APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

SHAIK ATHAM SAHIB (PLAINTIFF), APPELLANT,

v.

DAVUD SAHIB (DEFENDANT), RESPONDENT.*

1909.
April 20,
21, 22.
July 28.

Foreign judgments—Jurisdiction of Court over absent foreigner—International Law—Judgment of Court against absent foreigner subject to the same sovereignty—Authority to bind absent foreigner must be conferred by express words by the supreme authority—Submission to jurisdiction of foreign Court, what amounts to.

The rule of International Law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and district systems of administration and judicature, though owning allegiance to the same sovereign. A judgment of the Ceylon Court against a native of British India who was not at the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India.

Gurdyal Singh v. *Raja of Faridkote*, [(1895) I.L.R., 22 Calc., 222], referred to.

Emanuel v. *Symon*, [(1908) 1 K. B., 302], referred to.

It may be competent to the common sovereign authority to confer jurisdiction on the Courts of one country over absent foreigners residing in the other; but such jurisdiction must be conferred by clear and unambiguous words and cannot be inferred as a matter of implication.

A decree based on a contract imposing a personal obligation on an absent foreigner is not binding on him, even when the contract is made in the territory of the *forum* which passed the decree.

A person who appears in obedience to the process of the foreign Court and applies for leave to defend the action without objecting to the jurisdiction of the Court when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court.

Parry & Co. v. *Appasawmy Pillai*, [(1899) I.L.R., 22 Mad., 407], distinguished.

Siva Raman Chetty v. *Iburam Saheb*, [(1895) I.L.R., 18 Mad., 327], distinguished.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 27 of 1908, presented against the decree of K. S. Lakshmi Narasa Ayyar, District Munsif of Valangiman, in Original Suit No. 161 of 1907.

* Second Appeal No. 1095 of 1908.

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The plaintiff was an endorsee of a promissory note executed for Rs. 1,500 by the defendant in favour of one Ka. Ibram Rowthan The promissory note was executed at Kandy in Ceylon where the defendant was at that time carrying on trade in sundry articles. The plaintiff brought a suit to recover the amount of the promissory note in Suit No. 17114 of 1905 on the file of the District Court of Kandy. The suit was based on a negotiable instrument and the practice followed in Ceylon was similar to that described in Chapter XXXIX of the Civil Procedure Code. The defendant applied by his vakil to the District Court of Kandy for permission to defend the suit. The application was supported by an affidavit of the defendant wherein he pleaded discharge of the debt due on the promissory note as described therein and asserted that he had a good and honest defence on the merits.

The Kandy Court granted permission to defend on condition of his furnishing security for the amount of the promissory note. The defendant not complying with the order a decree was passed against him.

On this decree the present suit was filed in the Munsif's Court of Valangiman. The Munsif held that the defendant was not residing in Ceylon at the time of action ; that the Court of Kandy had no jurisdiction and that the defendant had not submitted to the same and dismissed the suit.

The Subordinate Judge confirmed this decree.

The plaintiff appealed to the High Court.

T. Rangachariar, *M. K. Narayanasami Ayyangar* and *K. B. Ranganatha Ayyar* for appellant.

The Hon. The Advocate-General and *T. R. Venkatarama Sastri* for respondent.

JUDGMENT.—The appellant in this second appeal sued in the District Munsif's Court of Valangiman upon a judgment which he had obtained against the present respondent in the District Court of Kandy for a certain sum of money due on a promissory note. Both the District Munsif and the Subordinate Judge in appeal, dismissed the suit on the ground that the judgment of the Ceylon Court having been passed *in absentem* was not binding upon the respondent who is a native of British India and was not resident at the time of the action in Ceylon. They also found against the contention of the appellant that the respondent had submitted himself to the jurisdiction of the Ceylon Court.

Upon the first question the contention of the learned vakil for the appellant is, that rules of private international law apply only to judgments of Courts of foreign Independent States and not to that of a Court of a country which is subject to the same sovereignty as the country in which the judgment in question is sued upon. This proposition, to support which there is really no authority, is obviously untenable. The Ceylon Court being outside the limits of British India is a foreign Court as defined by section 2, Civil Procedure Code (Act XIV of 1882), and its judgments are foreign judgments. That being so, the recognition of such judgments by a Court in British India would *primâ facie* be subject to all the rules which govern foreign judgments. And we are not aware that the validity of a foreign judgment when it is obtained in the *forum* of a country with a system of administration and judicature separate and distinct from that of the country in which it is sued upon, though both the countries may owe allegiance to the same sovereign, is, apart from especial legislation, regulated by rules different from those which regulate the operation of other foreign judgments. Perhaps the phrase Private *international* law—which has however the sanction of authority and long usage—is as pointed out by Mr. Dicey (see his Conflict of Laws, Introduction, page 15) misleading and has, as he says, given rise to many misconceptions. In fact, the assumption underlying the entire argument addressed to us by the learned vakil for the appellant on this point is that when considering the question of application of private international law to foreign judgments one must understand the word international in the same sense in which it is used when speaking of the usages and customs regulating the public relations *inter se* of Independent States. As for authority, he has referred us to certain passages in the judgment of Lord Selborne in *Gurdyal Singh* v. *Raja of Faridkot*(1), the leading case on the subject of foreign decrees. But in that case the present question did not arise at all, for there the judgment sued upon was that of an Independent Native State, and if Lord Selborne in stating the general rules of private international law relating to the enforcement of foreign decrees speaks with particular reference to judgments of Courts in foreign independent territories, that is clearly

(1) (1895) I.L.R., 22 Calc., 222.

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because the question before the Board arose with reference to the judgment of such a Court and not that he wanted to confine the application of the rules of international law to judgments of such Courts alone. Considerable reliance was also placed on behalf of the appellant upon the decision in the case of *Moazzim Hossein Khan* v. *Raphael Robinson*(1), but, as we read the judgments of Maclean, C.J., and Banerjee, J., in that case the ground on which the judgment of the High Court of Justice in England obtained *in absentem* in a personal action against one of the defendants, a resident of British India, was upheld, was that a statute of the British Parliament which is also the Supreme Legislature for India gave jurisdiction to the English High Court in actions of a particular class over non-resident British subjects. We are not concerned here with the question whether the decision correctly appreciated the scope of certain orders and rules of English practice upon which the High Court in England acted, but the conclusion arrived at in that case is, we take it, based on especial legislation of the Supreme Legislature (see pages 647 and 648). Otherwise it would be difficult to reconcile that decision with the ruling in *Kassim Mamoojee* v. *Isuf Mahomed Sulliman*(2) to which also Maclean, C.J., was party, and where it was held that the judgment of a Court in Mauritius passed *in absentem* imposing personal liability upon a native of British India, was a nullity. There the Chief Justice of the Calcutta High Court says, "I think the defendant here was a foreigner within the meaning of that term as used in the cases I have mentioned, otherwise the result would be that, upon a judgment obtained in a Court of any colony of the British Crown against an absent person who was not a native of, or either permanently or temporarily resident or domiciled within that colony at the time of the suit or of the judgment passed against him *in absentem*, he might be successfully sued upon that judgment in any other Court within the British dominions. This view appears inconsistent with the decision in the case of *Turnbull* v. *Walker*(3)." This is a direct authority negativing the appellant's position and it seems that no doubt was ever entertained that for the purposes of private international law two provinces, part of the same Empire,

(1) (1901) I.L.R., 28 Calc., 641. (2) (1902) I.L.R., 29 Calc., 509.
(3) (1892) 67 L.T. Rep., 787.

may be treated as foreign to each other. For instance the judgment of a West Australian Court was in *Emanuel* v. *Symon*(1), assumed, without any question at the bar, to be subject to the rules of private international law : and the judgments of the Scotch and the Irish Courts apart from the Judgments Extension Act have always been considered in England to be governed by those rules. (See Halsbury's 'Laws of England,' vol. VI, page 291.)

It is then argued, that the Ceylon Court having derived authority from the British Crown by the Charter of 1833, section 24 (Ceylon Legislative Enactments, vol. I) and by section 9 of Ordinance No. 2 of 1889 (Ceylon Legislative Enactments, vol. II, page 576) passed by the Legislative Council of Ceylon under the general power of legislation conferred on them by the British Parliament, to adjudicate in a matter in which the cause of action arose within its jurisdiction, it must be held that the Imperial Parliament empowered the Ceylon Court in such cases to bind by its decree a defendant who is a resident of British India and subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Ceylon Court. We shall assume that the British Parliament, if it so thought fit, might confer authority on the Ceylon Courts to exercise jurisdiction over residents of British India *in absentem* in a personal action of the kind under consideration, and that, if such jurisdiction were conferred, the case would probably fall within the dictum of Lord Selborne in *Gurdyal Singh* v. *Raja of Faridkot*(2) where he says at page 238, " As between different provinces under one sovereignty (*e.g.* under the Roman Empire) the Legislation of the Sovereign may distribute and regulate jurisdiction." But such jurisdiction having regard to the principles of International Law would only be recognized in British India if it was conferred by the Supreme Legislature by express and clear words. In the absence of any express enactment the ordinary " presumption that the jurisdiction of all Courts is properly and strictly territorial would not be displaced, just in the same way as a contract on the part of an absent foreigner to submit himself to the jurisdiction of the *forum* of a country to which he owes no allegiance, if not

(1) (1908) 1 K.B., 302.

(2) (1895) I.L.R., 22 Calc., 222.

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express, would not be inferred as a matter of implication." (See the case of *Emanuel* v. *Symon*(1) already referred to.)

In this connection it is important to bear in mind the distinction between the question of validity and operation of a decree within the territorial limits of the country of the *forum* which passed it and its recognition outside such limits. To the former question International Law has nothing to say, while no amount of mere territorial legislation can enforce its recognition beyond the territory itself. Thus although the decree sued upon in the present case may be perfectly valid in Ceylon, it will not be recognized by a British Indian Court if it be in violation of any of the well established doctrines of International Law.

The next argument of Mr. Rangachari, the appellant's vakil in connection with his first contention, that a decree based on a contract imposing personal obligation upon an absent foreigner is countenanced by the comity of nations if the defendant entered into the contract in the territory of the *forum* which passed the decree, is no longer worth any serious consideration after the decision in *Gurdyal Singh* v. *Raja of Faridkot*(2). But reference has been made to *Jadepalli Subba Rao* v. *Nawab Sayed Mir Gulam Allikhan of Banganapalli*(3) as laying down the law otherwise. All that the case decides however is, that a non-resident foreigner who is subject of a Protected Native State may be sued in the Courts of British India if the cause of action arose within the jurisdiction of any such Court; but the learned Judges in that case, one of whom was Subrahmania Ayyar, J., were not called upon to consider the validity of such a judgment outside British India. There are, no doubt, words in the judgment of Subrahmania Ayyar, J., which would show that he overlooked the distinction I have just alluded to, but he himself took the opportunity afforded to him in a subsequent case in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*(4) to correct the misapprehension (see page 278).

Upon the other question however, whether the respondent submitted to the jurisdiction of the Ceylon Court, we are unable to agree in the view which has commended itself to the lower Courts. What happened was this:—The respondent, a native of the Madras

(1) (1908) I.K.B., 302.
(2) (1895) I.L.R., 22 Calc., 222.
(3) (1906) I.L.R., 29 Mad., 69.
(4) (1906) I.L.R., 29 Mad., 233.

Presidency, executed the promissory-note in question at Kandy where he was then carrying on business. But at the time the suit to recover on the note was instituted in the District Court of Kandy he had left Ceylon and was residing at a village in Kumbakònam where he was served with the summons of the Kandy Court. In answer to the summons which was issued under the summary procedure relating to suits on Negotiable Instruments laid down in Chapter LIII of the Ceylon Ordinance II of 1889 and which is substantially the same as enacted in section 532 of the Indian Civil Procedure Code of 1882 and in Order XXXVII of the Indian Civil Procedure Code of 1908, the respondent appeared through a duly appointed Attorney and applied for leave to defend the suit on the allegation that the not which he admitted he had made had been discharged. He filed an affidavit in support of his allegation, but the learned Judge having regard to certain facts doubted the good faith of the defence and granted leave to the respondent conditional upon his furnishing security. The respondent failed to furnish the required security and judgment was accordingly entered against him.

The question is did the respondent by appearing in obedience to the process of the Kandy Court and applying for leave to defend the action—neither of which he was obliged to do—without raising any objection to its jurisdiction, voluntarily submit himself to the jurisdiction of that Court? The answer must be in the affirmative. And it would be clear bad faith on his part having once elected to submit to the *forum* chosen by his opponent and taken the chance of a decision in his favour in that *forum* to turn round and say afterwards when the decision has gone against him that the judgment was without jurisdiction This according to the doctrines of International Law he cannot be permitted to do (See *Emanuel* v *Symon*(1)). But the learned Advocate-General who appears for the respondent argues that according to section 704 of the Ceylon Ordinance II of 1889 a defendant in an action under the summary procedure can appear *or* defend the action only after leave is granted and hence he contends that if leave was refused or if leave having been granted, the defendant did not appear in pursuance of such leave—and in this respect it would make no difference whether the leave if granted was conditional

(1) (1908) 1 K.B., 302.

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or absolute—he cannot be held to have appeared in the action at all and submitted to the jurisdiction of the Ceylon Court. We think the words "appear or defend" occurring at one place in section 704 which runs thus: "In any case in which a plaint and summons are in such forms respectively, the defendant shall not *appear or defend* the action unless he obtains leave from the Court as hereinafter mentioned so to appear and defend . . ." are the equivalent of "appear and defend" and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all. (See also section 705.) But what we are concerned with is not the question whether appearance in order to apply for leave is or is not appearance in the action for certain purposes contemplated in Chapter LIII of the Ordinance, but whether appearance in answer to the process of the Ceylon Court without any protest whatever and applying for leave to defend the action do not show that the respondent submitted to its jurisdiction. It is not even necessary that submission must be by an act done in the course of the action itself, for it can be constituted by a contract to that effect entered into between the plaintiff and the defendant previously to the action. That the conduct of the respondent amounted in this case to submission hardly admits of any doubt, as we have already indicated, and in this view we are supported by the case of *Voinet* v. *Barrett*(1). There the defendant having appeared and taken part in certain proceedings of a preliminary nature was held to have submitted to the jurisdiction of the Court although he eventually allowed judgment to go against him in default of appearance at the time of hearing. The learned Advocate-General has cited the case of *Parry & Co.* v. *Appasami Pillai*(2), as an authority in his favour. But there the defendant who appeared in order to escape the inconvenience of arrest and attachment of property in a foreign territory objected at the same time to the jurisdiction of the foreign Court though ineffectually and that was held to show that his submission was not voluntary. In *Sivaraman Chetti* v. *Iburam Saheb*(3) also quoted by the Advocate-General, the facts of which are not fully

(1) (1885) 55 L.J.N.S. (Q.B.D.), 39. (2) (1880) I.L.R., 2 Mad., 407.
(3) (1895) I.L.R., 18 Mad., 327.

set forth in the report, it seems that the defendant had instructed a vakil to defend the action but at the time of the hearing the vakil stated that he had no instructions and thereupon judgment was given against the defendant *ex parte*. There the learned Judges while recognizing the force of the rule that a defendant who has taken his chance of a decision in his favour cannot afterwards take exception to the jurisdiction held that on the facts of the particular case before them there was in fact no submission. It is not for us to consider whether the view they took of the facts in that case was correct or not, but there is nothing in the judgment of Collins, C.J., and Best, J., to indicate that they intended to lay down broadly that if the defendant allows judgment to be passed against him by a foreign Court in default of appearance although he might have otherwise submitted to its jurisdiction the plaintiff cannot sue upon that judgment in the *forum* of the defendant's country. No doubt a judgment of a foreign Court which does not decide upon the merits of the dispute—for instance if a suit is dismissed as being barred by the law for limitation of suits prevailing in that Court—cannot be pleaded as a bar to a suit instituted in the Court of plaintiff's domicile on the same cause of action. The cases of *The Delta. The Erminia Foscolo*(1) and *The Challenge and Duc D'Aumale*(2) were cases of that description. But we are not dealing with a question of that nature in the present case.

In the view we have expressed we reverse the judgments of both the lower Courts and decree the plaintiff—appellant's suit. There will be judgment for the plaintiff for Rs. 1,873-0-5 with interest at 6 per cent. per annum from the date of suit until payment. The plaintiff will have his costs throughout.

(1) (1876) 1 P.D., 393. (2) (1904) P.D., 41.