IN THE SEYCHELLES COURT OF APPEAL

VIRAL VADILAL DHANJEE APPELLANT

versus

SUZAN MARGARET DHANJEE nee GILLARD RESPONDENT

Civil Appeal No.13/2000

[*Before: Ayoola, P., Silungwe & De Silva, JJ.A]*

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Mrs.N.Tirant-Gherardi for the Appellant
Mr.F.Bonte for the Respondent

JUDGMENT OF THE COURT

(*Delivered by De Silva, JA.*)

The respondent (the "applicant" before the trial court) filed an application in the Supreme Court of Seychelles in order to obtain a declaration that a foreign judgment delivered by the High Court of Justice, Family Division, Leeds, in the United Kingdom is enforceable in the Republic of Seychelles. At the hearing before the Supreme Court, the said foreign judgment was admitted in evidence and marked as exhibit P1.

The respondent gave evidence before the Supreme Court. The appellant did not give evidence nor was any evidence adduced on his behalf. The respondent testified that she was a British Citizen and that she married the appellant on 17th July 1991.

The child, Milun Viral Dhanjee, whose custody is the subject of these proceedings, was born on 21st February 1994. On the basis of the judgment, exhibit P1, which admittedly was a judgment by consent of parties, the respondent was awarded the custody of the child on 14th July 1999, by the High Court, Family Division Leeds, U.K. The respondent in her evidence further averred that on 21st August 1999, while the child was with her in the U.K. the appellant had taken the child for a week's "contact" in accordance with the consent judgment, but had thereafter absconded with the child. "I have not seen them since nor heard from them.....I don't even know where the child is" she stated. It is in these circumstances that the respondent made the present application to render the foreign judgment (exhibit P1) executory in Seychelles.

Upon a consideration of the evidence and the submissions made on behalf of both parties the trial Court (Juddoo J) held in favour of the respondent and made order declaring the foreign judgment executory in Seychelles. Learned Counsel for the appellant first submitted that the learned trail Judge erred in law in admitting the respondent's application which was erroneous in form. It was argued that an application for "exequatur" had to be made in the form of a plaint. Learned Counsel for the appellant relied on the following passage in the judgment of Sauzier J in ***Privatbanken Aktieselskab v Bantele*** (hereinafter referred to as the case of Privatbanken) 1978 SLR No.52, page 226 at 231.

> *"In Mauritius the procedure is to apply to the Supreme Court by motion to render the foreign judgment executory. In England the foreign judgment is sued upon in an ordinary action. That last procedure is the correct one to be followed in Seychelles on account of section 23 of the Seychelles Code of Civil Procedure or of section 15 of the Courts Act, if section 23 is held not to be applicable to such a case."*

In the appeal before us the respondent did not file a plaint but filed an application under section 227 of the Civil Procedure Code. In her application however, she pleaded all the relevant and material facts, namely her marriage to the appellant on 17th July 1991;

the fact that the child was born on 21st February 1994; the consent judgment awarding the legal custody of the child to her; a copy of the said judgment was annexed to the application; the alleged abduction of the child by the appellant since August 1999, and the urgent need to render the said judgment executory in Seychelles. The prayer was in the following terms. "*.....for an order declaring the Order of the High Court in U.K.....executory and enforceable in Seychelles.*" The appellant filed an answer to the application. The answer was in two parts. Part A set out the "plea in limine litis" and Part B was "on the merits."

It is to be observed that it was not contended that the form of the application filed by the respondent prevented the appellant from raising the appropriate defences nor was it suggested that the failure to file a plaint caused any prejudice whatever to the appellant in the presentation of his case before the Supreme Court. Nowhere in the judgment of Sauzier J in the case of Privatbanken (supra) is it stated that the failure to file a plaint renders the proceedings a nullity. In our view, there is no merit in the objection based on the form of the application filed by the respondent.

It was next contended that the learned trial Judge erred in law in extending the applicability of section 227 of the Civil Procedure Code (referred to in the respondent's application) to applications for "exequatur" of judgments in respect of child custody issues. In considering this submission, the learned trial Judge relevantly referred to the following passage in the case of Privatbanken (supra) which appears at page 231.

> *"Section 226 (now section 227) is an English translation of Article 546 (of the French Code of Civil Procedure) and all the French authorities on that Article are relevant so as to apply to section 226."*

Having carefully considered the relevant French jurisprudence and having made extensive reference to the authorities, the learned trial Judge rightly concluded that *"the procedure under Article 546 of the French Civil Procedure Code has been extended to child custody matters. The jurisprudence under the French provision is applicable under section 227 of the Seychelles Code of Civil Procedure."*

It is worthy of note that the French authorities relied on by the learned Judge are well known and well recognized authorities which have been cited with approval by Sauzier J in the case of Privatbanken (supra) where the Learned Judge laid down "*the conditions that must be satisfied before a foreign judgment is declared executory.*" (at page 232)
We are therefore of the view that there is no substance in the objection based on the reference to section 227 of the Civil Procedure Code contained in the respondent's application to the Supreme Court.

Learned Counsel for the appellant further submitted that the foreign judgment (exhibit P1) did not satisfy the first condition laid down by Sauzier J in the case of Privatbanken (supra) (at page 232), namely that "the foreign judgment must be capable of execution in the country where it was delivered." It was argued that a court always has the power to vary, suspend or discharge an order relating to the custody of a child and is therefore not final and conclusive. While it is true that a court could vary a "custody order" having regard to the "best interests of the child", what is relevant to note is that the requirement postulated by Sauzier J is that the foreign judgment "*must be capable of execution in the country where it was delivered.*" It is therefore necessary to consider the contents of exhibit P1. It is an order made by the High Court of Justice Family Division, Leeds. The Order is described as a "Residence Order/Contact Order" The operative part of the Order reads as follows :

"BY CONSENT it is ordered that

1. *The wardship proceedings issued on 8th March 1999 be discharged.*

2. *Save for the purpose obtaining the "mirror order" hereinbefore referred to, jurisdiction in relation to the child shall be with the Family Division of the English High Court.*

3. *There shall be a residence order in relation to the child Milun Viral Dhanjee in favour of the applicant."*

(emphasis added)

It is manifest that the exhibit P1 is ex facie a "consent judgment" which was not challenged at the hearing before the Supreme Court. As stated earlier, the appellant did not give evidence nor was any evidence adduced on his behalf. There was no appeal against the judgment (exhibit P1). Moreover, there was nothing to indicate that an application has been made to vary, discharge or suspend the "custody order". In these circumstances, the finding of the learned trial Judge that the "*judgment being a consent judgment which has not been subject to appeal is conclusive between the parties and capable of execution in the foreign country*" is correct and must be upheld.

Finally, it was submitted that the exhibit P1cannot be enforced in Seychelles because the Court in the United Kingdom did not have jurisdiction under the "residency rule." This submission too overlooks the crucial fact, namely, that we are here concerned with a consent judgment. In other words, the appellant submitted to the jurisdiction of the Court and it is specifically stated in the exhibit P1 that ".....jurisdiction in relation to the child shall be with the Family Division of the English High Court." At this point it is relevant to refer to the following passage from Cheshire and North, Private International Law, eleventh edition page 92.

".....any person may contract either expressly or impliedly to submit to the jurisdiction of a court to which he would not otherwise be subject."

In the present case there is no doubt that the jurisdiction in respect of custody of the child is with the Family Division of the High Court. In other words, the Court has jurisdiction in regard to the subject matter of the proceedings. This, therefore, is not a case where the Court has entertained a matter beyond its authority.

The appellant having consented to submit to the jurisdiction of the High Court in the United Kingdom, cannot now contest the binding effect of the consent judgment. It is not without significance that in his pleadings the appellant averred that "the judgment was entered into as a result of duress." There is no evidence at all to support the plea of duress.

Before we conclude we wish to add that the authorities strongly relied on by learned Counsel for the appellant, namely the case of Privatbanken (supra) and the case of ***Green v Green*** (1973) No.23 SLR page 295, do not deal with foreign judgments which are ex facie "consent judgments."

For these reasons, we affirm the judgment of the Supreme Court (Juddoo J) and dismiss the appeal with costs.

E.O.AYOOLA	**M.M. ILUNGWE**	**G.P.S.DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 10 day of April 2002