

**Dhanjee v Dhanjee**  
**(2000) SLR 91**

France Bonte for the respondent  
Nichol Tirant-Gherardi for the respondent  
Dora Zatte for the Attorney-General

*Appeal by the respondent was dismissed on 10 April 2002 in CA 13 of 2000.*

**Judgment delivered on 3 July 2000 by:**

**JUDDOO J:** This is an application to render a foreign judgment delivered by the High Court in the United Kingdom executory in the Republic of Seychelles.

The applicant has filed a petition titled to be made under section 227 of the Seychelles Code of Civil Procedure (Cap 213) and the respondent has filed a reply to the petition. In *Privatbanken v Aktieselekab Bantele* (1978) SLR 226 this court observed that the procedure to render a foreign judgment executory under section 227 is by way of an ordinary action, a plaint. In the present case, the petition filed before this court is primarily and unequivocally on the basis of making the foreign judgment referred therein and delivered by the High Court in the U.K. executory in the Seychelles. The respondent has filed a reply thereto resisting the application in limine litis and on the merits in the manner of a defence without affidavit. The matter was heard and both parties were granted the opportunity to call their witnesses. The applicant gave evidence in court and was cross-examined by counsel for the respondent. The respondent elected to call no evidence on their behalf. The case has proceeded in the manner of a plaint and this court is not prevented from determining the issue nor has any prejudice resulted to the respondent. Accordingly, the matter is thereafter treated as an ordinary action, a plaint.

A photostat copy of the judgment purporting to bear the seal of the High Court of Justice, Family Division, Leeds, U.K. was produced by the applicant, as exhibit PI. Under section 7 of the English Evidence Act 1851, which is applicable to the Seychelles by virtue of section 2 of the local Evidence Act (Cap 74), where a document is sought to be admitted as a judgment of a foreign court, the authenticated copy to be document must purport to bear the seal of the foreign court without necessity of proof of the seal. The document, exhibit PI, bears of its face a seal which purports to be the seal of the High Court, Family Division, Leeds, U.K. Accordingly, I find the document to be admissible as a foreign judgment before this court.

The foreign judgment is a 'judgment by consent of the parties' delivered on 14 July 1999 by the High Court, Family Division, Leeds, U.K. under section 58(1) of the Children Act 1989 (UK) whereby:

- (1) the wardship proceedings issued on 8 March 1999 be discharged;

- (3) there shall be a residence order in relation to the child Milun Viral Dhanjee in favour of the applicant (plaintiff):
- (4) there shall be contact between the said child and the first respondent (defendant) as follows:
  - A. Direct contact in 1999 ...
  - B. Direct contact in 2000 ...
  - C. Contact thereafter ...
  - D. Indirect contact ...

The applicant testified that she is a British citizen. She married the respondent on 17 July 1991 and from their marriage a child, Milun Viral Dhanjee, was born on 21 February 1994. By virtue of a consent judgment delivered in July 1999 by the High Court, Leeds, (U.K.) the applicant was awarded custody of the child as per exhibit PI. On 21 August 1999, the respondent had taken the child for a weeks contact in compliance with the said consent judgment. However, since the 26 August 1999 the respondent has absconded with the child thereby denying to the applicant her rights under the judgment delivered. The applicant added that it was urgent that the judgment delivered in the U.K. be made executory in Seychelles.

Under cross examination, the applicant explained that their child holds dual nationality as a British citizen and a Seychellois national. She testified that the proceedings before the court in U.K. had lasted from January 1999 to July 1999 and custody of the child would have been determined by the court on 14 July 1999 when the parties reached an agreement which was drawn up and delivered as a consent judgment.

At the close of the case for the applicant, the respondent did not adduce further evidence. Counsel for the respondent submitted in essence that:

- (1) section 227 of the Seychelles Code of Civil Procedure is not applicable to enforce a 'custody judgment' granted by a foreign court being limited to cases falling under article 2123 of the Civil Code which purports to judicial mortgages;
- (2) alternatively, the foreign judgment sought to be declared executory does not satisfy the conditions for a foreign judgment to be declared executory since it is not a final and conclusive judgment
- (3) even if the Reciprocal Enforcement of British Judgments Act (Cap 199) was to be applied the foreign judgment sought to be declared executory falls outside the definition of judgment in the Act since such definition is limited, to "civil proceedings ... whereby any sum of money is made payable and includes an award in proceedings or an arbitration and thereby excludes custody judgments.

An application by a party to render a foreign judgment executory in Seychelles may be

determined in accordance with the provision enacted under section 227 of the Seychelles Code of Civil Procedure (Cap 213) which reads:

Foreign judgment and deeds drawn up in foreign countries can only be enforced in the cases provided for by articles 2123 and 2128 of the Civil Code and agreeably with the provisions of the aforesaid articles...

Article 227 is an English translation of article 546 of the French Code of Civil Procedure (now article 509 of the French Code) which pertains to what is known as "exequatur". In *Privatbanken Aktieselskab v Bantele* (1978) SLR 231 it was observed that:

Section 226 (now section 227) is an English translation of article 546 and all the French authorities on that article are relevant so as to apply section 226...

The full purport of this provision has been given considerate examination by eminent authors. In *Droit International Prive* Batiffol & Lagarde, (7<sup>th</sup> Edition, 1983) page 551, the authors states that:

L'exequatur donne aux jugements et actes publics étrangers force exécutoire ... Les articles 2123 C. Civ. et 546 ancien C. Proc. Civ. ont prévu son existence sans aucunement le réglementer. La jurisprudence a dû construire un système déterminant les décisions susceptibles d'exequatur, les conditions de son octroi, la procédure à suivre et les effets du jugement auquel elle aboutit...

And, in *Encyclopedic Dalloz, Droit International, Verbo Jugement Etranger* (Matières Civile et Commerciale) Titre 1<sup>er</sup> Note 3, the author commented that:

L'article 546 du Code de procédure civile dispose que 'les jugements rendus par les tribunaux étrangers ... ne seront susceptibles d'exécution en France, que de la manière et dans les cas prévus' par article 2123 du Code Civil. Or il n'est question dans ce dernier article que de l'hypothèque judiciaire, dont il est prescrit qu'elle ne peut résulter des jugements rendus en pays étranger que s'ils ont été 'déclarés exécutoires par un tribunal français'... Le droit français en cette matière est donc à déduire d'une coutume jurisprudentielle

The jurisprudence in France has established that article 546 (of the French Civil Procedure Code) is applicable to both monetary and non-monetary foreign judgments delivered as a result of civil litigation between private parties. The jurisprudence has however excluded the application of article 546 to administrative or criminal matters as observed in *Encyclopedic Dalloz*, supra, note 11:

Les jugements étrangers régis par les règles exposées ci-après

comprennent toutes les décisions rendus par une juridiction étrangère dans un litige d'intérêt privé. Doivent donc en être écartées les décisions à caractère purement administratif ou répressif (matière pénale)...

and in *Droit International Prive*, supra page 551:

L 'exequatur n'est accordé traditionnellement qu'aux décisions étrangères de droit privé par oppositions aux décisions pénales ou administratives...

Section 227 of the Seychelles Code of Civil Procedure is a faithful translation of article 546 of the French Code of Civil Procedure and the jurisprudence which has evolved under the French provision is applicable under the local law unless there is a specific law to prohibit its application or sufficient reason to depart therefrom.

In relation to custody matters, the jurisprudence has evolved to make 'exequatur' applicable to any act of coercion upon a person; as follows - vide: Dalloz, supra:

**note 50**

Doivent cependant recevoir l'exequatur, selon la jurisprudence de la cour de causation tous ceux parmi les jugements qui emportent exécution matérielle sur les biens ou coercition sur les personnes...

**and note 55:**

Quand à la coercition sur les personnes elle s'entend dans les cas où l'on veut en vertu d'un jugement étranger exiger l'accomplissement d'un acte.

**Note 57:**

Le même principe vaut apparemment et malgré l'hésitation de certains tribunaux pour les jugements statuant sur la garde des enfants... voir les décisions cités, supra à 40, et sur l'ensemble de la question PONSARD. La reconnaissance et l'exécution en France des décisions étrangères concernant la garde des enfants...

Accordingly, I find that the procedure for exequatur under article 456 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.

The next determination is whether the Reciprocal Enforcement of British Judgments Act (Cap 199) by virtue of its definition of judgment in the Act as "any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable..." limits the operation of section 227 as far as U.K. judgments are concerned. The Reciprocal Enforcement of British Judgments Act 1922 (Cap 199) has to be read with section 9(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1961 (Cap 85) Under section 4(1) of the latter Act a foreign judgment may be registered and, if not set aside under section 7, shall for the purposes of execution be of the same force and effect as a local judgment of the registering court. Under section 4(1) the President

may by order direct that part 1 of the Act extend to a foreign country.

Under Statutory Instrument 56 of 1985 an order was made for part I of the Foreign Judgments (Reciprocal Enforcement) Act to apply to "the Commonwealth and to judgments obtained in the Commonwealth...". Section 9(2) of the Foreign Judgments (Reciprocal Enforcement) Act enacts that where an order is made extending part I to any part of the Commonwealth to which the Reciprocal Enforcement of British Judgments Act applies, the Reciprocal Enforcement of British Judgments Act shall cease to have effect in relation to that part of the Commonwealth. Accordingly, the definition of "judgment" under the Reciprocal Enforcement of British Judgments Act is replaced by the definition of "judgment" under the Foreign Judgments (Reciprocal Enforcement) Act which includes "as a judgment or order given or made by a court in any civil proceedings..." This definition does not restrict the application of exequatur in respect of the United Kingdom Judgments.

The conditions that must be satisfied before a foreign judgment is declared executory under section 227 of the Seychelles Code of Civil Procedure (Cap 213) were, after a review of the French jurisprudence, summarised in *Privatbanken Aktieselskab v Bantele*, supra, as follows:

- (1) The foreign judgment must be capable of execution in the country where it was delivered.
- (2) The foreign court must have had jurisdiction to deal with the matter submitted to it.
- (3) The foreign court must have applied the correct law to the case in accordance with the rules of Seychelles private international law.
- (4) The rights of the defence must have been respected.
- (5) The foreign judgment must not be contrary to any fundamental rules of public policy.
- (6) There must be absence of fraud.

Under the first condition, counsel for the respondent submitted that the applicant has failed to establish as a fact that the judgment delivered in U.K. is final and conclusive and that in the absence of proof to that effect Seychelles law should be resorted to whereby child custody matters can always be reviewed. In the instant case, the submission is misconceived.

The requirement is that the foreign judgment must be "capable of execution" in the foreign country. This is referred to in Dalloz, supra, note 197 as *Caractere Executoire*:

Lorsque l'exequatur est poursuivi aux fins d'exécution, il faut que le

jugement étranger soit exécutoire dans les pays dont il émane...

and at note 200

Il n'est pas d'avantage nécessaire que le jugement étranger soit passé en force de chose jugée. Il suffit qu'il soit exécutoire même par provision. Sont également susceptibles d'exequatur les jugements provisoires dont les condamnations restent exposés a des modifications ultérieures. La jurisprudence sur ce point est actuellement bien établie...

The judgment sought to be enforced in the Seychelles is a "residence and contact order" delivered by the High Court of Justice, Family Division, Leeds U.K. wherein the custody and care of the minor child, Milun Viral Dhanjee, was agreed to by the respondent and made part of the judgment delivered by the court. The applicant testified that the terms of the settlement were drafted and agreed by both parties outside court. Upon the undertaking given by both parties, a consent judgment was delivered by the court. No appeal has been lodged against the judgment delivered. Accordingly, I find that the said 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.

On the question of jurisprudence and competence of the High Court of Justice, Leeds, U.K. the trial court must have jurisdiction in the international sense and also local jurisdiction. The first must be determined in the light of Seychelles private international law whereas the second in the light of the law of the country of the trial court. The foreign court had local jurisdiction since the applicant and the minor child are British citizens and the respondent submitted to the jurisdiction of the court. On the other hand the foreign court had jurisdiction in the international sense under section 6(i) (c) of the Foreign Judgments (Reciprocal Enforcement) Act given that the jurisdiction of the foreign court is recognised under Statutory Instrument 56 of 1965 which extends part 1 of the Act to the Commonwealth and to judgments obtained in the Commonwealth.

The court must be satisfied that the foreign court has applied the correct law ("la loi competente") to this case in accordance with the rules of Seychelles private international law. The issue before the court concerned the custody of the minor child. In *Pillay v Pillay* (1973) MR 179 and (1973) SLR 307, the Court of Civil Appeal approved of the following passage from *Austin v Bailey* (1962) MR 113:

Since the rule of private international law of any country must necessarily have their foundation in the internal law of that country those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that subject to any exception which may arise through certain different statutory enactments and treaty obligations, we must be guided by the French rules of private international law...

The Matrimonial Causes Act 1992 (Seychelles) is based on the Matrimonial Causes Act

1973 of the United Kingdom and the Domicile and Matrimonial Proceedings Act 1973. This constitutes "an exception which arises through certain different statutory enactments" and we are guided by the English rules of private international law. In the United Kingdom, the personal and proprietary relationship between members of a family are governed by the law of the domicile - vide: *Conflict of Laws* (J.C. Morris 1988) page 14. In the case of a minor child the domicile is that of dependency. Section 4(1) and (2) of the Domicile and Matrimonial Proceedings Act (1973) (UK) provide that the domicile of a dependent child whose parents are alive but living apart shall be that of the mother - vide: *Conflict of Laws*, supra, page 29. Accordingly, the law of domicile applied by the foreign court was "la loi competente".

The next condition is whether the rights of the respondent were respected. The applicant testified that the matter proceeded before the High Court of Leeds from January to July 1999. The respondent submitted to the jurisdiction of the Court.

The foreign judgment includes undertakings by the applicant towards the respondent and various agreed periods of 'direct contracts' as well as 'staying contacts' between the minor child and the respondent. It is certain from the foreign judgment that the rights of the respondent were respected. In addition, I do not find that the foreign judgment offends against any fundamentals rules of public policy and nor is there any element of fraud present.

The evidence led by the applicant establishes that the respondent had not returned the minor child to her after a 'direct contact' visit. In so doing, the respondent is not a person who comes before this court with clean hands. He has submitted to judgment before the foreign court and has acted in contempt of the said judgment delivered. This court can only strongly disapprove of such behavior which stands in defiance of a judgment delivered by a foreign court.

In the end result, being satisfied that all the conditions for an 'exequatur' are fulfilled, I entered judgment in favour of the applicant with costs and hereby declare the judgment of the High Court of Justice, Leeds, UK executory in Seychelles.

**Record: Civil side No 65 of 2000**