradesh. Since Act 2 of 1951 repealed this provision and substituted another in its place, the repeal did not take away the right which the decree-holder had acquired prior to the repeal. This right was reserved by Section 6(e), General Clauses Act.

But it is to be seen what -that right was.

The right was that the decree-holder could make an application to any Court in the State of Uttar Pradesh for execution. But at the same time the judgment-debtors had a right to plead that the decree which was being enforced against them was not a decree of a competent Court. Section 44 Evidence Act, gives a right to a party to show that any judgment which is relevant or which the other party has proved against him was delivered by a Court not competent to deliver it. This right has not been taken away by Section 43, Civil P. C. * * * *

If it is now held that that decree has become final and binding, it will mean that they (the judgment-debtors) have been denied an opportunity of meeting the decree-holder's claim on merits. Obviously it could not have been the intention of law to bring about such drastic changes and to deprive the judgment-debtors of the valuable right of meeting the decree-holder's claim on merits. I am, therefore, of the opinion that the right to treat the decree as a nullity, which has been described in some of the cases * . * * *

* * as an immunity from the decree, has been kept intact by virtue of Section 6(c), General Clauses Act."

The learned Judge goes on to say:

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

37. The only other case which is relevant is a Division Bench decision of this Court in L.P.A. 24 of 1952 (P). In that case a decree was passed by a Court at Nabha, but it is not clear from the judgment whether that decree was ex parte and whether the defendant had refused to submit himself to the jurisdiction of the Court, and if the defendant did appear and contest the suit he cannot raise the plea which has been raised by the judgment-debtors before us. Therefore, the decision in that case that the decree of the Nabha Court could be executed in the State of Punjab may be inapt so far as the facts of the present case are concerned on this ground.

38. The net result is that all the rulings which might support the decree-holder's claim relate to cases in which decrees were passed by Courts situated in Part A States, whereas only two reported cases which are similar to the case before us are cases in which it was held that decrees passed by Courts situated in native States were not capable of execution in India.

39. I now come to the consequences that follow from the enactment of Article 261(3) of the Constitution:

"261(3) Final judgments or orders delivered or passed by civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law." It seems to me quite clear that the judgments or orders mentioned here are judgments or orders which are passed or delivered after the coming into force of the Constitution. On this point all the High Courts are unanimously agreed, and it is only necessary for me to refer briefly to the cases cited before us.

In AIR 1954 Raj 4 (B) it was held that the provisions of this Article had no retrospective operation because there was nothing in the wording of Article 261 to show that by its express intention or by necessary implication the Article was to apply retrospectively. Similar view was taken by the Calcutta High Court in *The Owners and Partners of the firm named Shah Kantilal Vs. Dominion of India owing East Indian Railway*, , by the Mysore High Court in AIR 1952 Mys 69 and also in the following cases *Maloji Rao Narsingh Rao Vs. Sankar Saran and Others*, and *P. C. Vareed v. Gopalbai Bahubai Patel* AIR 1954 Ker. 358 (S).

40. Counsel for the decree-holder drew our attention to a decision of the Supreme Court in *Kishori Lal Vs. Sm. Shanti Devi*, That case, however, does not support the contention of the decree-holder. The decision of that case proceeded on the wording of Section 490, Criminal P. C. It was held in that case that an order passed u/s 488, Criminal P. C. by a Court in Lahore before the partition of the country could be executed in Delhi after the partition because on the wording of Section 490 that order was always executable in India. The decree in the present case was not executable in India at any time and therefore the coming into operation of any subsequent law did not remove this disability.

Indeed, it was conceded before us by Mr. Sodhi who appeared on behalf of the decree-holder that he could not rely upon the provisions of Article 261(3) and that this Article was not intended to be retrospective. There is no decision of any High Court to the contrary.

41. In the result, therefore, I would hold that the decree of the Court of Indore, at the time it was passed was a decree of a foreign Court. The judgment-debtors did not submit themselves to the jurisdiction of the Court and at that time the decree could not have been executed through the Court in Ludhiana. The subsequent change in the definition of the "foreign Court" and in the provisions of Section 43, Civil P. C. did not make the decree capable of execution in Ludhiana, nor did the provisions of Article 261(3) of the Constitution remove the disability which attached to the decree.

The judgment-debtors were not debarred from raising the plea that the decree was a nullity by reason of the fact that it was passed by a Court which had no Jurisdiction to pass it. That plea was open to them still as the right to raise that plea was not taken away by subsequent legislation. The appeal of the decree-

holder is therefore liable to be dismissed and I would dismiss it.

Bishan Narain, J.

42. I agree with Khosla J., and have nothing to add.

Dulat, J.

43. On 17-2-1948, Messrs Radhe Sham--Roshan Lal of Indore obtained an ex parte decree from the Court of the Additional District Judge, Indore, against Messrs Kundan Lal--Mohan Lal of Ludhiana. At that time the Indore Court was a foreign Court within the meaning of the CPC and its decrees could not be executed in Courts governed by the Code of Civil Procedure.

On 26-1-1950, the Constitution of India came into force and Indore came to be included in a Part B State called Madhya Bharat. At the same time Section 43, Civil P. C. was amended and decrees of Courts in Part B States became executable in the other Indian Courts to which the CPC applied. In April 1951 the CPC became applicable to the whole of India including Part B States. In the meantime Messrs Radhe Sham--Roshan Lal, the decree-holders, applied for the transfer of the decree for purposes of execution to Ludhiana and obtained a transfer certificate on 21-9-1950.

On 10-1-1951, an application for the execution of this decree was presented in the Court of the Senior Subordinate Judge at Ludhiana. Notice was issued to the judgment-debtors and on their behalf objection was at once taken that the decree could not be executed at Ludhiana as it was the decree of a foreign Court. This objection prevailed and the executing Court held that the decree was not capable of execution at Ludhiana, and, therefore dismissed the decree-holders' application. The decree-holders appealed to this Court and that appeal has been referred for decision to this Full Bench.

44. The question is whether the decree in this case having been granted in February 1948 by a civil Court at Indore, could after 26-1-1950, or 1-4-1951, be lawfully executed through the civil Court at Ludhiana and the answer to that depends on the answer to the Question whether the decree at the time of its execution is to be deemed the decree of a foreign Court or the decree of a Court in a Part B State, i.e., an Indian Court quite clearly if it is to be considered the decree of a foreign Court at the time of its execution, then it can certainly not be executed in a Court governed "by the Code of Civil Procedure, while on the other hand if it is to be deemed the decree of a Court in a Part B State, or an Indian Court, then equally clearly it cannot be refused execution.

45. An exactly similar question arose in this Court in L.P.A. No. 24 of 1952 (F). The decree in that case was granted on 12-7-1947, by a Court at Nabha which was later Included in PEPSU, a Part B State, and that decree was sought to be executed at Simla after 26-1-1950 and the question was whether it was to be deemed the decree of a foreign Court or the decree of a Court in Part B State.

A Division Bench of this Court held that the decree was capable of execution at Simla as at the time of the execution it must be deemed to be the decree of a Court in Part B State. I was a party to that decision and having considered the arguments advanced in the present case I still think that our decision in Dalel Singh v. Shrimati Dhan Devi (P) was correct and that it fully applies to the present case. A distinction was sought on the ground that in the present case the decree was obtained ex parte and the defendants, who were not residents of Indore, never submitted to the jurisdiction of that Court while in Dalel Singh v. Shrimati Dhan Devi (P) it was not clear that the decree was not obtained after contest. This distinction, in my opinion, makes no difference in principle.

The question still is whether the decree is to be considered the decree of a foreign Court as It undoubtedly was at the time it was made or whether in view of the amendment of Section 43, Civil P. C. it is to be considered the decree of an Indian Court subsequent to those amendments. The fact that a decree may have been obtained ex parte or after contest does not, in my opinion, affect the matter, for the decree of a foreign Court whether ex parte or obtained after contest remains Incapable of execution, while on the other hand the decree of an Indian Court, whether ex parte or otherwise cannot be refused execution. No principle of international law is really involved in the matter and the question is fully covered by the provisions contained in the Code of Civil Procedure.

46. The main argument for the view that the decree in the present case must be deemed to be a foreign decree is that the decree when made was the decree of a foreign Court and cannot change its character on account of subsequent political events-" which made the foreign Court in question an Indian Court, and that the amendment of Section 43, Civil P. C. is not meant to be retrospective and does not, therefore, affect the status of those decrees which were granted by a foreign Court prior to the amendment.

I am aware that such a view is possible but the inconvenience in adopting such a view is in my opinion so great that it should on that ground alone be rejected. The argument involved really comes to this. The Indore Court was a foreign Court before 26-1-1950, and became a Part B State Court only on that date and because a Court governed by the CPC only on 1-4-1951. The decrees granted by the Indore Court prior to 26-1-1950, were, therefore, foreign decrees and could not be executed in any Court governed by the CPC even after the Indore Court became a Part B State Court or even after the CPC was made applicable.

If the argument is sound it would logically follow that a decree granted by the Indore Court on 25-1-1950, could not be executed even in the Indore Court after 26-1-1950, or, at any rate, after 1-4-1951, because the Indore Court had by then become a Court governed by the CPC just as the Court at Ludhiana was, and a decree granted even by the Indore Court prior to 26-1-1950, being a foreign decree would not be capable of execution in a Court governed by the Code of Civil Procedure. This would be an Intolerable situation and on the ground of public convenience, therefore, such a view ought not to be adopted.

To support the argument, assistance was sought from the observations of the Supreme Court in *Janardan Reddy and Others Vs. The State*, The question in that case, however, concerned the interpretation of Article 136 of the Constitution, the question being whether the Supreme Court could grant leave to appeal against a judgment of the Hyderabad High Court pronounced before 26-1-1950. The Supreme Court held that Article 136 of the Constitution did not empower the Supreme Court to grant leave to appeal from such a judgment because a right of appeal is a statutory right and there was nothing to indicate that such a right existed in respect of judgments pronounced before the Constitution.

The question of the inconvenience involved to adopting that narrow view was raised in the Supreme Court on behalf of the petitioners but the Supreme Court found that in actual fact no in-convenience was involved. The main consideration therefore, that arises in the present case did not arise in the case before the Supreme Court and the question of considering the effect of the amendments of Section 43, Civil P. C., was, of course, not before the Supreme Court. It appears to me that a right of appeal is very different from the right of executing a decree and I am not, therefore persuaded that the decision in *Janardan Reddy and Others Vs. The State*, covers the present case.

47. Regarding the decisions of the various High Courts in India on the particular question before us, there has been sharp divergence of views which we noticed when deciding L. P. A. No. 24 of 1952 (F), and which divergence has continued. The view of the Pull Bench of the Bombay High Court in *Bhagwan Shankar Vs. Rajaram Bapu Vithal*, which the Division Bench of this Court in the main accepted, has since been followed by a Pull Bench of the Madhya Bharat High Court in AIR 1955 MB 1 (O), and a Full Bench of the Rajasthan High Court in -- "*Radheyshiam v. Firm, Sawai Modi Basdeo Prasad*" AIR 1953 Raj 204 (T), but not followed by the Nagpur and the Allahabad High Courts as would appear from AIR 1955 Nag 103 (R), which is a Division Bench decision, and *Maloji Rao Narsingh Rao Vs. Sankar Saran and Others*, which is a Single Bench decision of that Court, and in view of this divergence not much assistance can be derived from mere authority although the weight of it I feel is still with the view this Court took in L. P. A. No. 24 of 1952 (P).

48. Mr. Mital for the judgment-debtors stressed the point that the decree in the present case was made by a foreign Court and against a nonresident defendant who had not submitted to the Court's jurisdiction and it was, therefore, in the eye of international law a nullity and it could, therefore, never be executed through an Indian Court.

As I have already pointed out, this consideration does not really arise in the present case, for if the decree sought to be executed is to be deemed the decree of a foreign Court, it is not capable of execution under the provisions of the CPC and would not be capable of execution even if it were a decree obtained after contest.

In my opinion, however, the decree in this case must now be taken to be the decree of an Indian Court to which the CPC fully applies and as such the decree cannot be refused execution merely because it was obtained ex parte. On this view, I must hold that the executing Court was in error in refusing to execute the decree and the appeal should, therefore, be allowed and the order of the lower Court refusing execution set aside.

The Court :

49. The decision of the Full Bench is that the appeal of the decree-holder is dismissed and the objections of the Judgment-debtors are upheld. In the circumstances of the case there will be no orders as to costs.