

1952

Present : Rose C.J. and Gunasekara J.

MILLER, Appellant, and MURRAY, Respondent
S. C. 440—D. C. Kandy, 3,818

Jurisdiction—Cause of action arose in Ceylon—Defendant resident abroad—Right of plaintiff to sue in Ceylon—Civil Procedure Code, ss. 9, 69—Private International Law.

Under section 9 of the Civil Procedure Code an action may be instituted in Ceylon against a defendant who is resident abroad and is not domiciled in Ceylon. The jurisdiction of a Court of any particular State depends upon the local municipal law and is unaffected by the consideration as to whether a judgment once obtained is enforceable in the Courts of a foreign State.

APPPEAL from a judgment of the District Court, Kandy.

H. V. Perera, Q.C., with *P. Somatilakam* and *S. Sharvananda*, for the plaintiff appellant.—This is an action for breach of promise of marriage. The promise was made within the jurisdiction of the Kandy Court. Thereafter the defendant went to Australia. Summons was duly served under section 69 of the Civil Procedure Code. The defendant gave proxy to a Proctor at Kandy to defend the action. The proctor filed answer denying liability and alleged that as defendant had gone to Australia the Court had no jurisdiction to hear the action. The question for decision in this appeal is one of jurisdiction. The cause of action arose in Ceylon. Therefore the question of jurisdiction is determined by the law of Ceylon. Section 69 of the Civil Procedure Code gives the power to Court to issue summons out of the Island, the condition precedent being that the Court must have jurisdiction. Jurisdiction is dealt with in section 9 of the Civil Procedure Code. In the present case authorities relating to actions on foreign judgments were erroneously cited before the trial Judge. The moment a person is properly served with summons under section 69 he is precisely in the same position as a person who is in this country. See *Schibsby v. Westenholz*¹ and *In re Liddell's Settlement Trusts*². *Emanuel v. Symon*³ and *Worman & Co. v. Noorbhai*⁴ relate to actions on foreign judgments and are therefore distinguishable.

E. B. Wikramanayake, Q.C. (*N. E. Weerasooria, Q.C.*, with him, *Ivor Misso* and *P. Colin Thome*), for the defendant respondent.—Where one party to a dispute is a foreigner domiciled abroad the question of jurisdiction must be decided according to the Rules of Private International Law. Section 9 of the Civil Procedure Code presupposes the existence of a defendant subject to the jurisdiction of the Court. Jurisdiction is limited to persons who are subjects of the Sovereign. See *Cheshire: Private International Law, 2nd. ed., Ch. 3*, and *Sirdar Gurdial Singh v. Rajah of Faridkote*⁵. Section 69 of the Civil Procedure Code presupposes that the Court has jurisdiction under section 9. Section 9 is further “subject to limitations prescribed by law”, which would include the

¹ (1870) L. R. 6 Q. B. 155.² (1836) 1 Ch. D 365.³ (1908) 1 K. B. 302.⁴ (1912) 15 N.L.R. 355.⁵ (1894) A. C. 670.

Rules of Private International Law. According to Private International Law the Courts of any country have no jurisdiction over any matter with regard to which they cannot give an effective judgment—*Tallack v. Tallack*¹. See also *Schibsby v. Westenholz* (*supra*); *Worman & Co. v. Noorbhai* (*supra*); *Hukm Chand: Res Judicata*, p. 373. Section 69 only applies to persons domiciled in the country who are at the moment abroad. It does not apply to persons who are permanently outside the country.

H. V. Perera, Q.C., replied.

Cur. adv. vult.

July 10, 1952. ROSE C.J.—

The appellant seeks to recover damages from the respondent for breach of promise of marriage. The matter went to trial on the following issues:—

1. Did the defendant by his letters dated 19th November, 1947, 9th December, 1947, 29th June, 1949, 11th July, 1949, 9th August, 1949, and 19th September, 1949, promise to marry the plaintiff?
2. Has the defendant repudiated his said promise and refused to marry the plaintiff?
3. If so, what damages is the plaintiff entitled to?
4. In view of the fact that the defendant has been residing outside Ceylon from April, 1948, has this Court jurisdiction to hear the plaintiff's action?

The fourth issue was heard as a preliminary issue of law.

The appeal was argued on the basis that if the matter was justiciable in Ceylon at all the Kandy District Court was the appropriate Court.

Service of summons out of the island was duly effected, having been permitted under Section 69 of the Civil Procedure Code on the ground, no doubt, that the cause of action arose in Kandy, or that the contract sought to be enforced was made there. (Section 9 of the Code)

The respondent contends that Section 9 applies only to persons domiciled in Ceylon and purports only to allocate jurisdiction as between the various courts of the island in respect of such persons. He submits that the words "subject to the pecuniary or other limitations prescribed by any law" introduce the limitations of international law and should not, as the appellant argues, be taken to refer exclusively to municipal law.

The respondent relies in the main upon two decisions, *Worman & Co. v. Noorbhai*² and *Emanuel v. Symon*³. It is to be noted that in the former case the question to be decided was whether a judgment obtained against the defendant in the Court of Small Causes of Calcutta was enforceable in Ceylon. On this matter Lascelles C.J. said as follows:—

"The argument on appeal principally turned on a point which does not appear to have been urged before the learned District Judge. But as the consideration of that argument involves no further finding of fact, I think we cannot refuse to entertain that argument. Now

¹ (1927) *Probate* 211.

³ (1908) 1 *K. B.* 302.

² (1912) 15 *N. L. R.* 355.

it is urged by Mr. Hayley that, accepting the findings of the District Judge on the two points in issue, namely, *the competence of the Court in India* and the service of the summons in Colombo, the present action is still one that is not maintainable on general principles of international law. It is argued that, inasmuch as the defendant was not domiciled within the jurisdiction of the Indian Courts, and was not resident there at the time of the action against him, and did not appear to the process or agree to submit to the jurisdiction of the Court of Small Causes, he is not bound by the judgment of that Court. The authorities which Mr. Hayley has cited to us are explicit on the point, and being authorities on questions of international law they are binding on us. In the case of *Emanuel v. Symon* the facts were on all fours with the facts of the present case. The defendant had been in Western Australia and had carried on business there. He then left Australia and went to live in England. His former partners then obtained a judgment against him in the Australian Court. The defendant was served with the writ in England, but he entered no appearance, and did not defend the action. The Australian Court gave judgment against him, and an action was brought in England against the defendant to enforce the Australian decree, and it was held, on the grounds that I have mentioned, that the defendant was not bound by the decree of the Australian Court. In an Indian case, *Sirdar Gurdial Singh v. The Rajah of Faridkote*¹, the same principles were enunciated. I regard these judgments as binding on us, and I would set aside the judgment of the District Court and dismiss the action against the defendant."

It is to be noted that neither in that case nor in *Emanuel v. Symon* (supra) was the point taken that the original judgment, in Calcutta, or Western Australia, as the case may be, was bad in itself. Indeed the contrary would seem to be assumed and in *Sirdar Gurdial Singh v. The Rajah of Faridkote* (supra) Lord Selborne said at page 684 :

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

In other words, the jurisdiction of a Court of any particular State must depend upon the local municipal law and is unaffected by the consideration as to whether a judgment once obtained is enforceable in the Courts of a foreign State. That latter question will of course depend upon international law or the local municipal law of the foreign State in question. This distinction would seem to be explained by Blackburn J. in *Schibsby v. Westenholz*,² at page 159.

"Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our Courts could entertain would be whether the Acts of the British legislature, rightly construed, gave

¹ (1894) A. C. 670.

² (1870) L. R. 6 Q. B. 155.

us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our Courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners."

Moreover in a comparatively recent case in *re Liddell's Settlement Trusts*¹, Romer L.J. has said, at page 374, in considering the effect of Order X1 Rule 1 (c) (of the United Kingdom Supreme Court),

"The moment a person is properly served under the provisions of Order X1 that person, so far as the *jurisdiction of this court is concerned*, is precisely in the same position as a person who is in this country."

It seems to me, therefore, that there is no good reason for accepting the respondent's contention that section 9 applies only to persons domiciled in Ceylon. The appellant is, in my opinion, entitled to succeed in her appeal. The appeal is therefore allowed, but, as the merits have not yet been adjudicated upon, the matter must be remitted to the District Court for determination according to law. The respondent will pay the costs of this appeal and of the hearing in the District Court on 13th March, 1951.

GUNASEKARA J.—I agree.

Appeal allowed.
