

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provision) Act No.19 of 1990 as amended by Act No.54 of 2006.

Samarasinghe Gamachchige Senani  
Piumika Samarasinghe,

No.71, Gajabapura,

Kolonnawa.

**PLAINTIFF**

**S.C. Appeal No. 11/2018**

**S.C. (H.C.C.A) L.A. Application No. 390/2016**

**WP/HCCA/COL/21/2015/LA**

**DDV/00921/12**

**Vs.**

1. Ganegoda Haputhanthrige Sujith  
Asanka,  
No. 152/2/1/, Panchikawatta Road,  
Colombo 10.  
Presently at,  
No 09, Bevill Squire,  
Salford, England.

2. Anna Jones,  
No, 405, Quedec Building Burry  
Street,  
Manchester, M37 DX,  
England.

**DEFENDANTS**

**AND BETWEEN**

Samarasinghe Gamachchige Senani  
Piumika Samarasinghe,

No.71, Gajabapura,

Kolonnawa.

Presently at,

No.09, Baggotts Place,  
New Castle, Under Lyme,  
Staffordshire,  
England.

Appearing by her Attorney,  
M.J. Samarasinghe,  
No 71, Gajabapura,  
Kolonnawa.

**PLAINTIFF – PETITIONER**

**Vs.**

1. Ganegoda Haputhanthrige Sujith  
Asanka,  
No. 152/2/1/, Panchikawatta Road,  
Colombo 10.

Presently at,  
No 09, Bevill Squire,  
Salford, England.

2. Anna Jones,  
No, 405, Quedec Building Burry  
Street,  
Manchester, M37 DX,  
England.

**DEFENDANT – RESPONDENT**

**AND NOW BETWEEN**

1. Ganegoda Haputhanthrige Sujith  
Asanka,  
No. 152/2/1/, Panchikawatta Road,  
Colombo 10.

And at,  
No 09, Bevill Squire,  
Salford, England.  
Presently at,  
No. 02. Melrose Place,

Bristol, Bs8 2NQ,  
U.K.

Now presently at,  
C/O: N.A.J.S.S. Perera,  
64 Blackmoor,  
CourtLeedsLS17,  
7RTUK.

Appearing by his Attorney,  
Ganegoda Haputhanthrige  
Rupasinghe,  
No. 152/2/1, Panchikawatta Road,  
Colombo 10.

**DEFENDANT – RESPONDENT –**

**PETITIONER**

**Vs.**

Samarasinghe Gamachchige Senani  
Piumika Samarasinghe,

No.71, Gajabapura,

Kolonnawa.

Presently at,

No.09, Baggotts Place,

New Castle, Under Lyme,

Staffordshire,

England.

Now presently at,

C/O Mrs. Chandrika Arulanathan,

94 Kingsbury Road,

London,

NW90AX.

Appearing by her Attorney,  
M.J. Samarasinghe,  
No 71, Gajabapura,  
Kolonnawa.

**PLAINTIFF – PETITIONER –  
RESPONDENT**

Anna Jones,  
No, 405, Quedec Building Burry Street,  
Manchester, M37 DX,  
England.

**DEFENDANT – RESPONDENT –  
RESPONDENT**

**Before** : **Hon. Kumudini Wickremasinghe, J.**  
**Hon. Janak De Silva, J.**  
**Hon. Menaka Wijesundera, J.**

**Counsel** : Saliya Peris, P.C. with Yohan Peiris and Andrea Wijewansa for  
the Defendant – Respondent – Appellant

Chandana Dias with K. Chathurika Govinnage and Maheesha  
Dushyanthi for the Plaintiff – Petitioner – Respondent

**Written Submissions** : 27.03.2018 and 15.09.2025 by the Defendant –  
Respondent – Appellant  
04.10.2018 by the Plaintiff – Petitioner – Respondent

**Argued on** : 25.08.2025

**Decided on** : 13.03.2026

**Janak De Silva, J.**

The Defendant-Respondent-Appellant (Defendant) and Plaintiff-Petitioner-Respondent (Plaintiff) got married on 30.10.2008 in Colombo. Thereafter they proceeded to the United Kingdom.

On or about 03.12.2012, the Plaintiff instituted this action to obtain divorce a *vinculo matrimonii* on the grounds of adultery and constructive malicious desertion.

The Defendant filed answer and *inter alia* claimed that there was no valid marriage between the parties as the marriage had already been dissolved by the County Court of Manchester in the United Kingdom. He moved for the plaint to be dismissed *in limine*.

The trial began with the recording of several admissions including the following:

“07. නඩුවේ විත්තිකරු විසින් එංගලන්තයේදී පැමිණිලිකාරියගන් දික්කසාද වීම සඳහා අංක එම්.ඒ. 120821 දරණ නඩුව පවරා ඇති බව පිළිගනී.

08. එම නඩුව ඒකපාර්ශ්කව විභාග කර තීන්දු කර ඇති බව පිළිගනී.”

Once the issues were settled, the Defendant moved that issue Nos. 15-20 be decided as preliminary issues. They read as follows:

“15. උත්තරවාද මත ඉදිරිපත් කරන ලද 7, 8 එකඟතා මත මෙම නඩුව පවරන විට පැමිණිලිකාරිය හා විත්තිකරු අතර වලංගු විවාහයක් නැත්තේද?

16. මෙම නඩුවේදී ප්‍රායෝගික වශයෙන් මෙම අධිකරණයට සිවිල් නඩු විධාන සංග්‍රහයේ 602 හා 604, 605 වගන්ති යටතේ තීන්දු ප්‍රකාශ කිරීමට ප්‍රායෝගිකව හැකියාවක් නොමැතිද?

17. උත්තරයේ 5 වන ඡේදයේ සඳහන් පරිදි පැමිණිලිකරුට 1 වන විත්තිකරුට එරෙහිව වලංගු නඩු නිමිත්තක් හට ගෙන නොමැත්තේද?

18. උත්තරයේ 6 වන ඡේදයේ සඳහන් කරුණු මත පැමිණිලිකාරිය ක්‍රියා කර මෙම නඩුව පවරා ඇත්තේද?

19. මෙම නඩුව සිවිල් නඩු විධාන සංග්‍රහයේ 207 වගන්තිය හා රෙස්‍යුට්ට්ටා නීතිය අනුව මෙම නඩුව අධිකරණයේ පවරා පවත්වාගෙන යාමට හැකියාවක් නොමැතිද?

20. (i) පැමිණිල්ලේ සඳහන් කරුණු එකිනෙකට පරස් විරෝධී වන්නේද?

- (ii) පැමිණිල්ල මගින් වලංගු නඩු නිමිත්තක් කර නොමැත්තේද?
- (iii) පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 40 වන වගන්තියේ ප්‍රතිපාදන වලට අනුකූල නොවන්නේද?
- (iv) පැමිණිල්ලේ ශීර්ෂයේ සම විත්තිකාරියක නොමැති බැවින් සිවිල් නඩු විධාන සංග්‍රහයේ ප්‍රතිපාදන වලට පටහැනි වන්නේද?”

Parties were granted an opportunity of filing written submissions on this application. Thereafter, the learned trial judge delivered judgment holding that there was no valid marriage between the parties as it was dissolved and dismissed the action of the Plaintiff as well as the cross-claim of the Defendant. However, the cross-claim made by the Defendant-Respondent-Respondent was allowed to proceed. Issue Nos. 15-20 were answered as follows:

- “15) වලංගු විවාහයක් නැත.
- 16) නොමැත.
- 17) වලංගු නඩු නිමිත්තක් හටගෙන නොමැත.
- 18) ඔව්.
- 19) බලයක් නොමැත.
- 20) (i) අදාළ නොවේ.
- (ii) නොමැත.
- (iii) අදාළ නොවේ.
- (iv) නැත.”

The Plaintiff appealed to the High Court of Civil Appeal of the Western Province holden in Colombo (High Court). The High Court held that the Manchester County Court did not have jurisdiction to enter decree dissolving the marriage between the parties as the wife (Plaintiff) takes the domicile of the husband (Defendant) which in this case is Sri Lanka.

The High Court set aside the judgment of the District Court and answered issue Nos. 15-20 as follows:

*“15. There is a valid marriage.*

*16. The District Court has the power to enter decree.*

*17. A cause of action has accrued to the Plaintiff which is to be investigated by the District Court.*

*18. No. There is no suppression by the Plaintiff too.*

*19. There is no impediment from the provisions of section 207 of the Civil Procedure Code or on the principle of res judicata.*

*20. (1) No.*

*(II) A valid cause of action has been disclosed.*

*(III) The plaint is in conformity with the requirements of Section 40 of the Code.*

*(IV) There is no obstacle to proceeding with the action of the Plaintiff.”*

The action of the Plaintiff was restored to the roll of calling cases and the learned District Judge was directed to proceed with the trial of the remaining issues according to law.

Aggrieved, the Defendant sought leave to appeal which was granted on the following questions of law:

- 1. Did the High Court err in law in holding that the marriage between the Plaintiff and Defendant continues to subsist notwithstanding the dissolution of marriage granted by the Manchester County Court in England?*
- 2. Did the High Court err in law when it failed to take cognizance that the Plaintiff had submitted to the jurisdiction of the Manchester County Court in England and*

*acquiesced in the proceedings and hence is estopped from claiming that the said Court had no jurisdiction?*

- 3. Did the High Court err in law in setting aside the judgment of the District Court which dismissed the Plaintiff's action?*

***Marriage Registration Ordinance No. 19 of 1907 as amended (Ordinance)***

Admittedly the marriage between the parties was registered in terms of the Ordinance.

Section 19 of the Ordinance reads as follows:

*“(1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*

*(2) Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.*

*(3) Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground.”*

The Defendant relies upon a judgment given by the Manchester County Court to establish that these requirements have been satisfied and claim the matter is *res judicata*.

This brings a foreign element into the action. The Defendant seeks to obtain recognition for a foreign judgment. In ***Adams v. Cape Industries plc [(1990) Ch 433 at 513]*** it was held that the recognition of a foreign judgment must be determined in accordance with “*our own rules of private international law.*” The same legal principle applies in Sri Lanka.

Hence, there is a need to examine the applicable Private International Law or Conflict of Law rules applicable in Sri Lanka. I had the opportunity to examine one aspect of it, namely governing law, in ***Strabag AG v. The Commissioner of Labour and Others [(2020) 1 Sri.L.R. 76]***. Nevertheless, the issue before us encompasses two other aspects of the applicable

Private International Law or Conflict of Law rules, namely jurisdiction and recognition and enforcement of foreign judgments. I wish to delve into these areas in some detail as there is a dearth of judicial pronouncement.

### ***Private International Law***

This area of law can broadly be compartmentalised into jurisdiction, governing law and recognition and enforcement of foreign judgments. It becomes relevant when a domestic court is confronted with a claim containing a foreign element.

Jurisdiction sets out the conditions under which the court is competent to entertain such a claim.

Governing law determines the particular municipal law that the court must apply to determine the rights of the parties.

Recognition and enforcement set out (i) the conditions under which a foreign judgment can be considered as decisive on the question before the domestic court and (ii) the right of the judgment creditor of the foreign judgment to have it enforced.

### ***Recognition vs. Enforcement***

Although the terms '*recognition*' and '*enforcement*' are often used in conjunction, there is a clear distinction between them. Broadly speaking recognition serves as the legal acceptance of the foreign judgment whilst enforcement allows for its practical implementation.

Recognition arises where a party to an action relies on a foreign judgment as a defence, such as *res judicata*, to establish that the dispute between the parties has been finally decided by a foreign judgment. Here a domestic court need only recognise the validity of the foreign judgment without having to enforce it.

Enforcement on the other hand requires a domestic court to execute the foreign judgment by measures such as asset seizure or injunctions to satisfy the judgment.

As Forsyth [*Private International Law*, 4<sup>th</sup> ed., Juta, 2003, pages 390-391] explains, recognition implies only that the domestic court declares that the foreign judgment has:

*“the legal effect which the foreign court intended it to have (e.g. decree of divorce), whilst enforcement requires that the local Court will, in addition, compel the judgment debtor to comply with the foreign judgment”.*

Thus a domestic court must always recognise a foreign judgment before enforcing it, whereas the question of enforcement does not arise where the only question is whether the foreign judgment must be recognised. The defence of *res judicata* is one such example.

In fact there are some judgments such as a foreign judgment for the dissolution or annulment of a marriage or separation of the parties which need only be recognised by a domestic court without the need for its enforcement.

The Private International Law rules of any country may have international treaties, domestic legislation or common law as its sources.

### ***Reciprocal Recognition, Registration and Enforcement of Foreign Judgments Act No. 49 of 2024 (Act)***

The Act in its Bill form was challenged on its constitutionality. The Supreme Court in ***S.C. (SD) No. 80/2024 and S.C. (SD) 81/2024*** held that it was constitutional subject to certain amendments been made to it as specified in the determination of the Court.

The provisions of the Act came into operation on 26.03.2025 [Gazette Extraordinary No. 2429/51 dated 28.03.2025]. Application of the provisions of Part I of the Act has been extended to the judgments of courts of 53 countries including the United Kingdom [ibid.].

Sections 6 to 11 has specifically provided for the recognition of a foreign judgment for the dissolution or annulment of a marriage or separation of the parties to a marriage in Sri Lanka. It makes no reference to its enforcement. Thus the distinction between recognition on one hand and enforcement on the other has been recognised in the Act.

Section 3(1)(b) specifies special conditions which must be satisfied before the Act becomes applicable to a foreign judgment for the dissolution or annulment of or separation of the parties to a marriage under the Marriage Registration Ordinance. The foreign court will be considered as having jurisdiction only where it is founded on domicile, habitual residence, nationality or submission to jurisdiction.

Section 14 mandates that from and after the date on which an Order under subsection (1) of section 2 is published in the *Gazette*, i.e. 26.03.2025, any proceedings for the recognition, registration and enforcement of a judgment of a court of such foreign country shall not be entertained by any court in Sri Lanka, except in accordance with the provisions of the Act.

This action was filed in 2012. It is trite law that generally the rights of the parties must be determined by reference to the law as at the date of action [***Ponnamma v. Arumogam* (8 N.L.R. 223 at 226)**, ***Silva v. Nona Hamine* (10 N.L.R. 44 at 51)**, ***Ponnamma v. Weerasuriya* (11 N.L.R. 217)**, ***Silva v. Fernando et al* (15 N.L.R. 499 at 500)**, ***Jamal Mohideen & Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272)**, ***Shariff et al v. Marikkar et al* (27 N.L.R. 349 at 350)**, ***Eminona v. Mohideen* (32 N.L.R. 145)**), ***De Silva et al v. Goonetilleke et al* (32 N.L.R. 217 at 219)**, ***De Silva v. Edirisuriya* (41 N.L.R. 457 at 458)**, ***Lenorahamy v. Abraham* (43 N.L.R. 68 at 69)**, ***Kader Mohideen & Co. Ltd., v. Gany* ( 60 N.L.R. 16 at 19)**, ***Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267 at 278 and 280)**, ***Talagune v. De Livera* (1997) 1 Sri. L. R. 253 at 254**, ***Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235 at 248**, ***Lalwani v. Indian Overseas Bank* (1998)**

**3 Sri. L. R. 197 at 198, *Jayaratna v. Jayaratne and another* (2002) 3 Sri. L. R. 331 at 332, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341 at 345].**

However, it is not an immutable principle and courts have recognized certain exceptions to the general rule [***Sabapathipillai et al v. Vaithialingam* (40 N.L.R. 107 at 108), *Appusinno v. Balasuriya* (16 N.L.R. 385), *Thangavadivel v. Inthiravathy* (53 N.L.R. 369 at 371), *Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others* (S.C. No. 69/92, S.C.M. 05.11.1993), *Master Drivers (Pvt) Ltd. v. Karunaratne and others* (CA (PHC) APN 140/2012, C.A.M. 09.08.2018)]]. Nevertheless, this action does not fall within any such exception.**

The general rule of determining the rights of the parties as at the date of action can be displaced where there is a clear legislative statement that a law will apply retrospectively. For example, Section 3 of the Civil Procedure Code (Amendment) Act No. 17 of 2022 specifically states that the provisions therein apply to any case or appeal pending on the date of coming into operation of that amendment.

However, the provisions of Section 22(b) of the Act indicates that it clearly has no retrospective application to pending proceedings.

Moreover, Section 4(a) permits the recognition, registration and enforcement of a foreign judgment only where such an application is made within ten years from the date of the final judgment although the proviso proves an exception to this principle. I make no finding on the applicability of the proviso to the judgment of the County Court of Manchester as it is a moot point.

The issues before this court must then be determined by the law in force as at 2012.

### ***Judgment in Harendra Silva***

In ***Harendra Silva v. Weerasekera and Others [C.A. Writ 266/2021, C.A.M. 01.12.2023]***, Rajakaruna, J. (as he was then) held (at page 9) that a valid decree of dissolution of marriage entered into in a foreign country can be given effect, when necessary, within Sri Lanka, subject to other laws of Sri Lanka and the following three guidelines:

- (i) Ascertain whether the law of such country has bestowed the jurisdiction to the respective court to dissolve marriages entered into in a foreign territory.
- (ii) Both parties who entered into the contract of marriage in Sri Lanka must have been residing in the respective country, for a reasonable period of time when applying for a divorce.
- (iii) Both husband and wife should actively participate in such divorce proceedings in the foreign court while being subjected to the procedure adopted in such court concerning matrimonial actions.

However, this decision has no application now in view of Section 14 of the Act which mandates that any proceedings for the recognition, registration and enforcement of a judgment of a court of a specified foreign country shall not be entertained except in accordance with the provisions of the Act.

### ***Reciprocal Enforcement of Judgments Ordinance No. 41 of 1921***

This makes provision for the enforcement in Sri Lanka of judgments obtained in the Superior Courts of the United Kingdom and of other parts of her majesty's realms and territories. However, its scope is limited to enforcing any judgment, decree, or order given or made by a court in any civil proceedings, whether before or after the passing of it, *whereby any sum of money is made payable*, and includes an award in proceedings in an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that

place. The foreign judgment sought to be recognised by the Defendant does not fall within this scope.

Moreover, it deals with enforcement rather than recognition. Hence it is of no assistance in ascertaining the conditions under which the judgment of the County Court of Manchester should be recognised.

I must hasten to add that although it deals with only enforcement, that does not in my view reflect any legislative intention to exclude the recognition of foreign judgments by reference to other sources of Private International Law.

### ***Enforcement of Foreign Judgments Ordinance No. 4 of 1937***

The Legislative Enactments 1956 Revised Edition, which is the last official version, states that this enactment was not in operation on 30<sup>th</sup> June, 1956. The 1980 Revised Edition (Unofficial) lists this as an enactment in force on 31<sup>st</sup> December 1980. Probably this is a reference to its enactment rather than being made operational. Coomaraswamy [*The Law of Evidence*, Vol. 1 (2<sup>nd</sup> Ed., Stamford Lake Publication, 2018), page 540 note 183] states that it was not proclaimed. My best endeavours did not yield any order making it operational.

Section 21(a) of the Act states that it this is repealed with effect from the appointed date i.e. 26.03.2025. In my view this is to formally repeal it from the legislative framework rather than an acknowledgment of it having been made operational.

### ***Common Law***

Notwithstanding the absence of any legislative framework for the recognition and enforcement of a foreign judgment, the common law of many jurisdictions recognises the ability of a judgment-creditor of a foreign judgment to sue on the foreign judgment using it as a cause of action and thereby seek to enforce it.

Initially English law recognised the ability to sue on a foreign judgment solely on the ground of comity [**Geyer v. Aguilar (1798) 7 Term Rep 681 at 97**]. However, later the theoretical justification was changed to the “doctrine of obligation”.

In **Owens Bank Ltd v. Bracco [(1992) 2 AC 443 at 457]** Parker LJ expounded the basis of the enforcement of a foreign judgment under English common law as follows:

*“The first method of enforcement here of a foreign judgment was by an action upon the judgment. The foreign judgment, in the absence of statute, could have no direct operation in England and Wales because of the principle of the territoriality of a court's jurisdiction. At first, the basis for enforcing the foreign judgment by action in this country was thought to be the doctrine of comity but that was later replaced by the doctrine of obligation, namely, that the judgment of a court having competent jurisdiction over the defendant imposed on him an obligation to pay the sum for which judgment had been given: see Russell v. Smyth (1842) 9 M. & W. 810, 819; Schibsby v. Westenholz (1870) LR 6 QB 155 and the cases cited in Dicey & Morris, The Conflict of Laws, 11<sup>th</sup> ed. (1987), vol. 1, p. 420. It followed that anything which may properly be held to negative that obligation was a defence to the action upon the judgment. It is pointed out by the editors of Dicey & Morris, The Conflict of Laws, at p. 421, that the right, which the plaintiff seeks to enforce in such proceedings, is a right created and defined by English law and not by foreign law. Thus, in order for the foreign judgment to be enforced in this country, it is essential that the foreign court should have had jurisdiction over the defendant, not in the sense of the foreign law but according to the rules of our law: see Adams v. Cape Industries Plc. [1990] Ch. 433, 513H; and the defences which may be pleaded by the defendant in an action upon a foreign judgment, such as that the judgment was obtained by fraud, are themselves creatures exclusively of English law.”*

In **Rubin v. Eurofinance SA [(2012) UKSC 46, (2013) 1 AC 236]** the UK Supreme Court adopted this view. Lord Collins went on to expound that:

*“The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained: Williams v Jones (1845) 13 M & W 628, 633 per Parke B; Godard v Gray (1870) LR 6 QB 139, 147, per Blackburn J; Adams v Cape Industries plc [1990] Ch 433, 513; Owens Bank Ltd v Bracco [1992] 2 AC 443, 484, per Lord Bridge of Harwich. As Blackburn J said in Godard v Gray, this was based on the mode of pleading an action on a foreign judgment in debt, and not merely as evidence of the obligation to pay the underlying liability: LR 6 QB 139, 150. ... this is a purely theoretical and historical basis for the enforcement of foreign judgments at common law.”*

Adopting a similar approach, South African courts have held that under common law, which in this case is Roman-Dutch law, a foreign judgment constitutes a cause of action that can be enforced by a regular action under the civil procedure rules [**Jones v. Krog (1995) 1 SA 677 (A) at 685B**].

This principle has been judicially recognised in Sri Lanka. In **Meerapullailebbe v. Noohoolebbe [3 C.L.R. 32 at 34]** Withers, J. held that a foreign judgment raises no more than an implied simple contract for the sum adjudged to be due. However, Court went on to hold that an action on a foreign judgment cannot be brought under the provisions of Chapter LIII of the Civil Procedure Code, entitled “Summary Procedure on Liquid Claims”. In **Narayanaswami v. Marimuthpillai [41 C.L.W. 112]**, Gratiaen, J. held that the judgment of a Foreign Court of competent jurisdiction is, in accordance with the principles of private international law, regarded in other countries as *prima facie* evidence of a debt

at common law and that this rule has long been recognised in Ceylon, and that an action lies for the recovery of the debt so adjudged subject to such defences as may be raised by the debtor at the trial.

In ***Shamji Gordhandas & Co. v. Ramanathan & Co.*** [20 N.L.R. 129 at 131] Wood-Renton, CJ., held as follows:

*“In an action on a foreign judgment it is not necessary for the plaintiff to aver that the foreign Court had jurisdiction over the parties or the cause; Jurisdiction . is presumed, and, where that presumption has not Been rebutted, the Court in which, the action on the foreign judgment is brought will not review the competency of, or an irregularity of the proceedings in, the foreign Court, or even the correctness of the foreign judgment itself, unless there has been something in the nature of a violation of the rules of natural justice.”*

The jurisdiction of the foreign court was raised in ***Worman & Co. v. Noorbhai*** [15 N.L.R. 355] where plaintiffs obtained judgment against the defendant in the Court of Small Causes of Calcutta, but 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. The plaintiffs subsequently sued the defendant in the District Court of Colombo on the judgment of the Calcutta High Court. It was held that the defendant was not bound by the decree of the Calcutta Court.

Whether this common law principle is still valid after the enactment of the Act has to be considered in the context of Section 14 of the Act which mandates that any proceedings for the recognition, registration and enforcement of a judgment of a court of such foreign country shall not be entertained by any court in Sri Lanka, except in accordance with the provisions of the Act. It is a moot point on which I reserve my position.

However, this is not an action where the Defendant seeks recognition or enforcement of a foreign judgment based on any one of the above sources. He seeks to obtain *recognition* for an English judgment he has obtained to establish that (i) the marriage between the parties have been dissolved, (ii) the matter is *res judicata* as a defence to the action brought by the Plaintiff.

This must be considered in the context of the provisions in Section 19 of the Ordinance and the criteria relevant to establishing the defence of *res judicata*.

### ***Section 19 of the Ordinance***

In terms of this provision, the following requirements must be fulfilled for the dissolution of the marriage between the Plaintiff and Defendant:

1. There must be a judgment of divorce a *vinculo matrimonii*.
2. That judgment must have been pronounced by some competent court.
3. Such judgment shall be founded on the ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

### ***Res Judicata***

According to Coomaraswamy [*supra.*, page 528], the following elements must be established to succeed in a plea of *res judicata*:

- (a) The former action must have been a regular action.
- (b) The two actions must be between the same parties or their representatives in interest (privies).
- (c) The previous decision must be what in law is deemed such.
- (d) The particular judicial decision must have been in fact pronounced as alleged.
- (e) The previous judgment must be a final judgment.

- (f) The same question or identical causes of action must have been involved in both actions.
- (g) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf.
- (h) The judgment should not have been obtained by fraud or collusion.
- (h) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice.
- (i) The correctness of the decision is not a relevant consideration.

Both the defences raised by the Defendant require *inter alia* the establishment of the competence of the foreign court and that the same question or identical causes of action were involved in both actions, namely ground of adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

### ***Competent Court***

We must examine whether the County Court of Manchester had jurisdiction to grant a divorce a *vinculo matrimonii*.

In terms of Section 19(3) of the Ordinance, every court in Sri Lanka having matrimonial jurisdiction has been declared competent to dissolve a marriage on any such ground.

Section 24(1) read with Section 5 of the Judicature Act as amended has vested matrimonial jurisdiction in the District Court [Act No. 16 of 1989 has not been brought into force as yet. See ***Huseira v. Samaranayake (1998) 1 Sri. LR 141***].

Nevertheless, the Plaintiff submits that the District Court is not the only competent court to dissolve a marriage registered under the Ordinance. Relying on the words “*some competent court*” in Section 19(1), it is submitted that a court where the family is domiciled would have jurisdiction to grant a divorce.

There is merit in this contention as this action involves a foreign element. Private International Law recognises certain grounds upon which a court may be held to have jurisdiction over an action having a foreign element. The issue is what are the grounds we must recognise as giving the County Court of Manchester jurisdiction.

There is universal acceptance that questions affecting the personal status of any person should be governed constantly by one and the same law irrespective of where he may be or where the facts constituting the question may have befallen. However, there is debate on whether this law is determined by reference to domicile or nationality.

Domicile generally means the place or country in which a person has established his permanent home.

According to Walter Pereira [*The Laws of Ceylon*, Vol. II, page 151], home has been defined as follows:

*“A person’s home is that place or country (1) in which he, in fact, resides with the intention of residence (animus manendi), or (2) in which he having so resided, he continues actually to reside, though no longer retaining the intention of residence, or (3) with regard to which, having so resided, he retains the intention of residence, though in fact he no longer resides there. More briefly, a person’s home is that place or country in which he resides with the intention of residence (animus manendi) or in which he has so resided, and with regard to which he retains either residence or the intention of residence [Dic. 81]”*

The choice of domicile can be justified as it is the most natural and appropriate law to determine his personal status. In places where there are political units as in the USA, UK, Canada and Australia where the same nationality embraces a number of disparate legal systems, domicile provides the only real test. However, while it may be appropriate, its application may lead to an unpredictable law.

Applying the test of nationality over domicile has the advantage of been readily ascertainable and yielding predictable results. Nevertheless, it brings about some unsatisfactory results. It may result in applying the law of a country with which the person has lost all connections. Moreover, there are persons who have dual citizenship which makes the application of this test challenging.

According to Voet (5.1.95,96), the wife by her marriage, even before she leaves her residence, acquires the domicile of her husband. She retains it, even after the relationship is dissolved by the death of her husband, until she makes choice, and establishes another domicile or remarries In ***Varuna Jayasuriya v. Krishanjini Jayasuriya [(2005) 2 Sri LR 382]*** the Court of Appeal held that according to the common law, the only court which has jurisdiction to entertain an action for divorce is the court in whose area the parties are domiciled at the time of institution of proceedings and that the wife acquires the domicile of the husband up to date of decree in a matrimonial action.

In the context of the facts of this appeal, two important differences between English law and our law must be pointed out.

In England the rule until 1974 was that the domicile of a husband was communicated to his wife immediately on marriage and it was necessarily and inevitably retained by her for the duration of the marriage. However, this rule was abolished by Section 1 of the Domicile and Matrimonial Proceedings Act 1973. Now the domicile of a wife in English law must be determined by reference to the same factors as in the case of any other individual capable of having an independent domicile. However, according to our law, the wife acquires the domicile of the husband up to date of decree in a matrimonial action.

Moreover, English courts have jurisdiction to entertain proceedings for divorce, nullity and judicial separation if either of the parties to the marriage is domiciled in England at the time when proceedings are begun [Section 5(2)(a) of the Domicile and Matrimonial Proceedings Act 1973] whereas Section 607(1) of the Civil Procedure Code permits any

husband or wife to present a plaint to the District Court within the local limits of the jurisdiction of which he or she (as the case may be) resides.

There is a presumption that domicile of origin continues. However, it is now accepted that the presumption may be displaced by a domicile of choice. There are two requisites for the acquisition of a fresh domicile. They are residence and intention. Any person can acquire a domicile of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*). Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it [***IRC v. Duchess of Portland* (1982) Ch 314 at 318-319**].

The decision in ***Thevagnanasekaram v. Kuppammal* [36 NLR 337]** confirms that our law recognises both domicile of origin as well as domicile of choice. There an Indian Tamil, M, came to Ceylon in 1850 and joined two of his brothers in a partnership business in Colombo, where he married. He married in Ceylon, owned property, carried on business and continued to live at Colombo, save for occasional visits to India till his death in 1896. His children, among whom was S, born in 1886, were all born in Ceylon. S married his niece (sister's daughter) in India in 1906, and after his marriage lived continuously in Ceylon till his death in 1931. Court held that M had acquired a domicile of choice in Ceylon and that the domicile of origin of his son S was also in Ceylon.

According to Voet (5.1.93), the burden of proving such displacement is on the party who alleges of displacement [**See *Winans v. A-G* (1904) AC 287 at 289; *Re Lloyd Evans* (1947) Ch 695; *Messina v. Smith* (1971) P 322 at 330; *Puttick v A-G* (1980) Fam 1 at 17; *Spence v. Spence* (1995) SLT 335**]. However, it must be emphasised that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words [***Re Fulds Estate (No. 3)* (1968) P 675 at 686; *Brown v. Brown* (1982) 3 FLR 212 at 218, 220**].

The High Court in this case proceeded on the basis that the domicile of the husband (Defendant) is Sri Lanka and the wife (Plaintiff) takes on the domicile of the husband. The High Court was correct in its approach. However, it erred in failing to consider whether the domicile of origin was displaced by domicile of choice which could have been done only after hearing evidence.

Moreover, I do not think that restricting the competence of the foreign court to domicile is justified given that Section 607(1) of the Civil Procedure Code permits any husband or wife to present a plaint to the District Court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void. There can be no objection to recognising the jurisdiction of a foreign court where it has assumed jurisdiction on the same basis as would a District Court in Sri Lanka.

Besides, given that Section 3(1)(b) of the Act accepts habitual residence as a basis for a foreign court to assume jurisdiction, there is no injustice in recognising that a foreign court within whose jurisdiction either party is habitually resident as at the date of action to be a competent court.

I am further of the view that where a party has submitted to the jurisdiction of the foreign court, It can be said to have jurisdiction over the subject matter.

For the foregoing reasons, I hold that the County Court of Manchester can be held to be a competent court where:

- (a) At the time the proceedings were begun,
  - a. the Defendant was domiciled within its jurisdiction (as the Plaintiff takes on the domicile of the Defendant); or
  - b. Either party was habitually resident within its jurisdiction.

or

- (b) The Plaintiff has submitted to its jurisdiction.

### ***Cause of Action***

Section 19(2) of the Ordinance mandates that the cause of action on which the divorce was granted shall be either adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

In my view, a foreign judgment granting a divorce must comply with this provision. The positive rule in Section 19 leaves no room for any other interpretation.

For the foregoing reasons, in order for the Defendant to succeed in both his defences, namely that the marriage has been dissolved or that the matter is *res judicata*, the following requirements must be satisfied:

- (a) At the time the proceedings were begun,
  - a. the Defendant was domiciled within its jurisdiction (as the Plaintiff takes on the domicile of the Defendant); or
  - b. Either party was habitually resident within its jurisdiction.

**OR**

- (b) The Plaintiff has submitted to its jurisdiction

**AND**

- (c) the cause of action in the County Court of Manchester should have been adultery subsequent to marriage, or of malicious desertion, or of incurable impotence at the time of such marriage.

However, I find that neither the District Court or the High Court or for that matter this Court is in a position to apply these tests. The reason is that the judgment of the County Court of Manchester has not been admitted by the Plaintiff. No doubt it was marked as part and parcel of the answer. However, that does not allow the District Court to consider it as evidence.

Section 154 of the Civil Procedure Code regulates the tender and admission of documents in evidence. Both the District Court and the High Court have overlooked this basic provision in proceeding to answer issues Nos. 15-20 as preliminary issues.

Moreover, there are certain facts which needs to be examined before answering issues Nos. 15-20.

Consequently, I am compelled to answer the three questions of law as follows:

**Both the District Court and the High Court erred in proceeding to answer issue Nos. 15-20 as preliminary issues. The judgment of the County Court of Manchester was not duly admitted in evidence. Moreover, there are certain facts which needs to be examined before answering issues Nos. 15-20.**

For all the foregoing reasons, I set aside the judgment of the High Court dated 30.06.2016 and the judgment of the District Court dated 14.10.2014.

I direct the District Judge of Colombo to proceed to trial forthwith and answer all issues raised in this action at the end of the trial taking into consideration the legal position set out above.

Appeal partly allowed. Parties shall bear their costs.

**JUDGE OF THE SUPREME COURT**

**Kumudini Wickremasinghe, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**Menaka Wijesundera, J.**

I agree.

**JUDGE OF THE SUPREME COURT**