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It remains to consider the ground on which the District Munsif dismissed the suit, viz., that the plaintiff's decree was incapable of execution against anything save the mortgaged property, at the time when the first defendant attached the other property. It is true that at that time the plaintiff was not in a position to immediately execute his decree, but neither was the first defendant, for the decree in favour of the latter was subject to precisely the same limitation as the plaintiff's decree. The property ought not, therefore, to have been sold and the money paid to the first defendant until the mortgaged property had been sold and had been found to be insufficient to pay his debt. His title to receive payment out of the property sold, did not arise until the mortgaged property was found to be insufficient, and the plaintiff's title arose at precisely the same time. The payment of the whole of the sale-proceeds to the first defendant was, therefore, wrong, as the plaintiff was entitled to a rateable share.

In this view we must set aside the decrees of the Courts below, and give judgment for plaintiff as sued for with costs throughout.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

1896. October 19, 20, 21. November 26.

NALLA KARUPPA SETTIAR (PLAINTIFF), APPELLANT,

v.

MAHOMED IBURAM SAHEB (DEFENDANT), RESPONDENT.*

Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant—Constructive residence.

The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon: but he was a partner in a firm which carried on business at Kandy and he was interested in lands at that place which he had visited once or twice:

Held, that the Court at Kandy had no jurisdiction over the defendant.

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* Second Appeal No. 854 of 1895.

SECOND APPEAL against the decree of E. J. Sewell, District Judge of Tanjore, in appeal suit No. 477 of 1893, reversing the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 5 of 1893.

The plaintiff sued to recover from the defendant certain sums due under decrees passed against the defendant by the District Court of Kandy in Ceylon.

The defendant pleaded, among other things, that the District Court of Kandy had no jurisdiction, as he was at the time the suits were brought and the decrees passed, permanently residing in British India, that he had no notice of the suits, and was not aware of their institution, and that the decrees were not properly passed against him.

The Subordinate Judge found that there was sufficient service of notice of the suits to make the defendant liable, and that the Court in Kandy had jurisdiction, and passed a decree as prayed.

The defendant appealed against this decision and the District Judge reversed the decree appealed against on the grounds which are stated in the judgment of the High Court.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The plaintiff sued in the Tanjore Subordinate Judge's Court in British India to recover certain sums under decrees passed in his favour by the District Court of Kandy in Ceylon. The defendant raised a number of pleas, but the Subordinate Judge found against him on all the issues and decreed the claim.

On appeal the District Judge tried three main questions, viz.—

(i) whether notice of the suit in the Kandy Court was so served on the defendant as to justify the British Indian Court in passing a decree on the judgment of the foreign (Kandy) Court:

(ii) whether the foreign Court had jurisdiction over the person of the defendant who was domiciled and resident in British India: and

(iii) whether the defendant was a minor when the judgment was given, and whether, in consequence, the judgment was one which could be made the basis of a suit in British India.

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On all these issues the District Judge decided in defendant's favour, and, therefore, dismissed the suit.

The plaintiff now appeals on all the issues decided against him.

We do not, however, think it necessary to discuss the first and the third of the above issues, as we are of opinion that the decision of the District Judge on the second issue is right, and that the plaintiff's suit must fail on that ground, whatever the decision on the other issues might be.

The defendant was the chief partner in the firm of Iburam Saheb and Company, which carried on business in Kandy under the terms of a deed of partnership (exhibit A). The plaintiff was domiciled and ordinarily resident in British India, but he visited Kandy once or twice and his family owned some immoveable property there in which he claimed to have an interest.

The plaintiff was not even temporarily resident in Ceylon when the suits were instituted in the Kandy Court or subsequently. The business was, under the terms of exhibit A, managed by one of the other partners who lived in Kandy. When the suits were filed, summonses on the partners, including the defendant, were served on the resident partners. It is not shown that they informed the defendant. He did not appear to defend the suits, and decrees *ex parte* were passed against him.

The question which we have to decide is this—

Assuming that service of notice of the suit on defendant's partner is sufficient service on defendant, and assuming that defendant is entitled to no protection on the score of minority, had the Kandy Court jurisdiction, in the above state of facts, to pass a decree against the defendant's person?

It is conceded that for the present purpose the Kandy Court must be considered to be a foreign Court. The Courts of British India will be guided in this matter by the same principles as are adopted by the Courts of England. The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over the defendant imposes a duty, or obligation, on the defendant to pay the sum decreed which the English Court is bound to enforce, and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

Schibsby v. *Westenholz*(1). In the case of *Rousillon* v. *Rousillon*(2), Fry, L.J., referring to *Schibsby* v. *Westenholz*(1) and *Copin* v. *Adamson*(3), explained the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court. He said "the Courts of this country consider the "defendant bound where he is a subject of the foreign country in "which the judgment has been obtained; where he was resident "in the foreign country when the action began; where the defend- "ant in the character of plaintiff has selected the *forum* in which "he is afterwards sued; where he has voluntarily appeared; where "he has contracted to submit himself to the *forum* in which the "judgment was obtained, and, possibly if *Becquet* v. *MacCarthy*(4) "be right, where the defendant has real estate within the foreign "jurisdiction, in respect of which the cause of action arose whilst "he was within that jurisdiction."

If these tests are adopted in the present case, it will be seen that not one of them applies. It is, however, urged that the law as to the authority to be ascribed to foreign judgments is in course of development by means of judicial legislation, and we are asked, on the analogy of *Becquet* v. *MacCarthy*(4), to hold that the defendant by carrying on business through his partners at Kandy should be regarded as constructively resident there, and as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was being carried on. We do not think that the current of decided cases will justify us in going so far. In *Becquet* v. *MacCarthy*(4) the defendant still held, at the time of the suit, a public office in the colony in which he was sued, and the cause of action arose out of or was connected with it. His duties required him to be present in the colony, and, therefore, amenable to the jurisdiction of its Courts. It was on this ground that he was held to be constructively present in the colony, though, in fact, temporarily absent. This case was stated in *Don* v. *Lippmann*(5) "to go to the verge of the law," and the Privy Council in the recent case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*(6) were of the same opinion, and stated that, if the case could not have been distinguished by the said special features

(1) L.R., 6 Q.B., 155, 159.
(2) 14 Ch. D., 351, 370, 371.
(3) L.R., 9 Ex., 345.
(4) 2 B. & Ad., 951.
(5) 5 Cl. & F., 1.
(6) L.R., 21 I.A., 171, 186.

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from the case of any absent foreigner who, at some previous time, might have served the Colonial Government, they would have regarded the case as wrongly decided. In the present case there was no obligation on the defendant to reside in Kandy, nor did he do so except for very short periods. The business was carried on by a resident partner who, by the fact of his residence, was liable to the colonial jurisdiction, but we are unable to find any ground for holding that the defendant was constructively resident, or at the time of the suit present within the jurisdiction of the Kandy Court. Nor does the possession by the defendant of some immoveable property in Kandy give that Court jurisdiction over him in matters of contract like the present, for in *Schibsby* v. *Westenholz*(1) it was observed: "We doubt very much whether "the possession of property, locally situated in that country and "protected by its laws, does afford such a ground. It should "rather seem that, while every tribunal may very properly execute "process against the property within its jurisdiction, the existence "of such property, which may be very small, affords no sufficient "ground for imposing on the foreign owner of that property a "duty or obligation to fulfil the judgment." The general law is laid down very clearly by the Privy Council in the case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*(2) in these words: "All jurisdiction is properly territorial and *extra territorium* "*jus dicenti, impune non paretur*. Territorial jurisdiction attaches "(with special exceptions) upon all persons either permanently or "temporarily resident within the territory while they are within "it; but it does not follow them after they have withdrawn from "it, and when they are living in another independent country. "It exists always as to land within the territory, and it may be "exercised over moveables within the territory; and, in questions "of status or succession governed by domicil, 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 obedi-"ence to the power which so legislates.

(1) L.R., 6 Q.B., 155, 159. (2) L.R., 21 I.A., 171, 186.

"In a personal action, to which none of these causes of juris-
"diction apply, a decree pronounced *in absentem* by a foreign
"Court to the jurisdiction of which the defendant has not in any
"way submitted himself is by international law an absolute nul-
"lity. He is under no obligation of any kind to obey it; and it
"must be regarded as a mere nullity by the Courts of every
"nation, except (when authorized by special local legislation) in
"the country of the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities
"on international law; among others, by Story (*Conflict of Laws*,
"2nd edition, ss. 546, 549, 553, 554, 556, 586), and by Chancellor
"Kent (*Commentaries*, vol. I, p. 284, note *c*, 10th edition), and
"no exception is made to them in favour of the exercise of juris-
"diction against a defendant not otherwise subject to it, by the
"Courts of the country in which the cause of action arose, or (in
"cases of contract) by the Courts of the *locus solutionis*. In those
"cases, as well as all others when the action is personal, the
"Courts of the country in which a defendant resides have power,
"and they ought to be resorted to to do justice."

We do not think that there are any special circumstances in the present case to take it out of the general rule that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit—a rule which is stated by Sir Robert Phillimore (*International Law*, vol. 4, s. 891), and by the Privy Council in the case already quoted "to lie at the root of all international and of most domestic jurisprudence on this matter." That was the course which the plaintiff in this case ought to have followed, if he desired a remedy against the defendant personally.

On the ground that the Kandy Court had no jurisdiction over the defendant, the Lower Appellate Court rightly dismissed the suit. We, therefore, confirm the decree of that Court and dismiss this second appeal with costs.