# The Associated Hotels Of India, Ltd. And ... vs R. B. Jodha Mal Kuthalia on 23 August, 1960

## Equivalent citations: 1961 AIR 156, 1961 SCR (1) 259, AIR 1961 SUPREME COURT 156, 1961 (1) SCR 259 ILR 1960 2 PUN J 913, ILR 1960 2 PUN J 913

## Author: P.B. Gajendragadkar

## Bench: P.B. Gajendragadkar, Bhuvneshwar P. Sinha, J.L. Kapur, K.N. Wanchoo

PETITIONER:
THE ASSOCIATED HOTELS OF INDIA, LTD. AND ANOTHER

Vs.

RESPONDENT:
R. B. JODHA MAL KUTHALIA.

DATE OF JUDGMENT:
23/08/1960

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
SINHA, BHUVNESHWAR P.(CJ)
KAPUR, J.L.
SUBBARAO, K.
WANCHOO, K.N.

CITATION:
1961 AIR 156 1961 SCR (1) 259
CITATOR INFO :
R 1975 SC 824 (27)

ACT:
Partition of India-Creation of two Dominions, India and Pakistan-Formation of new provinces and transfer of territories-Decree passed by Federal Court of Pakistan-Whether executable in India-Evacuee laws-Whether affect such decree--The Indian Independence Act, 1947, s. 9-The Indian Independence (Legal Proceedings) Order, 1947, art. 4, cls. 1, 2, 3-Code of Civil Procedure, 1908 (V of 1908), O. 45, r. 15.

HEADNOTE:

On October 2, 1946, the Associated Hotels of India Ltd., and its managing director, Mohan Singh Oberoi, appellant 1 and 2 respectively, entered into an agreement with the respondent for purchasing certain property from the latter for a price of Rs. 52,75,000 and paid Rs. 5 lacs as earnest money; but as the respondent's title to the property was found to be defective the sale was not completed. The appellants filed a suit in the Court of Senior Subordinate judge at Lahore for the recovery of Rs. 5,10,000 which included the earnest money and interest accruing thereon, and the suit was decreed for Rs. 5,08,333/5/4 with future interest in favour of appellant NO. 2 on March 14, 1949. The claim of appellant No. I was rejected. On appeal by the respondent the High Court at Lahore reversed the decree of the trial court and dismissed the suit on November 21, 1949. The Federal Court of Pakistan on appeal by the appellants allowed the appeal of appellant NO. 2 on December 21, 1953, and restored the decree passed in his favour by the trial court. After the passing of the decree by the trial court and before the decision of the respondent's appeal in the Lahore High Court the appellants had put the decree in execution which was stayed at the request of the respondent on condition that the respondent should deposit Rs. 3,00,000 in the High Court and furnish security for the balance of the decretal amount. In course of the execution proceedings and after the Federal Court's decree in favour of appellant NO. 2 the main question that arose, inter alia, was whether the deposited sum of Rs. 3,00,000 should be applied towards the satisfaction of the decree of the Federal Court and paid to the decree-holder after transferring it to India or whether the custodian of evacuee property in Pakistan was entitled to the money as evacuee property. The decree-holder and the judgment-debtor were both agreed that the money in question vested in the decree-holder and

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should as requested by him be either transmitted to India or paid to him. This was resisted by the custodian and the High Court held that the money could not be transferred to India, and directed the custodian to report what interest any evacuee had in the money. It was under these circumstances that the appellants made the present application to the Punjab High Court (India) under O. 45, r. 15, and s. 151 of the Code of Civil Procedure with a prayer for transmitting to the Court of the Senior Subordinate judge, Simla, the proceedings' between the parties for execution of the said decree in accordance with the provisions applicable for execution of original decrees passed by the said judge. Their contention was that as a result of the provisions of Art. 4(3) of the Indian Independence (Legal Proceedings) Order, 1947, the decree passed in favour of appellant No. 2 by the Federal Court of

Pakistan had become executable in India as if it had been passed by the Supreme Court of India. The respondent resisted this on the grounds that the application was not entertainable and the decree could not be executed in the absence of a certificate as required by O. 21, r. 6(b) of the Code of Civil Procedure, that the decree did not attract the provisions of Art. 4(3) of the Order and that the decree in question having vested in the Custodian appellant NO. 2 was not entitled to execute it. The relevant portion of Art. 4 of the Indian Independence (Legal Proceedings) Order, 1947, runs thus:-

" Notwithstanding the creation of certain new provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947-

(1) All proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that the Court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;

(2) Any appeal or application for revision in respect of any proceedings so pending in any such court shall be to the court which would have appellate or as the case may be divisional jurisdiction over that court if the proceedings were instituted in that court after the appointed day, and

(3) effect shall be given within the territories of either of the two dominions to any judgment, decree, order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction within the Dominion."

Although the High Court held that the decree sought to be executed fell under Art. 4(1) of the order and could be executed under Art. 4(3) of the said order, it came to the conclusion that

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the " Court of competent jurisdiction " was the Senior Subordinate judge at Simla and that the appellants should have filed their application under O. 45 T. 15, Code of Civil Procedure in that Court. The High Court further held that the application was incompetent owing to absence of a certificate under O. 21, r. 6(b), of the Code, that the judgment debt was property and its situs was Pakistan and that the decree vested in the Custodian of Evacuee Property at Lahore and was not executable at the instance of the appellants. Consequently the High Court dismissed the appellant's application under O. 45, r. 25. On appeal by the appellants on a certificate of the High Court,

Held, (Kapur, J., dissenting), that the provisions of Art. 4 of the Indian Independence (Legal Proceedings) Order, 1947, did not apply to the decree sought to be executed by the appellants. The pending proceedings to which Art. 4(1) of

the order applied would continue before the specified courts even though the jurisdiction of the said courts might otherwise have been affected by the passing of the Indian Independence Act or the transfer of certain territories. Article 4(1) could not be extended to pending proceedings in respect of which the trial court's jurisdiction was in no way affected by the passing of the Act or the transfer of any territories.

Appeals would be taken against the judgments or orders passed in the said proceedings in the same manner in which they would have been allowed if the Original proceedings had been instituted after the appointed day.

Protap Kumar Sen and An.Y. v. Nagendra Nath Mazumday, A.I.R. 1951 Cal. 511, Ahidhar Ghose v. Jagabandhu Roy, A.I.R. 1952 Cal. 846, Naresh Chandra Bose v. Sachindra Nath Deb and Ors, A.I.R. 1956 Cal. 222, not applicable.

Per Kapur, J.-The High Court could and should have sent down the decree in question to the Senior Subordinate judge, Simla, to execute it in accordance with law.

The effect of Art. 4(1) and (3) of the Order was that " all proceedings " meaning all suits and other proceedings would continue unaffected by the passing of the Act and the setting up of two provinces of West Punjab and East Punjab, and also that once a decree was passed or sentence pronounced by a court in either of the new provinces of the two Dominions it was to be given effect to as if it was a decree or order passed by a Court of competent jurisdiction in the other Dominion. The amplitude of the language of Art. 4 is not cut down by any words in the article or the Order.

The meaning of the words appellate jurisdiction " as used in cl. (2) of Art- 4 of the Order is not affected by the subsequent extension of restriction of the jurisdiction of the Court and the decree of the Federal Court of Pakistan is covered by these words.

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The word effect " in cl. (3) of Art. 4 is wider than the words " enforce or " execute " and is not equivalent to " being enforced " by suit on a foreign judgment.

Clause 3 of the Art. 4 is in the nature of a deeming clause and makes the decree of the Pakistan Court (West Punjab) a decree of a court of competent jurisdiction in East Punjab (India).

Situs of the decree was not Pakistan alone but by a fiction of law the decree was a decree of a court of competent jurisdiction in what was the Dominion of India.

The provisions of the evacuee law in Pakistan would not affect the rights of the appellant to execute the decree in question in India.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 320/58. Appeal from the Judgment and Order dated the 22nd January, 1957, of the Punjab High Court in Civil Misc. No. 24/C of 1955.

D. N. Pritt, S. N. Andley, J. B. Dadachanji and P.L. Vohra, for the Appellants.

C. K. Daphtary, Solicitor-General of India, A. V. Viswanatha Sastri and Naunit Lal, for the Respondent.

1960. August 23. The Judgment of B. P. Sinha, C. J., P. B. Gajendragadkar, K. Subba Rao, and K. N. Wanchoo, JJ., was delivered by Gajendragadkar, J. Kapur, J. delivered a separate Judgment.

GAJENDRAGADKAR J.-The Associated Hotels of India Ltd., and its Managing Director Mohan Singh Oberoi (hereafter called appellants 1 and 2 respectively) had filed an application in the High Court of Punjab under O. 45, r. 15 of the Civil Procedure Code for executing a decree passed by the Federal Court of Pakistan in favour of appellant 2 and against Jodha Mal Kuthalia (hereafter called the respondent). The said application was dismissed but, on an application made by the appellants under Art. 133(1) (a) and (c) of the Constitution, the said High Court granted a certificate to the appellants and it is with the said certificate that they have preferred the present appeal before this Court.

It is necessary at the outset to state the material facts leading to the appellants' application before the High Court under O. 45, r. 15. It appears that by an agreement dated October 2, 1947, the respondent had agreed to sell to the appellants certain property known as Nedous Hotel at Lahore for Rs. 52,75,000. In pursuance of the terms of the said agreement the appellants had paid the respondent Rs. 5,00,000 by, way of earnest money. It, however, turned out that the respondent's title to the property in question was defective, and so the sale could not be completed. That is why the appellants had to file a suit in the court of the Senior Subordinate Judge at Lahore claiming to recover from the respondent a sum of Rs. 5,10,000; this amount included Rs. 5,00,000 paid by the appellants to the respondent as earnest money and interest accrued due thereon up to the date of the suit. In the said suit the trial judge passed a decree for Rs. 5,08,333-5-4 with future interest thereon at 5% per annum in favour of appellant 2. The claim made by appellant I was rejected. This decree was challenged by the respondent before the Lahore High Court. The High Court upheld the contentions raised by the respondent, allowed his appeal, set aside the decree passed in favour of appellant 2 and dismissed the appellants' suit with costs. This decree led to an appeal by the appellants before the Federal Court of Pakistan. The Federal Court in turn allowed the appeal in favour of appellant 2 and restored the decree passed in his favour by the trial court. This decree was passed on December 21, 1953. The present application made by the appellants in the Punjab High Court under O. 45, r. 15 is intended to obtain the execution of this decree. While the litigation between the appellants and the respondent was thus proceeding in the courts in Pakistan certain other events took place in regard to the execution of the said decree to which reference must now be made After the trial court had passed its decree and before the date of the decision of the Lahore High Court, the appellants had put the decree in execution and thereupon the respondent had applied for stay of the said execution before the Lahore High Court. On the said application the Lahore High Court ordered that the execution taken out by the appellants should be stayed on

condition that the respondent should deposit a sum of Rs. 3,00,000 in the High Court and furnish security for the balance of the decretal amount. In accordance with this order the respondent deposited the amount and furnished the security. Subsequently when the Lahore High Court allowed the respondent's appeal he applied for a refund of the amount already deposited by him, and his application was allowed on December 16, 1949. On the same day, however, the Lahore High Court directed that information of its order allowing the respondent to withdraw the amount should be given to the Custodian. The Custodian then moved the High Court on December 20, 1949, for a review of its order on the ground that the amount in question was evacuee property and as such it vested in him. These proceedings were pending before the High Court when the appellants had taken their appeal before the Federal Court of Pakistan against the High Court's decision. After the Federal Court decreed the claim of appellant 2 the said proceedings were taken up before the High Court for final disposal. At this stage the respondent made an application before the High Court that the deposit of Its. 3,00,000 should be applied towards the satisfaction of the decree passed by the Federal Court in favour of appellant 2 and he stated that he wanted to withdraw his previous application for the return of the said deposit (R. F. A. No. 31 of 1949).

Similarly appellant 2 filed a Civil Miscellaneous Application (No. 120 of 1954) praying that the amount of Rs. 3,00,000 deposited by his judgment-debtor should be transferred to India, or that, if it could not be so transferred, it should be held that the Custodian was not entitled to the said amount and so it should be paid to the decree-holder at Lahore, or that it should be paid to such person other than the Custodian as may be entitled to it. These two applications along with the original petition filed by the Custodian for a review of the High Court's original order allowing a refund to the respondent were heard together by the High Court.

The High Court noticed that both the judgment debtor and appellant 2 agreed that the amount in question vested in the decree-holder and should either be transmitted to India or paid to him. The Custodian, however, resisted this prayer. Under s. 4 of the Pakistan Transfer of Evacuee Deposits Act, 1954, a deposit made in a civil proceeding to which an evacuee was entitled and in which no muslim was interested could be transferred to India provided that if the court was satisfied that if any of the persons interested in the deposit was not an evacuee the deposit shall not be transferred. It was under the provisions of s. 4 that appellant 2 had claimed a transfer of the deposit on the allegation that he was an evacuee. The High Court, however, proceeded to consider whether the amount of Rs. 3,00,000 belonged exclusively to appellant 2- and held that on going through the record it was satisfied that though the decree stood in the name of appellant 2 the amount really belonged to the Associated Hotels Limited, and it observed that it was not denied that among the shareholders of the Associated Hotels Limited there were muslims and non-evacuees. It was urged before the High Court by appellant 2 that since the decree stood in his name he alone could execute it and no question as to the title of appellant I could arise in the proceedings before the court. Curiously enough this contention was negatived and appellant 2's prayer for the transfer of deposit was rejected. How the High Court could have considered the question of the title of appellant in view of the decree passed by the Federal Court it is difficult to appreciate. However, on the view that it took the High Court came to the conclusion that since appellant I some of whose shareholders were muslims and non-evacuees was entitled to the deposit appellant 2 was riot entitled to claim the transfer of the deposit to India. In the result the High Court allowed the application of the Custodian

and set aside its earlier order for refund in favour of the respondent. In regard to the other two prayers made by appellant 2 the High Court observed that under s. 34 of the Pakistan Administration of Evacuee Property Ordinance it was only for the Custodian to consider what interest, if any, an evacuee had in the deposit in dispute, and so it left that question to be determined by the Custodian, and directed that the said prayers made by appellant 2 would have to be decided after issuing notice to the Custodian and after the Custodian returns his finding on the issue framed by it. This order was passed on January 20, 1956. It is under these circumstances that the appellants made the present application to the Punjab High Court under O. 45, r. 15 of the Code.

The case for the appellants was that as a result of the provisions of s. 4(3) of the Indian Independence (Legal Proceedings) Order, 1947 (hereafter called the Order), the decree passed in favour of appellant 2 by the Federal Court of Pakistan had become executable in India as if it had been passed by the Supreme Court of India. On this basis the provisions of O. 45, r. 15 of the Code were invoked and the High Court was requested to transmit to the Court of the Senior Subordinate Judge, Simla, the proceedings between the parties for execution of the said decree in the manner and according on the provisions applicable to the execution of the original decree passed by the said Judge. An alternative prayer was made for the same order under the High Court's inherent jurisdiction under s. 151 of the Code. This application was resisted by the respondent on several grounds. It was urged that neither O. 45, r. 15 nor s. 151 of the Code was applicable, that the decree could not be executed, and the application made by the appellants in that behalf could not be entertained, in the absence of a certificate required by O. 21, r. 6(b), that the decree in fact did not attract the provisions of s. 4(3) of the Order and that appellant 2 was not entitled to execute it because the decree under execution had vested in the Custodian of Evacuee Property at Lahore.

The High Court has held that the decree sought to be executed fell under s. 4(1) of the Order and thus could be executed under s. 4(3) of the said Order. As a result of these findings the appellant was held entitled to invoke the relevant provisions of the Order. The High Court, however, came to the conclusion that the court of competent jurisdiction specified in s. 4(3) was in the context of the relevant facts in the present case the Court of the Senior Subordinate Judge at Simla and that the appellants should have filed their application before that court. The High Court also took the view that the present application was incompetent for the additional reason that the certificate of non-satisfaction had not been filed along with the application as required under O. 21, r. 6(b). According to the High Court the judgment-debt was property and its situs was Pakistan. The result of these findings was that under the Pakistan law the decree vested in the Custodian of Evacuee Property at Lahore, and so it was not executable at the instance of the appellants. On these findings the application made by the appellants was dismissed. In the present appeal Mr. Pritt has challenged the correctness of these findings.

Mr. Pritt contends that the expression " a court of competent jurisdiction " in s. 4(3) of the Order must mean a court which can pass the decree under execution and that inevitably must mean the Supreme Court of India, because the decree under execution is a decree passed by the Federal Court of Pakistan. According to him the High Court was in error in holding that the appellants should have produced a certificate of non-satisfaction because the provisions of O. 45, r. 15 do not require such a certificate. If the decree under execution has to be regarded as one passed by the Supreme Court of

India the provisions of O. 45, r. 15 should have been applied and no additional limitations imposed on the appellants. Mr. Pritt conceded that the judgment-debt is property but disputed the correctness of the conclusion of the High Court that the situs of the said debt is Pakistan. He also urged alternatively that even if the situs of the judgment debt is assumed to be Pakistan, under the relevant provisions of Pakistan law the property in the judgment-debt did not vest in the Custodian and continued to be the property of appellant 2. Naturally in his opening Mr. Pritt assumed that the view taken by the Punjab High Court as to the applicability of ss. 4(1) and 4(3) of the Order was right and when the correctness of the said finding was challenged by the respondent in his reply Mr. Pritt supported the said finding on the merits.

On the other hand, the learned Solicitor-General has seriously disputed the correctness of the High Court's conclusion about the applicability of ss. 4(1) and 4(3) of the Order to the decree in question while he has supported the other findings of the High Court against the appellants. On these contentions the question which logically must first be considered is whether the decree under execution attracts the provisions of s. 4(3) of the Order.

The Order was made by the Governor-General on August 12, 1947, in exercise of the powers conferred on him by s. 9 of the Indian Independence Act, 1947, and all other powers enabling him in that behalf. Section 1(2) of the Order provides that it shall come into force at once. Section 2 of the Order provides that the appointed day means the 15th of August, 1947. Section 3 makes provisions for proceedings pending immediately before the appointed day in any of the special tribunals specified in column 1 to the Schedule. We are not concerned with the provisions of this section in the present appeal. We are concerned with s. 4 which it is necessary to read.

Section 4 reads thus:-

> "4. Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947- (1) All proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day ;
>
> (2) any appeal or application for revision in respect of any proceedings so pending in any such court shall lie in the court which would have appellate, or as the case may be revisional, jurisdiction over that court if the proceedings were instituted in that court after the appointed day; and (3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction within that Dominion."

The question which we have to consider is whether the proceedings from which the appeal to the Federal Court arose fall within s. 4(1); if they do s. 4(3) will come into operation. If, however, the said proceedings do not fall within s. 4(1), s. 4(3) would be inapplicable. The appellants contend that the words used in s. 4(1) are wide enough to include every suit pending in any civil court in the Punjab at the material time, and there is no scope for limiting the extent of the applicability of the said clause. On the other hand, it is urged for the respondent that it is only such proceedings as were pending in any court at the material time jurisdiction in respect of which would have been affected by the transfer of certain territories from one country to the other that are intended to be covered under s. 4(1). The problem thus posed by the parties is one of construction. As we have already observed, the High Court has construed s. 4(1) in favour of the appellants; and we have to consider whether the High Court was right in reaching the said conclusion.

Both the parties are agreed that in construing the provisions of s. 4(1) of the Order we should bear in mind the object with which the Order was made and should construe the provisions of the Order after reading them as a whole. Since the Order has been passed in exercise of the powers conferred on the Governor-General by s. 9 of the Indian Independence Act it would be useful to refer to the material provisions of the said section. Section 9(1)(d) provides that the Governor-General shall by order make such provision as appears to him necessary or expedient for removing difficulties arising in connection with the transition to the provisions of this Act. It was realised that as a result of the Act, in carving out two Dominions certain areas may have to be transferred from a Province in one Dominion to a province in another Dominion and such a transfer would inevitably create difficulties of jurisdiction of the civil courts to continue to try proceedings already pending before them. The Order was, therefore, made with the object of avoiding unnecessary complications or hardship to the litigants, and so it provided that the proceedings covered by it which were pending at the material time should be continued as if the Act had not been passed. In other words, a departure was deliberately made from the normal rules of private international law in regard to the enforceability of foreign judgments. Both parties are agreed that this was the object in making the Order, and that in construing the relevant words of the Order the courts must bear this object in mind. It is then urged by the learned Solicitor-General that in its very nature the Order should be treated as temporary though he immediately added that it would be alive and in operation until all the proceedings covered by it have been finally and fully disposed of. No doubt he commented on the fact that the Pakistan Government had by its legislative process made a substantial departure from the provisions of the Order, and had in substance decided to refuse to recognise judgments and orders of Indian courts to which the provisions of the Order undoubtedly applied. In this connection our attention was drawn to the Indian Independence (Pakistan Courts Pending Proceedings) Act, 1952 (IX of 1952), which by s. 3 provides that notwithstanding anything contained in any of the orders referred to in s. 2, no decree to which this Act applies shall be given effect to by any court or authority in India so far as such decree imposes any liability or obligation on any government in India. It appears that the Indian Government was satisfied that Pakistan had thought it fit to provide that no decree or order passed by a court in India would be given effect to in Pakistan, and so it became necessary that the position of the Government India and the three State Governments concerned should be adequately safeguarded. It is with that object that this Act was passed. The Solicitor-General contends that though the R. Order had been made by the Governor-General under s. 9 of the Indian Independence Act and was intended to apply to both the Dominions virtually the

provisions of the Order are no longer in operation in Pakistan. In our opinion, this consideration is hardly relevant in construing the material provisions of the Order. So long as the Order remains in force and has neither been modified or repealed it is the duty of the courts in India to consider its provisions in a fair and reasonable manner and to give full effect to them. Considerations based on the unilateral conduct adopted by the Pakistan Legislature in departing from the provisions of the Order cannot, in our opinion, have any bearing when we are dealing with the question of the construction of the Order itself. The Order is in force, and if the decree sought to be executed by the appellants falls under s. 4(1) it will attract the pro- visions of s. 4(3) and all relevant questions arising in working out the provisions of s. 4(3) would have to be judicially considered. It may be that there may not be a large number of decrees or orders which still remain executable and have not been executed and so occasions to invoke the provisions of this Order may not be too many ; but that is another matter.

Let us then consider the provisions of s. 4(1) first. Mr. Pritt has urged that the appeal to the Federal Court in which the decree under execution was passed in favour of appellant 2 arose from proceedings which were pending at the material time in a court in the Punjab and as such it fell within the purview of s. 4(1). He emphasises the fact that s. 4(1) refers to all proceedings in any civil court in the Punjab as well as in the Provinces of Bengal and Assam, and his case is that there is no justification for limiting the scope and effect of the wide words used in the first part of the clause. Prima facie there is some force in this contention ; but, in our opinion, it would be erroneous to construe these words in isolation and apart from the rest of the provisions in the said clause it. self. It is significant that s. 4 refers to the creation of certain new Provinces and the transfer of certain terri tories from the Province of Assam to the Province of East Bengal by the Independence Act. In other words, the non-obstante clause which constitutes the preamble of s. 4 clearly indicates that it was the creation of certain new Provinces and the transfer of certain territories which was the reason for the provisions made in the three clauses of the said section. It is also significant that s. 4 is confined to the specified judicial proceedings pending in only three Provinces; that is to say, proceedings pending in competent courts either in Sind or in the North West Frontier Province which are parts of Pakistan and in all the States in India except Punjab, West Bengal and Assam do not attract the provisions of the Order. There is, therefore, no doubt that the High Court was in error in assuming that " the use of the words gall' in 'all proceedings' clearly indicated that all cases pending in all courts in the two Dominions were intended to be covered by the Order. It is manifest that the Order, in its application to India and Pakistan, covered only three Provinces and not all.

The latter part of s. 4(1) must now be considered. The pending proceedings covered by the first part have to be continued in the court where they are pending as if the said Act had not been passed, and that court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day. These two clauses unambiguously indicate that by the passing of the Act the initial jurisdiction of the court to entertain the proceedings pending before it was affected ; that is why, in authorising the said proceedings to continue before the said court the clause proceeds to say that the said proceedings shall continue as if the Act had not been passed. In other words, reading s. 4(1) as a whole there can be no doubt that its provisions were intended to safeguard the continuance of only such pending proceedings in respect of which questions of Jurisdiction of the trial court would have arisen by the passing of the

Act and the transfer of certain territories. If proceedings were pending before the specified courts validly at the material time, and if the jurisdiction of the said courts to continue with the trial of the said proceedings was not affected by the passing of the Act or the transfer of the territory, it was wholly unnecessary to authorise the continuance of the said proceedings in the said court and to provide that the said proceedings should be so continued as if the Act had not been passed. In regard to such proceedings the latter part of s. 4(1) would be wholly redundant. The only answer which Mr. Pritt attempted to give in facing this difficulty was that even in regard to proceedings which the specified court was competent to try even after the passing of the Act its jurisdiction to execute the decree would be impaired or affected and that was intended to be cured 'by s. 4(1). This argument is clearly far-fetched and untenable. The jurisdiction and powers which are saved by s. 4(1) are in terms described as jurisdiction and powers " for the purpose of the said proceedings ". It is the jurisdiction to con- tinue with the pending proceedings which had been validly initiated and the word " proceedings " in the context must mean, in the case of a suit, a suit and not proceedings which may be taken out to execute the decree that may be passed in such a suit. Therefore, we feel no difficulty in holding that s. 4(1) does not apply to all proceedings pending at the material time before the specified courts but only such of them in respect of which the jurisdiction of the trial court would have been affected by the passing of the Act or by the transfer of certain territories. Section 4(2) deals with appeals or revisional applications arising from the pending proceedings covered by cl. (1). The learned Solicitor-General contends that this clause cannot apply to an appeal before the Federal Court because, according to him, it is only an appeal in respect of a pending proceeding that is contemplated by the clause. He argues that the word appeal " can reasonably mean only one appeal which arises directly against the decree passed in the pending proceedings and there would, therefore, be no scope to extend the application of s. 4(2) to a second appeal, as for instance an appeal to the Federal Court in the present case. In support of this argument he J. has incidentally referred to the fact that the Federal Court had not come into existence and had no jurisdiction to entertain a regular appeal from a decision of the High Court at the time when the Order was made. We are not impressed by this argument. In our opinion there is no doubt that the word " appeal " in the context must mean any appeal or appeals allowed by law in respect of pending proceedings covered by cl. (1). Any other view would lead to unreason. able, if not anomalous, consequences. What cl. (2) intends to provide is that the proceedings to which cl. (1) applies should be allowed to take their full course under the law governing them, and the final effective appellate decision should be as valid in regard to the said proceedings as it would be in regard to the proceedings validly instituted in that court after the appointed day. Incidentally, we may point out that as a result of the combined operation of Order G. G. O. 3 made on. February 25, 1948, and the provisions of the Federal Court (Jurisdiction Enlargement) Act, 1 of 1950, the Federal Court must be deemed to have come into existence and must be deemed to have had powers to entertain appeals from the decrees of the High Courts as from the appointed day. That takes us to s. 4(3). The Solicitor-General con; tends that the expression,, effect shall be given to' in this clause does not mean that the decree shall be executed. It only means that the decree shall be recognised as a decree passed by a court of competent jurisdiction and nothing more. His argument is that s. 4 wanted to make a very narrow and limited departure from the ordinary principles of private international law. It is well-known that except for cases falling under ss. 44 and 44A of the Code of Civil Procedure a foreign judgment has to be enforced by a suit;

and in such a suit the judgment-debtor is entitled to make certain pleas against the enforcement of the judgment. These pleas are specified by cls. (a) to (f) of s. 13 of the Code. According to the Solicitor-General, as a result of the fiction introduced by s. 4(3), when a foreign judgment to which s. 4(1) applies is I sought to be enforced by a suit in an Indian court it would not be open to the judgment-debtor to urge that the judgment or decree has not been passed by a( court of competent jurisdiction ; though such a plea is permissible under s. 13(a) it is excluded by operation of s. 4(3) of the Order; the remaining pleas would still be available to the judgment-debtor. If it is held that the word " effect shall be given " means that the decree shall be executed quite clearly all the pleas recognised by s. 13 of the Code would be inapplicable. Therefore, according to the respondent, the present decree cannot be executed but must be enforced by a suit and it would be open to the judgment-debtor to raise pleas (b) to

(f) recognised by s. 13 of the Code. This argument is sought to be supported on the ground that the jurisdiction which is protected by s. 4(1) is a national or local jurisdiction whereas the competent jurisdiction to which reference is made in s. 4(3) is the international jurisdiction. The distinction between these two jurisdictions is based on the statement contained in an earlier edition of Dicey's "Conflict of Laws" to the effect that " Proper Court means a court which is authorised by the law of the country to which it belongs or under whose authority it acts, to adjudicate upon a given matter, whereas 'Court of competent jurisdiction means a Court which has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter"(1). We ought to add that these definitions have been given by Dicey only to explain the meaning of the said words used by him in his Digest and nothing more, and even so it is not shown that they find a place in the latest edition of the book. (1) Dicey's " Conflict of Laws", 6th Ed., P. 345.

In considering the merits of this argument it is necessary first to bear in mind what is meant by the clause " a court of competent jurisdiction within that Dominion ". This clause in substance provides inter alia that the judgment should be given effect to within the territories of either of the two Dominions, and in doing so the said judgment should be treated as if it had been passed by a court of competent jurisdiction within that Dominion. The context thus clearly shows that the words " that Dominion " indicate the Dominion where effect is being given to the judgment; it cannot possibly mean the Dominion in which the judgment had been delivered, because the competent jurisdiction of the court to deliver the said judgment has been already provided for by s. 4(1). It would, we think, be idle to make any distinction between the jurisdiction prescribed by s. 4(1) and the competent jurisdiction to which reference is made in s. 4(3). Thus s. 4(3) requires that in the Dominion where effect is being given to a judgment, the judgment should be treated as passed by a court of competent jurisdiction in that Dominion. If that be so it would be difficult to accept the plea that the only way in which effect should be given is to recognise the judgment as a foreign judgment as suggested by the learned Solicitor-General. If, for instance, in the present case the judgment of the Federal Court is treated by the statutory fiction as one passed by the court of competent jurisdiction in India the words it effect shall be given " used in the said clause must inevitably mean that the decree following upon that judgment should be executed in India on the basis that the judgment has been competently pronounced by an Indian court. Indeed it is clear that unless cl. (3) intended to provide for the execution of the judgment covered by cls. (1) and (2) it would serve no purpose whatever. To say that cl. (3) merely saves a possible plea in s. 13(1) is to ignore the effect of cl. (1)

itself. By cl. (1) the jurisdiction of the specified court to deal with the pending proceedings is provided, and so there could be no challenge to the said jurisdiction any longer. We are, therefore, satisfied that cl. (3) in effect lays down that the judgment, decree, order or sentence to which the Order applies is executable and would be executed as though it bad been passed or pronounced by a competent court in the Dominion where execution is sought. This conclusion is fortified if we bear in mind that a sentence pronounced by a criminal court is dealt with in the same manner as a judgment delivered or order made by a civil court. It, would be far-fetched to suggest that in the case of a sentence pronounced by a criminal court all that cl. (3) authorises to be done is to take recourse to extradition proceedings permitted by law and nothing more. We must, therefore, hold that reading the three clauses of s. 4 together the result is that the pending proceedings to which cl. (1) applies would continue before the specified courts even though the jurisdiction of the said courts may otherwise have been affected by the passing of the Act or the transfer of certain territories, that the appeals would be taken against the judgments or orders passed in the said proceedings in the same manner in which they would have been allowed if the original proceedings had been instituted after the appointed day, and that the final judgment, decree, order or sentence in the said proceedings would be executed in either Dominion as if the said proceedings had terminated in that manner in a competent court in the Dominion where execution is sought. Having regard to the very serious departure which has been made by cl. (3) from the ordinary provisions of private international law it would not be unreasonable to draw additional support to our conclusion that the scope and extent of the proceedings covered by cl. (1) is limited only to such cases where jurisdiction of the specified court was affected by the passing of the Act or the transfer of certain territories. It seems to us difficult to assume that in making the Order the Governor-General intended that all decrees, judgments or orders passed by all the courts in the three specified States should fall under cl. (1) and should be capable of immediate execution in either Dominion under cl. (3). If that were so it is not easy to appreciate why the two other Provinces which formed part of Pakistan as well as the other Provinces in India should have been excluded from the scope of this Order. It seems to us that the main. object of the Order was not to disturb or interrupt judicial proceedings pending in the respective courts in the Provinces specified where it was apprehended that the jurisdiction of the said courts would be affected by the passing of the Act. We have carefully considered the three clauses in question and we are satisfied that on a fair and reasonable construction s. 4(1) cannot be extended to pending proceedings in respect of which the trial court's jurisdiction was in no way affected by the passing of the Act or the transfer of any territories.

At this stage we may conveniently refer to three decisions of the Calcutta High Court on which Mr. Pritt relied and to which the High Court has referred in its judgment. In Protap Kumar Sen & Anr. v. Nagendra Nath Mazumdar (1) the Calcutta High Court was dealing with an execution proceeding initiated by the decree-holder in the Alipore Court with a certificate of non-satisfaction issued by the Sub-Judge at Jessore who had passed the decree under execution. The validity of the non-satisfaction certificate appears to have been challenged by the judgment-debtor. The High Court held that the Jessore Court was competent to grant a certificate of non-satisfaction having regard to the provisions of s. 4(1) and (3) of the Order. The other point which was raised was in regard to the validity of the Order itself. It was urged that after the Indian Constitution was adopted the Indian Independence Act and orders issued thereunder were no longer in force having regard to the provisions of art. 395 of the Constitution. This argument was also rejected. We may add that the

respondent has not urged before us that the Order is no longer in force and so it is unnecessary to consider that point. This decision, therefore, is not of much assistance in construing the material words used in s. 4(1).

In Ahidhar Ghose v. Jagabandhu Roy (2) a decree (1) A.I.R. 1951 Cal. 511.

(2) A.I.R. 1952 Cal. 846.

sought to be executed bad been passed by the Alipore Court on compromise. It was a suit between a zemindar who held a Patni in respect of lands which at the institution of the suit lay wholly within the jurisdiction of Alipore Court but as a result of the partition part of the land went into Pakistan and thus R. ceased to be under the jurisdiction of the Alipore Court. The compromise decree provided for the payment of kist amount by stated installments and it further directed that in case of default of payment of any of the said instalments the entire decretal amount then outstanding would be realisable by the attachment and sale of the property in default. Since the property of the Patni tenure was situated partly within the jurisdiction of Alipore Court and partly outside, the judgment-debtor raised a plea that the claim made by the decree-holder for sale of the property within jurisdiction was incompetent. With that part of the case we are not concerned in the present appeal. So far as the applicability of s. 4(1) of the Order is concerned the court held that s. 4(1) applied to the proceedings and that we think was clearly right. It was a proceeding validly instituted before the Alipore Court; the jurisdiction of the Alipore Court was affected by partition, and so the proceeding fell within the scope of s. 4(1). There are some general observations made in the judgment on which reliance is placed by Mr. Pritt, but the said general observations must be read in the context of the facts in the case with which the court was concerned. Thus this decision also does not really assist the appellants.

In Naresh Chandra Bose v. Sachindra Nath Deb and Ors. (1),the principal question which the court considered was the effect of the provisions of Art. 395 of the Constitution on the validity and the continuance of the Order. As we have already pointed out, with this aspect of the matter we are not concerned in the present appeal.

The next question which must be considered is whether the present suit falls within s. 4(1) at all. The answer to this question must obviously be in the (1) A.I.R. 1956 Cal. 222.

negative.The material allegations made by the appellants in the plaint filed by them in the present suit clearly show that the whole cause of action had accrued within the jurisdiction of the Senior Sub-Judge at Lahore. The original contract had taken place at Lahore, the property agreed to be sold was situated at Lahore, the earnest amount of Rs. 5,00,000 was paid by the appellants to the respondent at Lahore, the breach of the contract took place at Lahore, and so under s. 20(c) of the Code of Civil Procedure the suit was properly filed in the court at Lahore and the jurisdiction of the said court to try the suit was in no manner affected by the passing of the Actor the transfer of territory. This position was not and is not disputed. There is, therefore, no doubt that the trial court could have proceeded to deal with this suit even if the Order in question had not been passed; and so the statutory fiction raised by the provisions of the Order cannot be invoked in enforcing a decree

passed by the Federal Court in an appeal arising from such a suit. In our opinion, therefore, the High Court was in error in holding that the provisions of s. 4 applied to the decree sought to be executed by the appellants.

In view of this conclusion it is not necessary to deal with the other points which have been decided by the High Court and which were argued before us. If we had come to the conclusion that the suit out of which the appeal before the Federal Court arose was a pending proceeding under s. 4(1) it would have been necessary for us to decide some other questions. We would, for instance, have had to consider which is the court of competent jurisdiction in India under s. 4(3) is it the Supreme Court ? If yes, do the provisions of O.45, r. 15 apply if not, does the statutory fiction raised by s. 4 assist the appellants in invoking the said provisions ? If the statutory fiction does not assist the appellants, to what court should they have applied ? Are the present proceedings in the nature of execution proceedings before a transferee court? Is the certificate of non- satisfaction prescribed by O. 21, r. 6(b) necessary ? It would also have been necessary to consider the character of the judgment-debt with the object of deciding whether or not the decree vested in appellant 2, or in the Custodian of Evacuee Property at Lahore. As we have already indicated, since we have held that the provisions of s. 4 are inapplicable to the decree sought to be executed by the appellants it is unnecessary to decide these questions.

Thus, though we have differed from the conclusion of the High Court in regard to the applicability of s. 4 of the Order that does not affect the final result of the appeal ; because on the view we take about the scope and effect of the provisions of s. 4 we hold that the application made by the appellants before the High Court under O. 45, r. 15 was incompetent, and so the High Court was right in dismissing it.

The appeal accordingly fails and is dismissed with costs. KAPUR J. I regret I am unable to agree with the majority judgment proposed which I have read with care and respect that it necessarily deserves and I now proceed to give my reasons for this dissent.

This is an appeal by a certificate under Art. 133 (1) (a) and (c) against the judgment and order of the High Court of Punjab dismissing the appellants' application for execution. The appellants, the Associated Hotels of India Ltd. and R. B. Mohan Singh Oberoi, the petitioners in the High Court, by an agreement, dated October 2, 1946, agreed to purchase and the respondent agreed to sell certain properties situate at Lahore now in Pakistan for a, sum of Rs. 52,75,000. In pursuance of the said agreement the appellants paid to the respondent a sum of Rs. 5 lacs by way of deposit or earnest money. The sale was not completed as the respondent could not make out a good title to the property agreed to be sold. On May 8, 1947, the appellants filed a suit in the court of the Senior Subordinate Judge at Lahore against the respondent for the recovery of Rs. 5,10,000, the amount deposited and interest thereon @ 6% per annum and also claimed future interest. This suit was decreed by the Senior Subordinate Judge on March 14,1949, for a sum of Rs. 5,08,333/5/4 with future interest @ 5% per annum but only in favour of the second appellant R. B. Mohan Singh Oberoi. The respondent took an appeal to the High Court at Lahore and on November 24, 1949, the decree of the trial court was reversed and the suit dismissed with costs. Against that judgment and decree both the appellants took an appeal to the Federal Court of Pakistan. On December 21, 1953,

the Federal Court of Pakistan allowed the appeal, set aside the decree of the High Court and restored that of the Senior Subordinate Judge, Lahore.

After preferring his appeal in the High Court the respondent applied to and on April 27, 1949, obtained from the High Court an order of stay of the execution on the condition that he deposited a sum of Rs. 3 lacs in the High Court and gave security for the balance. This sum was deposited and the security was furnished and thus the execution was stayed. After the judgment of the High Court the respondent applied to that Court for the refund of the three lacs deposited by him and an order to that effect was made on December 16, 1949. By the same order the Lahore High Court directed notice to be issued to the Custodian of Evacuee Property, Lahore. On December 20, 1949, the Custodian applied for a review of the order of the High Court allowing the money to be withdrawn by the respondent on the allegation that the amount deposited was evacuee property. He also obtained an interim stay of the order directing the return of money to the respondent. On December 21, 1953, the Federal Court of Pakistan reversed tile decree of the Lahore High Court. Thereafter on January 6, 1954, the respondent applied to the High Court praying that the amount deposited be applied towards a part satisfaction of the decree passed against him. On March 31, 1954, R. B. Mohan Singh Oberoi appellant No. 2, applied for the transfer of the Rs. 3 lacs along with the relevant records relating thereto, to India under the Transfer of Evacuee Deposits Ordinance, 1954 (Ordinance No. 1 of 1954), and the subsequent enactment. In the alternative he submitted that the Custodian of Evacuee Property was not entitled to that money and prayed that it be paid to him at Lahore or that it be paid to a person other than the Custodian of Evacuee Property but not to the respondent as the latter had no interest in the money. On January 30, 1956, the Lahore High Court which by then became the High Court of West Pakistan held (1) that the money could not be transferred to India ; (2) allowed the petition for review; and (3) directed the Custodian to report what interest, if any, any evacuee had in the money. That matter, we were informed, is under appeal in the Supreme Court of Pakistan.

On January 19, 1955, the appellants filed an application in the Punjab High Court at Chandigarh under Order 45, Rule 15, Civil Procedure Code and s. 151 of the Code for transmission of the decree of the Pakistan Federal Court to the Court of the Subordinate Judge at Simla and for directions to determine the decretal amount. In the alternative the appellants prayed for the decree being sent to the District Judge for execution. They alleged therein that under the provisions of Art. 4(3) of the Indian Independence (Legal Proceedings Order), 1947, hereinafter called the Order made under s. 9 of the Indian Independence Act, hereinafter called the Act, effect could be given within the territories of the Union of India to the decree passed by the Federal Court of Pakistan and it could be executed as if it had been passed by a court of competent jurisdiction within the Union of India; that the decree was to be treated as if it was a decree of the Supreme Court of India and was executable by the court of the senior Subordinate Judge at Simla on the decree being transmitted to it by the High Court as provided in Order 45, Rule 15, Civil Procedure Code. In the alternative it was prayed that if the procedure under Order 45, Rule 15, Civil Procedure Code, was not appropriate and applicable, the decree be sent for execution to the Senior Subordinate Judge's Court "as if it had been passed by the Court ". With this petition an application in the form set out in Order 21, Rule 11, Civil Procedure Code was attached. The respondent pleaded that the decree being a decree of a foreign court could not be executed in India and O. 45, r. 15, was inapplicable; that the Act having

been repealed by the Indian Constitution the Order had ceased to exist; that the decree vested in the Custodian of Evacuee Property, Lahore and the "appellants being divested of it could not execute it; that the petition wag not maintainable because the appellants had not filed a certificate of non-satisfaction of the court which passed the decree; that Art. 4(3) of the Order was inapplicable as the suit pending in the Lahore court at the time of the partition did not suffer from any defect of jurisdiction as a result of the partition of India; and that the appellants could not simultaneously take execution proceedings in the courts of two independent countries in regard to the same decree.

On January 22, 1957, the High Court of Punjab dismissed the petition holding that in spite of the coming into force of the Indian Constitution the Order was still in force; that "

> all cases pending in all courts in the two dominions were intended to be covered by the Order ", and the only way in which a decree of a civil court in Pakistan could be given effect to was to allow it to be executed in India; that the court of competent jurisdiction mentioned in the Order would be the court of the Subordinate Judge First Class at the place where the decree was sought to be executed and there- fore the proper procedure was not to apply to the High Court but to apply for a transfer certificate and after obtaining a non-satisfaction certificate from the Federal Court of Pakistan or from any other competent court in Pakistan, to execute the decree in the court of the Senior Subordinate Judge, Simla; that the appellants had been divested of all rights in the decree by the Evacuee Law of Pakistan and they had no right to execute the decree. In this connection the High Court held that the situs of the decree was Pakistan where the decree was passed and that the amount of Rs. 3 lacs which was being claimed by the Custodian of Evacuee Property, Lahore, will be taker. into account after the decision of that matter by the courts of Pakistan. Thus the petition of the appellants was dismissed. It is against this judgment and order that the appellants have come in appeal to this court. The first question for decision is the construction of the fourth clause of the Order. The High Court did not accept the contention of the respondent that the Order was applicable only to proceedings over which R. the court had lost its territorial jurisdiction consequential upon the division of the border districts and not to in proceedings pending in any court in the provinces of the two dominions, i.e., in any court of the provinces of East and West Punjab or East or West Bengal. This contention was repeated before us and the same Constricted interpretation was sought to be put on the words of Art. 4(1) of the Order. An examination of the provisions of the Act and other Orders made hereunder will be helpful in determining the scope of Art. 4 of the Order. The object of the Act was to provide for the setting up of the two independent Dominions in India, to make suitable changes in the Government of India Act, 1935, and "

to provide for the matters consequential on or connected with the getting up of those Dominions ". By s. 1 two separate Comings of India and Pakistan were set up. By. 2 the territories which were to fall in the two respective Dominions were delimited. Certain provinces wholly fell in one Dominion or the other, but three provinces, i.e., Bengal, the Punjab and Assam were to be provided between the two Dominions which was done under ss. 3, 4 and 9(6) of the Act. Under s. 3 the province of

Bengal, as it was constituted under the Government of India Act, 1935, ceased to exist and in as place two new provinces to be respectively known East Bengal and West Bengal were constituted. Under the first schedule of the Act certain districts wholly fell in East Bengal and the rest in West Bengal. this was subject to the Award of the Boundary Com- mission in regard to the boundary between the two provinces which meant between contiguous districts the two new provinces. Similarly under s. 4 the province of the Punjab was divided into West Punjab and East Punjab and whole districts mentioned in schedule 2 fell in West Punjab and the rest in East Punjab, but this was also subject to the Award to be made by the Boundary Commission which though made on August 12, 1947, was published on August 17, 1947, and thus became operative on that day. There was some dispute as to a portion of the province of Assam and it, as a result of a plebiscite, was in corporated in the province of East Bengal and the rest of the province of Assam was constituted under s. 9(6) of the Act into what became the province of Assam. The Award of the Punjab Boundary Commission shows that only small areas of the border tehsils of the border districts of Gurdaspur, Amritsar and Ferozepur in East Punjab and Sialkot, Lahore and Montgomery in West Punjab, i.e., tehsils along the rivers Ravi and Sutlej were affected by the Aware and the territories exchanged were not numerous of large by any standard.

The setting up of the two Dominions and the division of the three provinces of Bengal, the Punjab and Assam gave rise to many problems relating to legislative, executive and judicial branches of the Government including the division of assets, liabilities and powers. Certain provisions were made in the Act itself, but in order to give effective operation to the purposes of the Act it became necessary to promulgation Orders which was provided for in s. 9 of the Act an which comprised all the three branches of govern mental activity; executive, legislative and judicial Section 9 provided and I quote the relevant provisions:

> " 9(1) The Governor General shall by order make such provision as appears to him to be necessary expedient-
>
> (a) for bringing the provisions of this Act in the effective operation ;
>
> (b) for dividing between the new Dominions, and between the new Provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor General or, as the case me be, of the relevant Provinces which, under this A are to cease to exist;
>
> (c) .....

.

(d) for removing difficulties arising in connection with the transition to the provisions of this Act;.....

(i) so far as it appears necessary or expedient in connection with any of the matters aforesaid, for varying the constitution, powers or jurisdiction of any legislature, court or other authority in the

new Dominions and creating new legislatures, courts or other authorities therein ". By sub-s. (6) the Province of Assam on a certain event happening was to cease to exist and was to be reconstituted. Provision was also made in the section for continuance of the existing laws. In exercise of the powers conferred upon him under the Act the Governor General of India promulgated a number of Orders.

In regard to other provinces unaffected by the Act, it was unnecessary to make any Order as to the executive, judicial or legislative functions of the government and consequently none were made. But wherever any provision was necessary whether in the sphere of the Dominion or of the provinces of Bengal, the Punjab and Assam various Orders were made by the Governor General which included Orders in regard to the Federal Court because of the setting up of the two Dominions and in regard to the High Courts of Calcutta and Lahore. The Federal Court Order was promulgated on August 11, 1947, by Art. 5 of which all proceedings which were pending in the Federal Court immediately before the appointed day were to continue in the Federal Court of India on or after that day with the proviso that if it appeared to the Court that any such case ought to be transferred to the Federal Court of Pakistan those proceedings were to be transferred to that Court and with regard to those proceedings the jurisdiction of the Pakistan Court was exclusive. Any order made in the proceedings which were pending in the Federal Court of India and were continued on or after the appointed date became enforceable not only in India but also in Pakistan as if they were orders made by the Federal Court of Pakistan. This is clear from the language used in those articles and it was so held in regard to the High Court of Calcutta by the Federal Court in Midnapore Zemindary Co. Ltd. v. Province of Bengal and others (1) where Patanjali Sastri, J. (as he then was), said:-

> " It will be seen that, by virtue of these provisions, notwithstanding the constitution of the new province of East Bengal as part of the Dominion of Pakistan, the decree now under appeal which was made by the High Court of Calcutta before the appointed day is to have effect in East Bengal as if it was an order made by the High Court of East Bengal, while any decision of this court as the " appellate court "

confirming, varying or reversing that decree is to receive effect as if that decree were also a decree of the High Court of East Bengal. In other words, the judgment under appeal is to be regarded as a judgment of the High Court of East Bengal and quoad hoc this Court as the Court of appeal from that High Court ".

For the purposes of defining the jurisdiction of the High Courts of Calcutta and Lahore, for the establishment of the High Courts for the five new provinces, for specifying their powers and the extent and limit of the effectiveness of their orders the Governor General made four orders on August 11, 1947, i.e., The High Courts (Bengal) Order, The High Courts (Punjab) Order, The High Court (Calcutta) Order and the High Court (Lahore) Order. Under Art. 13 of the High Courts (Punjab) Order original proceedings in the Lahore High Court were to continue in that High Court but appeals and revisions pending immediately before the appointed day stood transferred to the High Court of East Punjab where the court of origin was situated in the province of Delhi or the Province of East Punjab. That Order provided that any order made by the High Court of East Punjab in proceedings transferred to it was to have effect not only as an order of that High Court but also of the High Court of Lahore; Art. 13(5). Further it provided that where before or after the appointed

day any order had been confirmed, varied or reversed on appeal, effect shall be given to the decision of the appellate court as if the order appealed (1) [1949] F.C.R. 309, 318.

from were an order not only of the High Court that made the order but also of the High Court of East Punjab or of Lahore as the case may be.

There still remained the problem of the civil and criminal proceedings pending in the courts subordinate to the High Courts. The other provinces of India and Pakistan had no such problem which the abolition of three provinces created. In order to declare the courts where the pending proceedings were to be tried and to specify the jurisdiction of the courts and the effect of their orders and decrees the Order was made by the Governor General. It was No. G. G. O. 11, dated August 12, 1947, and its relevant articles were:-

> " (3) Notwithstanding the setting up of the two independent Dominions of India and Pakistan and the creation of new Provinces by the Indian Independence Act, 1947,- (1) all proceedings pending immediately before the appointed day in any of the Special Tribunals specified in column 1 of the Schedule to this Order shall be continued in that Tribunal as if the said Act had not been passed, and that Tribunal shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day ; (2) notwithstanding anything contained in any other law to the contrary, any appeal from or application for revision of any order or sentence of the Tribunal in a case specified in column 2 of the Schedule to this Order shall lie to the High Court specified in the corresponding entry in column 3 of the said Schedule; and (3) effect shall be given within the territories of either of the two Dominions to any order or sentence of any such Special Tribunal as aforesaid and of any High Court in appeal or revision therefrom as if the order or sentence had been passed by a court of competent jurisdiction in that Dominion.
>
> (4) Notwithstanding the creation of certain new provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947,-
>
> (1) all proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day. (2) any appeal or application for revision in respect of any proceedings so pending in any such court shall lie in the court which would have appellate, or as the case may be, revisional jurisdiction over that court if the proceedings were instituted in that court after the appointed day; and (3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such court in the said proceedings, as if it had been passed by a court of competent jurisdiction

within that Dominion.

THE SCHEDULE (See Article 3) 1 2 3 Special Tribunal Cases High Court First Special All cases The High Tribunal Court in Calcutta... Calcutta.

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| Second Special Tribunal Calcutta. | All cases | The High Court in Calcutta. |

First Special 1.Crown v. Sohan Lal The High Tribunal... Bhayana, Shanta Court of Lahore. Nand, and Ram East Lal Sharma. Punjab.

2. Crown v. Major C. The High A. Hunt, M. A. Court in Sheikh Hussain Lahore.

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| | 3. Crown v. Major C. A. Hunt, Subedar Sant Ram Bhatia and M. A. Sheikh. | The High Court in Lahore. |
| Second Special Tribunal, Lahore.... | 1. Crown v. R. B. L. Padam Chand Teela and another. | The High Court in Lahore. |
| | 2. Crown v. J. K. Gas Plant Manufactur- ing Co., Ltd., Jug- gilal Kamlapat (Rampur) Ltd., B. B. Mathur and S. K. Seth. | The High Court in Bombay. |
| | 3. Crown v. Juggilal Kamlapat. Gas Plant Manufactur- ing Co., Ltd., Juggilal Kamlapat (Rampur) Ltd., Kailashpat Singhania, B. B. Mathur, and S. K. Seth. | The High Court in Bombay. |
| | 4. Crown v. Madanlal Dalmia, Lakshmi Chand Jain, Rang Lal, Kishan Sax- ena, Ranchor Das Bagri, Ganga Das Mohta Ram Gopalss Daga, and Balabh | The High Court of East Punjab. |

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| Third Special Tribunal, Lahore. | All cases | The High Court of East Punjab. |

Under Art. 3 of the Order proceedings were to continue in the respective Special Tribunals but appeals therefrom lay to different High Courts set out in the Schedule thereto and effect was to be given to the orders made and sentences passed by the Tribunals or by the High Courts to which the appeals lay within the territories of either of the two Dominions as if the 'orders bad been passed by a court of Competent jurisdiction in the Dominion in which effect was given. Therefore notwithstanding the partition, for offences committed in any part of British India, if the accused were convicted by any of these Tribunals whether at Lahore or Calcutta the orders were effective throughout India or Pakistan as the case may be. Now we come to Art. 4. An important fact to be kept in view is that the award of the Boundary Commission was not published till August 17, 1947, i.e., two days after the appointed day. Thus the two new provinces, East Punjab and West Punjab, upto that date were comprised of whole and undivided districts as specified in Schedule 2 of the Act and the territorial jurisdiction of the courts of the various border districts was till then unaffected as a result merely of the partition. The non obstante clause in Art. 4 refers to the creation of new provinces and to the transfer of certain territories from the province of Assam to the province of East Bengal. The language of cl. 1 of the article is of wide amplitude. It comprises and applies to all pending proceedings in any civil or criminal court (other than a High Court) in the erstwhile provinces of Bengal, the Punjab and Assam. It declares that the pending proceedings would Continue in the courts where they were pending immediately before August 15, 1947, and qua such proceedings the court was to continue to have the jurisdiction it would have had as if the Act had not been passed, i.e., three provinces had not ceased to exist and five new provinces had not come into existence in their place with all the consequential changes. There is no indication in the first part which limits, constricts or circumscribes the amplitude of the words of that clause. It contains no limitation either by express words or by implication. The words "all proceedings" and "in any civil or criminal court" are indicative of their comprehensiveness and negative the idea of a mere change based on the territorial jurisdiction of the court. The Act in its second schedule contemplated the division by whole districts and it is well-known that the Punjab Government, as other Governments to be affected by the Act, had made an extensive survey of the Punjab with a view to giving effect to the "

> Cabinet formula " for dividing the province; charts had been prepared, survey maps of revenue estates, maps of the canal irrigation system and distribution of population according to religious communities were prepared by the cleverest officers of the Government. It was on this basis that schedules in the Act were prepared. The Award of Sir Cyril Radcliffe (as be then was) shows that little change was required to be made in the dividing line prepared by the Punjab Government. The major change was of one district minus its trans Ravi Tahsil. It is significant that whatever the intention was to imply a change in territorial jurisdiction and its effect it was specifically so stated ; e.g., Art. 3 of the Indian Independence (Income-tax Proceedings) Order of August 12, 1947, which was in the following terms :

> " Where before the appointed day the jurisdiction of a tax officer under the relevant Tax Act has been altered in connection with the setting up of the Dominions of India and Pakistan, or where after the appointed day the case of an assessee is transferred from one Dominion to the other by agreement between the Central Board of Revenue of the two Dominions, and by reason of such alteration of jurisdiction or transfer the case of an assessee falls to be dealt with on or after the appointed day by the tax authorities of India, or as the case may be, of Pakistan, all proceedings relating to the case pending before any tax authority of Pakistan, or as the case may be of India, shall be transferred to the corresponding tax authority of India, or as the case may be of Pakistan, and shall be disposed of by the last mentioned tax authority in accordance with law ".

Respondent also relied on the fact that by unilateral action Pakistan bad by statute made the decrees of Indian courts including East Punjab ineffective in West Punjab and that an Indian Act had made similar provision as to decrees against the Government. This is hardly indicative of the true meaning of art. 4 but if it can afford any indication it only supports the appellants' contention that,, all proceedings" in Cc any court " were words of wider connotation. But limitation is sought from the words of the second part of the clause :

> " and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had before the appointed day ". These words have no such effect and do not circumscribe the amplitude of the language of the first part of the clause. They are merely dispersive of the doubts which a strict adherence to the rules of private International Law as accepted in courts founded upon the principle of effectiveness and submission might cast on the extent of jurisdiction and powers of the courts of the new provinces where pending proceedings were to be continued.
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> The language of arts. 3 and 4 of the Order is almost identical except that there is no mention of the transfer of territory from Assam to East Bengal in the non-obstante clause of art. 3 and the three provinces of Bengal, the Punjab and Assam are not mentioned in cl. 1 of that article because in the context they were irrelevant. The words in art. 3 must necessarily have wide amplitude because the cases before the tribunals related to offences committed in various parts of India. Is there any reason to give a different and constricted meaning to those same words in art. 4 of the Order. The mention of the three provinces was necessitated by their ceasing to exist. But the words emphasised by the respondent in the second part of cl. 1 of art. 4, i.e., " for the purposes of the said proceedings "

are common. They only mean that qua the proceedings pending in the particular court the jurisdiction and powers were to remain the same as they were before the division. The use of these words only carries out the intention of the makers of the Order and subserves the objects of the Act, i.e., providing machinery for an orderly continuance of the normal functioning of the judicial system.

Under the Civil Procedure Code the jurisdiction of courts was not based only on effectiveness or submission but on location of property, cause of action or residence. Unless expressly or impliedly taken away ordinarily the jurisdiction and powers of a Court conferred under a Statute continue if the Court continues to exist and that is also the principle of s. 9 of the Civil Procedure Code. The general doctrine of English law is that in the absence of an Act of Parliament the exercise of civil jurisdiction is founded upon one of the two principles-of effectiveness or submission, i.e., either the subject-matter of suit is in England or the defendant is present at the time of service of the writ in England. If neither of these elements is present the maxim actor sequitur forum rei applies: Cheshire on Private International Law, pp. 139-40 (3rd Ed.); Sirdar Gurdyal Singh v. Rajah of Faridkote (1) where this position has been clearly stated. In that case it was held that in all personal actions the courts of the country in which the defendant resides, not the courts of the country where the cause of action arose, should be resorted to. The defendant there was residing in and was domiciled in the State of Jind and at the date of the suit had ceased to be a resident of Faridkote which passed the decree based on the cause of action arising there. Such decrees it was held were a nullity under International law. The Privy Council at p. 185 said :-

> " The general rule is " 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, p. 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 (1) [1894] 21 I.A. 171.

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 and 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 ".

Thus jurisdiction may be conferred by Statute as under the Code of Civil Procedure or it may be based on the two principles of English Law above stated. If the latter are the exclusive guides in the matter of competence then mere accrual of cause of action will not make the court competent. Obviously therefore arts. 3 & 4 are a recognition of the rule above stated which would remove any doubts created as a result of the division of the provinces and of difficulties resulting therefrom. We cannot lose sight of the fact that the people of the province of the Punjab divided into West and East Punjab and so also of Bengal were so intertwined both in regard to relationship, succession, property and business dealings that if no such provision had been made it would have led to uncertainty, hardships and chaotic conditions, which would equally be the consequence of the interpretation contended for by the respondent.

If the interpretation contended for by the respondent were accepted in every case the litigant would have had to decide whether his suit could be continued or was hit by the principles above discussed, a decision which is difficult anywhere more so in the Courts subordinate to the High Courts. The absence of a provision made in the Order would have created an almost impossible position in regard to most proceedings. Even in the case of suits dealing with immoveable property the difficulty would have arisen where property was situated in the jurisdiction of more courts than one, the courts being in the two new provinces of the Punjab, e.g., suits for partition of property, succession, enforcement of mortgages and declarations of title under the provisions of the Punjab Land Revenue Act. Greater uncertainty would have arisen in cases where decrees of original courts were under appeal in districts and still more in suits where preliminary decrees had been passed and final decrees remained to be made. Even in cases of a matrimonial or testamentary nature, in cases dealing with guardianship and custody of infants, maintenance, restitution of conjugal rights and suits of a like nature the absence of a provision like art. 4 of the Order would have created almost unsurmountable difficulties. These cases are illustrative of the various kinds of proceedings which had to be provided for. In order to overcome difficulties and remove doubts and hardships the Order was made by the Governor-General in such general terms using language of wide amplitude. Thus the necessity to start new proceedings, pay fresh court fees and have fresh trials was obviated.

This interpretation is strengthened by reference to criminal cases. The jurisdiction of criminal courts under Chapter XV of the Criminal Procedure Code is dependent upon variety of circumstances any one of them could give rise to the conflict of jurisdictions. One of the simplest case would be the trial of an offender where a case was transferred from one district to another and the two districts fell into different provinces. His trial could not be continued without cl. 1 of art. 4 nor conviction become effective without cl. 3. The absence of a provision like art. 4 of the Order would lead to inconvenience if not confusing situations in cases where a person could, under the Criminal Procedure Code, be tried in different courts of the two Punjabs and the rules of International Law supervened. Instances could be multiplied in regard to criminal cases where but for the wider meaning given to the article the legality of the proceedings would have seriously been jeopardized.

The third clause of art. 4 is couched in equally wide language and it had necessarily to be so and was meant to be so, the object being remedial and to effectuate the orders, decrees and sentences passed by courts. Without this clause the first clause would have been of little purpose because if the judgments, decrees and sentences passed by courts of one part of the Punjab were to be treated merely as foreign judgments then the whole object of the Order would have been defeated. It has to be emphasised that in the Orders relating to the Federal Court and to the High Courts of Calcutta and Lahore which have been discussed in a previous part of this judgment effect was given to the judgments and orders of one court as if they were the judgments of the other court also and this was recognised in the judgment of the Federal Court in Midnapare Zemindary Co. Ltd. v. Province of Bengal & Others (1). Similar words used must, in the absence of any indication to the contrary, receive the same meaning and it is significant that Parliament has used the same words in a later Statute-The Indian Independence Pakistan Courts (Pending Proceedings) Act IX of 1952. which was passed to make ineffective the orders and decrees of Pakistan courts passed by virtue of the Special Orders under the Act for the continuance of proceedings in courts in Bengal, Assam and the Punjab. By s. 3 of that Act (IX of 1952) it was provided:-

> " Section 3. Notwithstanding anything contained in any of the orders referred to in s. 2, no decree to which the Act applies shall be given effect to by any court or authority in India in so far as such decree imposes any liability or obligation on any Government in India ".

This recognises the force of art. 4(3) of the Order and there is no indication in that Statute that Parliament was dealing with the limited territory contended for by the respondent.

It was argued that the intention of cl. 3 of art. 4 (1) [1949] F.C.R. 309.

was that the court passing the decree or order would be a court of competent jurisdiction within s. 13 of the Civil Procedure Code and the question of jurisdiction of the court passing the decree would not be available to the losing party, the submission being that the word " effect " did not mean the same thing as " execute ".

It may be pointed out that the respondent never raised, at the trial, the question of jurisdiction. He submitted voluntarily to the judgment of the Lahore Court and he can at no later stage be heard to say that the judgment is not binding on him: Cheshire on Private International Law, p. 140 (3rd Ed.). The word effect " is wider than the words "

> enforce " or execute ". There are decrees which are not executed in the ordinary sense of the term but are given effect to; e. g., decrees for dissolution of marriage, restitution of conjugal rights and injunction. In criminal matters it would mean carrying out the sentence of the court. It was for these reasons that the word " effect "

was used in cl. 3 of arts. 3 and 4 of the Order. After the partition all these courts situated in the two new provinces of West Punjab and East Punjab became foreign courts qua each other and therefore certain judgments and sentences passed and orders made in regard to certain cases in the absence of the Order might no longer have been effective. As has already been stated it was to provide for these difficulties and for removing all doubts as to the juris- diction of courts in the provinces which had cased to exist that art. 4 was promulgated and a consequential provision had to be made to give effect to these various decrees and orders. That decrees passed in courts of one new province of the Punjab were to be treated as if they were passed by the courts of competent jurisdiction in the other new Province of the Punjab is shown by the language used and particularly the words " court of competent jurisdiction within that Dominion ". The use of the words is very significant. Similar words were used in cl. (3) of art.; 3 where also effect was, to be, given. to the orders passed by, the Special Tribunal sitting in Lahore in regard to offences which might have been committed anywhere in India. It has not been suggested that those words were of lesser amplitude and did not make the conviction good in any part of India or Pakistan or the conviction was ineffective anyWhere in those two Dominions. It might be repetitive as an argument but is equally efficient in the case of cl. 3 of art. 4 as it was in cl. 3 of the third article.

It was also argued that a court of competent jurisdiction in cl. 3 was used in the same sense as in International Law, i.e., a court which has the right to adjudicate upon the matter. In the context it

can only mean the court as envisaged in cl. 1 of art. 4 or a court of similar and equal or co-ordinate jurisdiction but exercising it under the Civil Procedure Code or Criminal Procedure Code in either of the Punjabs in the two Dominions as the case may be. This would clearly show that the effect of art. 4(1) and (3) was that all proceedings meaning all suits and other proceedings would continue unaffected by the passing of the Act and the setting up of two provinces of West Punjab and East Punjab and also that once a decree was passed. or sentence pronounced by a court in either of the new provinces of the two Dominions it was to be given effect to as if it was a decree or order passed by a court of competent jurisdiction in the other Dominion.

Submission was then made that in cl. 2 of art. 4 reference to any appeal or to the court which would have appellate jurisdiction did not include the Federal Court of Pakistan because it was not in existence at the time and the Federal Court which came into existence as a result of the Federal Court Order was a court of limited jurisdiction. The word "

> appeal " there cannot be read as confined to only one appeal because the provision made for appeals is that it shall lie in the court having appellate jurisdiction over the court as if proceedings were instituted after the appointed day, and for proceedings instituted after, the appointed day the jurisdiction of the Privy Council had been conferred by the laws of Pakistan on the Federal Court of Pakistan. In these circumstances it would be contrary to the intention of the words used in the Order to restrict the appeals to the District Judge or to the High Court but they must be taken to include appeals to the highest court to which appeals could be taken. It was then submitted that at the time when the suit was filed the jurisdiction of the Federal Court was a limited one and no such appeal as was subsequently taken could have been taken to that court at that time. The Federal Court of Pakistan was undoubtedly a court of appellate jurisdiction over the courts including the High Courts even though its jurisdiction fell under s. 205 of the Government of India Act, 1935. The meaning of the words " appellate jurisdiction " as used in cl. (2) of art. 4 of the Order is not affected by the subsequent extension of restriction of the jurisdiction of the court because the scope of the appellate jurisdiction may vary from time to time but it still remains appellate jurisdiction. See Midnapore Zemindary Co. Ltd. v. Province of Bengal and Others (1). The next question for decision is whether as a consequence of evacuee legislation in Pakistan the appellant No. 2 lost his rights in the decree. The respondent contended that by s. 6 of the Pakistan Administration of Evacuee Property Ordinance, 1949 (Act XV of 1949), the decree must be taken to have vested and be deemed always to have vested in the Custodian with effect from March 1, 1947. The decree in dispute was passed by the Senior Subordinate Judge in 1949 and no claim was made by the Lahore Custodian of Evacuee Property in regard to it nor is there any proof that he has done so up to the present. Under s. 13 it was open to the Custodian to publish, by notification in the official gazette, this decree in the list of evacuee properties but it has not been shown that that has been done. Section 11 of that Ordinance which was in the following terms was how- ever relied upon by the respondent:-

" Section 11(1). Any amount due to an evacuee (1) [1949] F.C.R. 309.

or payable in respect of any evacuee property, shall be paid to the Custodian by the person liable to pay the same ". It is true that if the decree is evacuee property and has vested in the Custodian then the Custodian can claim payment from the judgment debtor. The appellant urged two points:-

(1) that the situs of the decree was the place where it could be effectuated and therefore where the debtor resides and (2) it was for the Custodian to decide as to whether it was evacuee property or he had made no such decision. If anything the decree had never been treated as evacuee property by the Custodian and it could no longer be so treated because of s. 3 of the Pakistan (Administration of Evacuee Property) Act, 1957 (XII of 1957), the relevant part of which is as follows:-

" Section 3(1). Property not to be treated as evacuee property on or after 1st January, 1957 : Notwithstanding anything contained in this Act, no person or property not treated as evacuee or as evacuee property immediately before the first day of January, 1957, shall be treated as evacuee or, as the case may be, as evacuee property, on or after the said date ". As to the situs of the decree Mr. Pritt relied on certain English cases which deal with the situs of a con- tract debt and referred to the following cases: In re, Russian Bank for Foreign Trade (1); Sutherland v. Administration of German Property (1); 'The Jupiter' (3). In this court in Delhi Cloth & General Mills Co. Ltd. v. Harnam Singh & Others (4) it was held that situs varies in the case of simple contract debts. At page 423 Bose, J., observed:-

" But when all is said and done, we find that in every one of these cases the proper law of the contract was applied, that is to say the law of the country in which its elements were most densely grouped and with which factually the contract was most closely connected ".

Applying these rules it would appear that the situs of a contract debt would be where the defendant

(1) [1933] 1 Ch. 745.

(2) [1934] 1 K.B. 423.

(3) [1927] P. 250.

(4) [1955] 2 S.C.R 402.

resides. But it was submitted by the learned Solicitor- General that the situs of the decree or judgment is where it was recorded and reliance was placed on Attorney-General v. Bouwen(1). According to Dicey's Conflict of Laws (7th Edition) p. 506, judgment debts are situate where the judgment is recorded and according to Cheshire's International Law p. 456:-

" With regard to this theory there can, of course, be no doubt that a debt is deemed by English law to have a definite locality of its own for several different purposes, such as the exercise of jurisdiction, the payment of death duties, and the grant of probate or of letters of administration ", and again pp. 519-520:-

" For the purposes of jurisdiction to make a grant of probate or administration, however, it has long been settled with respect to chooses in action and titles to property that judgment debts are assets where the judgment is recorded; leases, where the land lies; specially debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death ".

The authority for this is an observation of Lord Abinger, C. B., in Attorney-General v. Bouwen (1) from where this passage has been taken. That was a case of a claim by the Crown for probate duty on foreign securities held by the testatrix at the time of her death and the question for decision was whether for the purposes of administration they were assets locally situate within the jurisdiction of the Ordinary. As they were sold and delivered by the executors without doing any act outside the jurisdiction of the Ordi- nary, duty was payable in England. The above quoted observation was made in connection with the limited jurisdiction of the Ordinary. Thus it appears that the reason given by Lord Abinger for a judgment or decree having its situs where it is recorded is that it is normally enforceable in the country in which it is given; for the purposes of jurisdiction for the grant of probate, judgment debts are assets where the judgment is recorded. But in the present case by a fiction (1) (1838) 4 AL & W. 172; 150 E.R. 1390, 1398.

of law the decree is also decree of a court of competent jurisdiction in what was the Dominion of India and now the Union of India. Consequently the provision of the evacuee law will not affect the rights of the appellant to execute the decree in this country. Secondly for the purposes of jurisdiction to grant probate a judgment debt may have situs in the country where it was recorded but as was pointed out by this Court in Delhi Cloth & General Mills Case (1), the most densely grouping of elements may also have to be taken into account and in the peculiar circumstances of the present case where the judgment-debtor is residing and domiciled in East Punjab where the judgment debt is enforceable , the situs of the judgment-debt would not only be in Pakistan. Furthermore the judgment-debtor is an evacuee qua Pakistan and his property, if any, must have equally vested in the Custodian and the only country where the decree can be enforced will be in India.

No argument was addressed in support of the finding of the High Court that a transfer and non-satisfaction certificate was necessary to execute the decree of the Federal Court,. In the view that I have taken of art. 4(1) and (3) no such objection is sustainable. Even if Order 45, Rule 15, Civil Procedure Code may be inapplicable the High Court could and should have sent down the decree to the court of the Senior Subordinate Judge, Simla, to execute the decree in accordance with law.

To sum up I am of the opinion that (1) the amplitude of the language of art. 4 is not cut down by any words in the article or in the Order and therefore the decree of the courts of West Punjab passed in proceedings pending immediately before the appointed day are not foreign judgments in East Punjab and the limited interpretation contended for by the respondent is not sustainable. (2) The

decree of the Federal Court of Pakistan is covered by the words " appellate jurisdiction " in cl. 2 of art. 4 of the Order. (3) The word " effect " in cl. 3 of art. 4 is of wide connotation and is not equivalent to 'being enforced' by suits on a (1) [1955] 2 S.C.R. 402.

foreign judgment. (4) Clause 3 of art. 4 is in the nature of a deeming clause and makes the decree of the Pakistan court (West Punjab) a decree of a court of competent jurisdiction in East Punjab (India). (5) Situs of the decree is not in Pakistan alone but the legal fiction applies to that also, and (6) the evacuee A laws of Pakistan do not affect the effectiveness of the decree in India.

I would therefore allow this appeal and set aside the judgment and order of the High Court. The appellants will have their costs throughout.

BY COURT: In view of the majority Judgment, the appeal is dismissed with costs.

Appeal dismissed.

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