

(1953) 03 RAJ CK 0013
In the Rajasthan High Court
Case No : Second Appeal No. 6 of 1950

Radheyshiam and Another

APPELLANT

Vs

Firm Sawai Modi Basdeo Prasad and Another

RESPONDENT

Date of Decision : 31-03-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 5, 13, 39, 44

Citation : AIR 1953 Raj 204 : (1954) RLW 24

Hon'ble Judges : Ranawat Sharma, J; Dave, J

Bench : Division Bench

Advocate : S.R. Chandra, for the Appellant; R.K. Rastogi, for the Respondent

Final Decision : Allowed

Judgement

Ranawat, J.—In view of the importance of the questions involved herein, a Division Bench of this Court has referred this case to a larger Bench of this Court for decision.

2. On 24-3-1947 an ex parte decree was obtained by Radheyshiam and Radha Kishan against the firm of Sawai Modi Basdeo Prasad and Ramprasad of Dholpur for Rs. 2498/6/-plus costs in the court of the Civil Judge, Jaipur city. The defendants at that time were the subjects of the then Dholpur State. The suit was entertained in the court of the Civil Judge, Jaipur, as the cause of action arose within the limits of the jurisdiction of that court. The defendants did not enter appearance and the proceedings against them were taken ex parte. At that time the Jaipur State and the Dholpur State were two different Indian States and for the purposes of execution the decrees of the courts of one State were considered to be decrees of the courts of a foreign State in the other. As the decree in this case was a personal decree passed by a court of the Jaipur State against the defendant who, being a subject of the then Dholpur State not residing within the State of Jaipur, was a non-resident foreigner, it could not be regarded by the then Dholpur State courts to have conclusively determined the rights of the parties in the meaning of Section 13, Civil P. C., and as such it could

not be executed there at that time.

The Dholpur State merged into the Matsya Union on 18-3-1948 and subsequently the Matsya Union became part of the Rajasthan State from 15-5-1949. On 23-5-1949 the decree-holders applied to the court of the Civil Judge, Jaipur, for transfer of their decree to the court of the Civil Judge, Dholpur, for execution and the decree was accordingly transferred on 24-5-1949. The Civil Judge, Dholpur, sent the decree for execution to the court or the Munsif, Dholpur. The judgment-debtors appeared before the Munsif and raised an objection that the decree was not executable in the territories of the former Dholpur State, as the judgment-debtors were not subject to the jurisdiction of the Jaipur court at the time of the passing of the decree. In other words the objection was that as the decree was a personal decree of a foreign court against a non-resident foreigner who had not submitted to the jurisdiction of that court it could not be considered to be a decree of a competent court in the meaning of Section 13, Civil P. C. The learned Munsif disallowed this objection on 29-10-1949 but on appeal the Civil Judge, Dholpur, on 20-12-1949, accepted the objection of the judgment-debtor and held that the decree was not executable within the territories of the former Dholpur State as it could not be regarded to be a decree passed by a competent court because it was a personal decree of a foreign court against a non-resident foreigner who had not submitted to the jurisdiction of such court. The decree-holders filed an appeal in this court against the aforesaid order of the Civil Judge. This appeal was at first heard by a Single Judge, who referred it to a Division Bench on 29-9-1950 and the case was again referred to a larger Bench on 5-12-1952.

The following two points arise in this appeal :

1. Whether even after the merger of the former States of Jaipur and Dholpur in the State of Rajasthan the decree passed by the Civil Judge of Jaipur on 24-3-1947 before merger, which was a personal decree against the judgment-debtor, who was a subject of the then Dholpur State and who had not submitted to the jurisdiction of the then Jaipur State court is not executable within the territories of the former Dholpur State, on the ground that the- decree not being one of a competent court within the meaning of Section 13(a), Civil P. C. is a nullity?

2. Whether the court of the Civil Judge, Dholpur, had no jurisdiction to execute the decree because it had not been transferred to him for execution through the court of the District Judge, Bharatpur, in contravention of the provisions of Order 21 Rule 5 Civil P. C.

(2a) It has been admitted by the learned counsel of both the sides that the decree in the present case which had been passed by the court of the Civil Judge of Jaipur was in the nature of a personal decree and that at the time it was passed it was a decree of a foreign court in so far as the then Dholpur State was concerned. It is also admitted that the judgment-debtor in this case was the

resident of the then Dholpur State who had not submitted to the jurisdiction of the Jaipur State court. It is also not disputed that before the merger of the two States into the State of Rajasthan this decree was not executable within the territories of the then Dholpur State.

3. It has been contended by the learned counsel of the appellants that even though this decree was not executable at the time it was passed against the judgment-debtors within the territories of the then Dholpur State by the said State courts it has become executable now because of the change in the status of the judgment-debtors as citizens of Indian Republic. The courts at Dholpur and the courts at Jaipur are now the courts of the same State and the decree which had been passed by the Courts of one State can now be executed in the other State. It is further argued that even though different Codes of Civil Procedure were in force in the two former States of Jaipur and Dholpur at the time of the passing of the decree, yet now from 24-1-1950 a uniform CPC has been enacted in Rajasthan which equally applies to the territories of both the former States of Jaipur and Dholpur now forming parts of the State of Rajasthan. From 1-4-1951 the CPC of 1908 has been extended to the State of Rajasthan by the Part B States Laws Act. It is, therefore, urged on behalf of the appellant that the courts at Dholpur now cannot be regarded as foreign courts vis-a-vis the courts at Jaipur.

Section 2(5), C. P. C., defines "foreign court" as a court situate outside India and not established or continued by the authority of the Central Government. It is contended that the court of the Civil Judge at Jaipur cannot now be regarded as a foreign court qua Dholpur Court within the definition of a foreign court as provided in the Civil Procedure Code. Both the courts at Jaipur and Dholpur being governed by the same CPC a decree can be transferred for execution from Jaipur to Dholpur and vice versa.

The argument of the opposite party that the right to enjoy immunity from execution of a decree of a foreign court is a substantive right and cannot be taken away by repisal or by change of the law is met by the learned counsel of the appellant with the argument that the vested rights, if any, in the present case, have been taken away not by the change or repeal of any law but by the change in the status of the citizenship rights of the judgment-debtor which has been brought about by an Act of the State. The learned counsel of the appellant has put his reliance on the judgments in --" Chunnilal Kasturchand Vs. Dundappa Damappa, --" Bhagwan Shankar Vs. Rajaram Bapu Vithal, and --"Moosakutty Hajee v. Pylotu Joseph" AIR 1952 TC 89 (C).

4. Taking a converse case, it has been argued on behalf of the appellant that the decrees, passed before partition by those courts which were Indian courts during pre-partition days but which are now foreign courts being located within the territories of the dominion of Pakistan, cannot be executed by the Indian Courts because they are now decrees of a foreign court. Cases of -- Dominion of India Vs. Hiralal Bothra, and --"Saidul Hamid v. Federal Indian Assurance Co., Ltd.,

New Delhi" AIR 1951 P&h 255 (E) have been cited in support of this point.

5. The learned counsel on the opposite side has placed his reliance on the judgment of the Mysore High Court in --"Subharaya Setty & Sons v. S. K Palani Chetty & Sons" AIR 1952 Mys 69 (F). It is urged on behalf of the respondents that the vested right of the judgment-debtor to enjoy immunity from execution of the decree of a foreign court cannot be deemed to have been taken away by the introduction of one CPC in the territories of the former States of Jaipur and Dholpur. The Rajasthan CPC or the Indian CPC of 1908 which were made applicable to Rajasthan should not be applied retrospectively so as to take away the immunity enjoyed by the residents of the former States against the execution of the decrees which were at that time decrees of foreign court and which were not competent in the meaning of Section 13(a), C. P. C., and which were not executable against them during those days, being personal decrees of foreign courts, to whose jurisdiction they had not submitted.

It is further urged that Article 261(3) of the Constitution of India is not retrospective in its operation as has been held by the Supreme Court in --"Janardan Reddy and Others Vs. The State of Hyderabad and Others, The decrees which were foreign decrees before the coming into force of the Constitution of India should not now be regarded as decrees of the courts of the same State for purposes of their execution.

6. We have carefully considered the arguments of the learned advocates of both the sides. It is true that the decree in the present case was a foreign decree against a nonresident foreigner who had not submitted to the jurisdiction of the court which passed it and the decree being a personal decree was not executable against the judgment-debtor in the territories of the former Dholpur State before the merger of the two States into one. The position in this behalf is very clear and both the sides do not dispute it. The point, however, is whether, by change which has been brought about subsequently by the merger of both the States into one, such decrees have now lost their character of being foreign decrees and have become executable within the territories of the State where formerly it was not so executable. In -- AIR 1952 Mys 69 (F)", the learned Judges of the Mysore High Court have held that a decree which was a foreign decree before the coming into force of the Constitution of India and which was not executable within the territories of the Mysore State being a personal decree against a nonresident foreigner of that State could not now be regarded as executable because,

1. Article 261(3) of the Constitution of India is not retrospective in its operation the material date being the date of the decree and not the date of the execution petition, and

2. The vested rights which, the, citizens of the Mysore State enjoy of immunity against the execution of such foreign decrees could not be regarded as having been taken away by the accession of the Mysore State to the Union of India. The learned Judges have also held that execution of such decrees would result in

great injustice to the judgment-debtors because at the time of the passing of such decree the judgment-debtors could disregard the proceedings on the ground of the decree being that of a foreign court and not executable within the territories of that State. Any defence which might have been available to them at that time would now be shut out to them by making the decree executable against them in the territories of, the State, to which they formerly belonged. On the other hand in -- Chunnilal Kasturchand Vs. Dundappa Damappa, which has been subsequently followed by a Full Bench of the same court in --" AIR 1951 Born 125 (B)", a contrary view has been adopted, by the Bombay High Court. It has been held that a decree of Belgaum court which was not executable in the territories of the former Jamkhandi State because it was a personal decree against a non-resident foreigner who had not submitted to the jurisdiction of that court, would be executable in the territories of the former Jamkhandi State by the Jamkhandi courts after the surrender of the jurisdiction of that State by the Ruler in favour of the Government of India, by virtue of the change in the status of the judgment-debtor brought about by an Act of the State. The ordinary rule of law which has been given in Maxwell's Interpretation of Statutes, 9th Edn., at p. 222 :

"It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed out of respect to the legislature, to be intended not to have a retrospective operation"

has been held not to apply in such a case because the change that had come about was not by reason of any change in the law but by reason of the change in the status of the judgment-debtor.

7. In -- Gaekwar Baroda State Railway Vs. Sheik Habib Ullah it was held as follows :

"According to International law, pure and simple, a Court has no jurisdiction to entertain a suit against a foreigner who neither resides within, nor has submitted to its jurisdiction, merely because the cause of action, wholly or in part, arose within its jurisdiction. But different considerations arise where the local Legislature has conferred such jurisdiction upon the Court. Such special local legislation is a recognised exception to the said rule of international law; and it follows that if the Indian Legislature has conferred jurisdiction upon the British Indian Courts to entertain suits against nonresident foreigners where the cause of action, wholly or in part, arose within their jurisdiction, such courts undoubtedly have jurisdiction if the conditions provided by the law to which they are subject exist. The language of Section 20(c) C. P. C., is general and wide enough to apply to the case of non-resident foreigners, and there is nothing in the section which makes an exception as regards them. A court in British India

cannot disclaim jurisdiction against a non-resident foreigner, if the plaintiff's cause of action, wholly or in part, arose within its jurisdiction. What sanctity will attach to its decree if it is questioned in a foreign country is a different question."

8. According to Section 20(c), Jaipur Code of Civil Procedure, a civil suit could be entertained by a Jaipur State court against a nonresident foreigner if the cause of action, wholly or in part, arose within the jurisdiction of such court. In the present case, it is not disputed that the cause of action arose within the jurisdiction of the court of the Civil Judge of Jaipur. The decree passed by the Civil Judge of Jaipur was, therefore, a valid decree and it could be executed against the judgment-debtor personally if and when he had come to Jaipur and against his property, if any, within the jurisdiction of the Jaipur court. Such a decree, however, was a nullity for the purposes of the courts in a foreign State, as held by their Lordships of the Privy Council in --"Gurdial Singh v. Raja of Faridkot" 22 Cal 222 (I). Their Lordships have observed in that case as follows :

"Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of suit ("Actor sequitur forum rei"), which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, Section 891) to lie at the root of all international, and of most domestic jurisprudence on this matter. All jurisdiction is properly territorial 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. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute & regulate jurisdiction; but no territorial legislation can give jurisdiction; which any foreign court ought to recognise against foreigners who owe no allegiance or obedience to the Power which so legislates.

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."

9. It has been urged by the learned counsel of the opposite side that a decree which is an absolute nullity cannot become executable by any change in the status of the judgment-debtor or a change in the laws of the State. This argument has been thoroughly examined by the learned Judges of the Bombay

High Court in *Bhagwan Shankar Vs. Rajaram Bapu Vithal*, In view of the following observations of their Lordships of the Privy Council in " 22 Cal 222 (I)" the learned Chief Justice and the Judges of the Bombay High Court held that such a decree would not be an absolute nullity but it would be an executable decree in so far as the country of its origin is concerned :-

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

10. The decree in the present case passed by the Civil Judge of Jaipur was therefore not an absolute nullity but it was a good decree so far as the Jaipur State courts were concerned, though it might not be a decree within the jurisdiction of the then Dholpur State courts. It would be noticed that the decree in the present case was a live decree within the limits of the then Jaipur State and even after the merger of the Jaipur State into the State of Rajasthan it is not disputed that their decree is executable by the courts at Jaipur. The merger of the two former States of Jaipur and Dholpur into the State of Rajasthan has destroyed the boundaries of the jurisdiction of the two former States and merged them into one. This change was brought about by an Act of the State & the judgment-debtor on this account lost his immunity of being safe from the execution of that decree. The Rajasthan CPC and the Indian CPC were introduced subsequently but the loss of immunity cannot be attributable solely to any change or repeal of law. In fact the change which has come about and which has altered the position of the judgment-debtor is on account of the merger of the two former States which has also changed the status of the judgment-debtor. The reasoning which has been given by the learned Judges in *Chunnilal Kasturchand Vs. Dundappa Damappa*, appears to us to be more convincing than the one given by the learned Judges of the Mysore High Court in " AIR. 1952 Mys 69 (F)". In Rajasthan nineteen States have been merged into one. If a decree passed by the courts of each one of these States before their merger is held to be not executable within the limits of the other former States a curious result would ensue. Parts of one or more States are now parts of one District and it would be difficult to keep the former boundaries of those States alive for the purposes of the execution of the decrees which were passed by the courts of those States before the formation of the State of Rajasthan.

No doubt it is true that Article 261(3) of the Constitution is not retrospective in its operation. The learned counsel of the respondent has also not taken his stand on that Article. In *Dominion of India Vs. Hiralal Bothra*, the decree of Jamalpur court passed before the partition of India has been held by the Calcutta High Court to be not executable by the court of Small Causes of Calcutta because Jamalpur is now in Pakistan and its decree has to be regarded as a foreign decree within the meaning of Section 2(5), Civil Procedure Code. This is a converse case from the one which is under consideration before us. The Simla High Court also adopts the principle which has been accepted in the Calcutta

case referred to above. We are in respectful agreement with the opinion expressed" by the learned Judges in Chunnilal Kasturchand Vs. Dundappa Damappa, and Bhagwan Shankar Vs. Rajaram Bapu Vithal,

11. In our opinion, the courts at Dholpur and the courts at Jaipur are now courts of the same State and if a decree passed by a Jaipur court is executable within the jurisdiction of the Jaipur Court it cannot be held to be in-executable at Dholpur if it is transferred by the Jaipur court to the Dholpur court for execution under the provisions of the Civil Procedure Code. Both Dholpur and Jaipur are parts of the same State and it would be absurd to regard a decree executable in one district of the State not executable in its other district.

12. The second point relates to the question of the jurisdiction of the court of the Munsif at Dholpur. The decree which had been passed by the court of the Civil Judge of Jaipur was transferred by him on an application of the decree-holder on 24-5-1949. Instead of transferring the decree to the court of the District Judge, the Civil Judge sent it for execution to the court of the Civil Judge at Dholpur & the transferee court again transferred the decree for execution to the Court of the Munsif at Dholpur. Section 39, Civil P.C. provides as follows:-

(1) The court which passed a decree may on the application of the decree-holder, send it for execution to another court,

(a) if the person against whom the decree is passed actually and voluntarily resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or

(b) if such person has not property within the local limits of the jurisdiction of the " court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or

(d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

(2) The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction."

12a. In Section 39, C. P. C., it has not been provided that a decree shall be transferred for execution to the court of the District Judge only if the execution is sought in another district. It has been urged on behalf of the respondent that since there is no such provision in Section 39, C. P. C., for transfer of a decree for execution to a court of the District Judge only in case execution is to be sought in another district the execution proceedings in such transferee court cannot be regarded as without jurisdiction. Non-compliance with the rules of procedure which are given in Order 21, C. P. C., should not be so construed as to affect the jurisdiction of the court, it such court according to the conditions laid down in

Section 39, C. P. C., otherwise possesses such jurisdiction. This argument is based on the assumption that the substantive provisions of law have been contained in the sections of the CPC and the details of the rules of procedure have been given in the Orders, which follow subsequently.

13. The first case on this point is --"Debidayal Sahu v. Moharaj Singh" 22 Cal 764 (J). In that case on an application of the decree-holder a decree for money was transferred by the court of a Munsif in one district to the court of a Munsif in another district and not to the court of the District Judge as was provided for in Section 223, Civil P. C. which was then in force. It was held that the Munsif's court to which the decree was sent for execution had no jurisdiction to execute it without an express order of the District Judge u/s 223, C. P. C. In the judgment of the court it has been provided as follows :

"This point is not free from difficulty, for it involves the determination of, whether this was an irregularity, or a matter affecting the jurisdiction of the court of Aurangabad. After much consideration, however, we have come to the conclusion that the Munsif of Aurangabad had no jurisdiction without an express order of the District Judge passed u/s 226. The intention of the legislature as expressed in Section 226 seems to have been to give the court of the District in which it was desired to execute a decree which was passed by the court of another District supreme authority in regard to the execution of that decree, and to provide that it is only by an order passed by the District court that any subordinate court in that district is empowered to proceed in such a matter. Section 226 directs that, after receipt of the necessary papers from the court which passed the decree, the decree or order may, if the court to which it is sent be the District Court be executed by such court or by any subordinate court which it directs to execute the same. The District Court, no doubt, has jurisdiction over the entire District, and the Judge, there-fore, has the option given to him of executing the decree himself, or, if he so thinks fit, of directing any subordinate court to execute the same. Until such an order has been passed, we are of opinion that no subordinate court has jurisdiction to execute such a decree." (p. 766)

14. It may be pointed out that an objection was at once taken by the judgment-debtor in --"22 Cal 764 (J)", which is not the position in the present case. No such objection was ever taken by the judgment-debtor in the court at Dholpur or even in the court of first appeal. This objection has been raised for the first time in this Court at the time the case was heard by a Division Bench of this Court. The next case on the point is --"Prakash-Chandra v. Baldeoram" AIR 1914 Cal 786 (1) (K). In that case the District Judge of Gaya sent a decree for execution to the court of the Subordinate Judge at Palamau at Ranchi. The transferee court took an objection that the decree should not have been forwarded direct to him but that it should have been sent to the court of the Judicial Commissioner of Chhota Nagpur in order that he might send it to him. The transferee court therefore refused to proceed in the matter. The learned Judges of the Calcutta High Court held that in refusing to proceed in the matter the Subordinate Judge acted

erroneously, for, if he had no jurisdiction to deal with the matter he should have returned the papers to the District Judge of Gaya in order that he might adopt the correct procedure. The principle laid down in --"Debidayal Sahu's case (J)", was followed in this case.

In--"Kunja Becharisingh v. Tarapada Mitra" AIR 1919 Pat 324 (L), the principle laid down by the Calcutta High Court in --"Debidayal Sahu's case (J)", was followed.

Dalipsingh J. in --"Pyarelal Debisahai v, Naunemal Pannalal" AIR 1933 Lah 839 (M), placed reliance on the aforesaid authorities of the Calcutta High Court and the Patna High Court cases, but felt that the point was a difficult one and the arguments which had been advanced by the party against the view which had been accepted in this case were not altogether devoid of force.

Din Mohammad J. in --"Barkat Ram v, Bhagwan Sahai" AIR 1940 Lah 394 (N), followed the ruling of--"AIR 1933 Lah 839 (M)". In --" Juluri Venkataratnam and Others Vs. Balabhadruni Chennayya and Others, the authority of the Calcutta High Court was dissented from. It was held that the order transferring a decree to another court takes effect from the date on which it is passed and the transferee court has jurisdiction to entertain, application for execution from the date of the passing of the order of transfer. The decree under Order 21, Rule 5 C. P. C., it has been further held, has to be sent to the District Court for mere transmission to the transferee court and therefore no application lies to the District Court and Order 21, Rule 8 has no application to such a case.

15. In a later case in --"Bhagwan Singh v. Barkat Ram" AIR 1943 Lah 129 (P), the judgment of the court was delivered by Tek Chand J. who, after reviewing the authorities on the subject exhaustively, overruled the earlier decision of the same High Court in --"Pyare Lal Debisahai v. Nannemal Pannalal", (M). The learned court observed that the case in such circumstances was not one of inherent lack of jurisdiction, territorial or pecuniary, over the subject-matter and it was merely one of irregular assumption of it, the irregularity consisting in non-compliance with the procedure prescribed for the transmission of the certificate and the judgment-debtor having allowed the proceedings in the transferee court to go on without objection for such a long time must be taken to have waived it.

In --" Inderdeo Prosad Rai Vs. Deonarayan Mahton, it was held that the principle laid down by the decision in -- " AIR 1919 Pat 324" (L), was overruled by the decision of --"Jang Bahadur v. Bank of Upper India Ltd., Lucknow" AIR 1928 PC 162 (R). The learned Judges observed that a distinction must be made between inherent lack of jurisdiction and the irregular exercise of jurisdiction. The jurisdiction to transfer a case for execution from one court to another arises not under Order 21, Rule 5, but under Section 39, C. P. C., which prescribes the power, and the circumstances in which the transfer may be made. Order 21 Rule 5, C. P. C., merely prescribes the procedure, and does not touch the jurisdiction. The transferee court, if the transfer is made under one of the conditions specified

in Section 39 acquires its jurisdiction by the transfer. Further on, in the same judgment it has been remarked as follows :

"Hence, where a decree is sent direct to a court in another district having the necessary territorial and pecuniary jurisdiction instead of through the District Court as prescribed by Order 21, Rule 5, the procedure is merely irregular and the transferee court has jurisdiction to execute the decree and is a "proper court" within the meaning of Article 182(5), Limitation Act. The case is not one of inherent lack of jurisdiction on the part of the transferee court but one of irregular assumption of it the irregularity consisting of the non-compliance with the procedure prescribed by Order 21 Rule 5. The irregularity being merely defect in procedure can be waived and must be deemed to have been waived if no objection was taken for a long time."

16. The Calcutta High Court in --"Sachindra Kumar Bose v. Usha Prova De" AIR 1949 Cal 690 (S), has adhered to its previous decision in --"Devidayal Sahu"s case (J)". In doing so, the learned Judges have discussed the views expressed in the contrary decisions referred to above. They have proceeded to observe as follows :

"Section 39, no doubt, provides in general terms that on the application of the decree-holder the court which passed the decree may send it for execution to another court when the conditions specified in the section are fulfilled but then Order 21 Rule 5 steps in to fix the District Court as the court to which the decree shall be sent when it has to be sent to a court situated in another district. The words are mandatory and do not leave any room for the exercise of any discretion in the matter by the court which passed the decree. On receipt of the decree, the Dist. Judge may choose to execute the decree himself and may not send it to any subordinate court at all. Until the District Judge has passed an order of transfer under Rule 8, no subordinate court has any jurisdiction in the matter. The concept of jurisdiction embraces not merely territorial and pecuniary jurisdiction but also the fulfilment of any condition precedent that may have been attached by a statute to the court's power to take seisin of a cause. Hence, where a decree was transferred direct to a subordinate court in another district and not to the District Court of that district then, although the subsequent transfer of the decree to it by the District Court vests the subordinate court with jurisdiction to proceed with the application for execution which had already been filed, an order for attachment & the attachment effected thereunder previous to the said transfer are null & void, as at that time the subordinate court had no jurisdiction to execute the decree which had been transferred to him in disregard of the provisions of Order 21 Rule 5."

17. Order 21, Rule 5, C. P. C., lays down that where the court to which the decree is to be sent for execution is situate in a different district, the court which passed it shall send it to the District Court of the district in which the decree is to be executed. According to the provisions of Order 21, Rule 5, therefore, the decree has to be sent to the court of the District Judge if execution is sought in

another District but the question is what would be the effect of non-compliance with the provisions of Order 21 Rule 5. Whether the proceedings of the transferee court in such a case would be null and void or whether it would be a mere irregularity of procedure which would be deemed to have been waived by the other side if no objection had been taken in this behalf. The only point which has led the Calcutta High Court in "AIR 1949 Cal. 690 (S) to follow "Debidayal Sahu"s case (J)" is that it is optional in such a case for the court of the District Judge either to proceed to execute the decree itself or to transfer it to a court subordinate to it, which is otherwise competent to take cognizance of it. It is considered that because the District court has got option to execute such a decree itself any other subordinate court cannot acquire the jurisdiction unless such a decree is transferred to it by the District Court. The necessary preliminary condition according to Calcutta view for the acquisition of jurisdiction by a subordinate court in such a case is the transfer to it by a court of the District Judge. This view is inconsistent with the decision of their Lordships of the Privy Council in "AIR 1928 PC 162 (R). It may be noted that the Privy Council"s decision is not directly on the point at issue in the present case, but it is evident that the point which was under consideration in that case was similar to the one which is involved in the present case and which was decided by the learned Judges in "AIR 1949 Cal. 690 (S). The learned Judges of the Calcutta High Court have, however, tried to distinguish the decision of their Lordships of the Privy Council by saying that that decision cannot be invoked as an authority upon the question of interpretation of a different provision of the Code couched in different¹ language. It is true that the decision of the Privy Council relates to interpretation of Section 50 & Order 21 Rule 16 C.P.C., but the points which were determined in that case were no doubt very similar to those which were at issue in this case. In that case the decree-holder obtained a decree absolute for sale on a mortgage against Raja Durga Prasad, but as the property which the decree-holder sought to sell under that decree was situate in another district the subordinate Judge of Lucknow who passed the decree sent it for execution to the court of the Sub-Judge of Hardoi u/s 39, C.P.C., and the execution proceedings were taken out in that court in due course. The judgment-debtor then died. An application for substitution of the name of the legal representative of the judgment-debtor was filed in the transferee court and that court having entertained the application issued notice to the legal representative and when no objection was taken made an order substituting the legal representative in place of his deceased father. According to Section 50, Civil P. C., where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree has to apply to the court which passed it for substitution of the name of the legal representative in the place of the deceased judgment-debtor.

Order 21, Rule 16, C.P.C., also makes a similar provision that such an application for substitution of the name of a legal representative should be made to the court which passed the decree In disregard to the express provisions of Section 50 & Order 21, Rule 16, C.P.C., in that case the decree-holder made an

application in the transferee court and failed to make any such application in the court which passed the decree, to their judgment their Lordships of the Privy Council have observed as follows :

" This is a matter of procedure and not of jurisdiction. The jurisdiction, over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived; and the party who has acquiesced in the court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings."

18. It would be noticed that in spite of the fact that there is an express provision in Section 50 & Order 21 Rule 16, C. P. C., that an application for substitution of the name of a legal representative of a deceased judgment-debtor is to be made to the court which passed the decree a disregard of such a provision was held to be a matter of mere procedure and capable of being waived by acquiescence. Similarly, the provision in Order 21, Rules 5 & 8, C.P.C., regarding sending of a decree for execution to the court of the District Judge cannot be regarded as anything more than a matter of mere procedure. The court of the District Judge cannot confer any jurisdiction by transferring the decree to a subordinate court, because according to the provisions of Order 21, Rules 5 & 8, C.P.C., a District Judge has no authority to transfer such a decree for execution to any subordinate court which is otherwise not competent to execute it. The competence of the court is, therefore, to be governed by the provisions of the territorial and the pecuniary jurisdiction of such court. The idea of the learned Judges in "Sachindra Kumar Bose's case" (S) that transfer by the court of the District Judge is a necessary condition for the acquisition of jurisdiction by a subordinate court to execute such a decree does not appear to be in accord with the principles laid down by the judgment in "AIR 1928 P.C. 162 (R)". In our opinion the judgment of Tek Chand J. in "AIR 1943 Lah 129 (P)" lays down the correct law on this point. Ordinarily, the procedure is that when execution is sought in another district on an application of the decree-holder the decree should be sent to the court of the District Judge of such other District. This, however, is a rule of procedure & is capable of being waived by acquiescence. If no objection is taken by the other side and if the proceedings are allowed to be continued the other side should be presumed to have waived the objection in such a case. The proceedings of the transferee court cannot be held to be void on the ground of want of jurisdiction.

19. In the present case, this point is not very important, because the transferee court has not so far taken any steps for the execution of the decree and the judgment-debtor cannot claim that any proceedings of that court are without jurisdiction. What the transferee court has done is merely to entertain the objection of the judgment-debtor relating to Section 13, C.P.C. It would not affect the rights of the parties if the Munsif returned the decree to the Civil Judge of Jaipur for being sent to the District Judge of Bharatpur to be forwarded to him for execution. This point, therefore, which has been raised in this case, is more

of an academical nature than of actual consequence. However, we have expressed our opinion disallowing the objection of the judgment-debtor in this behalf. We are in respectful agreement with the proposition laid down by Tek Chand J. in "Sardar Bhagwan Singh's case" (P).

20. The appeal is, therefore, allowed and the order of the lower appellate court is set aside and the objection of the judgment-debtor regarding the decree being not executable is dismissed and the Munsif of Dholpur is directed to send back the papers to the Civil Judge Jaipur for being transferred to the court of the District Judge, Bharatpur, for execution according to law. Costs of this appeal and of both the lower courts shall be paid by the judgment-debtor to the decree-holder.