

(1987) 06 BOM CK 0007

In the Bombay High Court

Case No : Notice of Motion No's. 1738 of 1985, 2254 of 1986 in Miscellaneous
Petition No. 570 of 1980

Bengt Ingmar Eriksson

APPELLANT

Vs

Jamnibai Sukharya Dhangda

RESPONDENT

Date of Decision : 08-06-1987

Acts Referred:

Guardians and Wards Act, 1890 — Section 2, 4, 6, 7, 8

Citation : (1987) 89 BOMLR 263

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.L. Pendse, J.—Very unusual and unprecedented circumstances have given rise to filing of these two motions, and the complex issues arising there from are required to be answered not only by purely legal approach but with human considerations and bearing in mind welfare of two minor girls. The facts to be stated in hereafter would unfold the traumatic experience suffered by innocent people involved in this episode and would also highlight the precautions which must be taken before declaring a child as "destitute" under the provisions of Bombay Children Act, 1948.

2. Jamnibai is a resident of Village Chulane in Bassein Taluka of Thane District, and she was residing there with her husband and two minor daughters Gulab and Laxmi. Both Jamnibai and her husband were working as labourers collecting fire-wood from the nearby forests. Gulab was born on January 12, 1975, while Laxmi on January 2, 1979. On March 19, 1980 Jamnibai with her husband left for work early in the morning leaving the two minor girls in the house along with their third child, a 12 year old boy. Jamnibai returned back from her work late in the evening and found that the two minor daughters were missing from the house. Jamnibai carried the search in the village and round about, but was unable to trace the two girls, and thereupon on the next day lodged missing report No.

10/80 with the Bassein Police Station. On March 20, 1980 at about 6.45 P.M. the two girls were found by a police constable attached to Gamdevi Police Station at Nanachowk, a place near Grant Road Railway Station in Central Bombay. The constable found the girls crying on the street and thereupon removed them to the police station at about 8 P.M. The girls were then sent to Remand Home at Dongari. On March 21, 1980 the two girls were produced before the Metropolitan Magistrate, Juvenile Court, Umerkhadi in accordance with Section 40 of the Bombay Children Act, 1948. The Magistrate directed that the girls should be kept in the Remand Home. The elder girl on being interviewed in the Remand Home stated that she hails from Bassein and the other girl was her sister. The elder girl also disclosed their names to the authorities of the Children Home. On March 27, 1980 the girls were shifted to Additional Observation Home at Mankhurd, Bombay. The photographs of the two girls were taken in Man-khurd Observation Home and on June 4, 1980 the girls were sent to Bassein to ascertain whether their parents could be traced. A report was made on the next date that it was not possible to trace the parents at Bassein.

3. In the meanwhile, Jamnibai with the assistance of D'Souza, a Social Worker in the village, inserted an advertisement in the local news-paper at Bassein about the missing girls, and also forwarded a letter to the District Superintendent of Police, Thane intimating about the missing of her two daughters.

4. From March 20, 1980, the date on which the girls were found by the constable of Gamdevi Police Station, both the girls were produced before the Juvenile Magistrate from time to time and were detained in the Observation Home at Mankhurd. On June 5, 1980, Mrs. Mrudula Rao, who is employed as a representative by the Family Association for Inter-country Adoption incorporated in Sweden, approached Juvenile Court for permission to ascertain whether any child in the Remand Home could be offered for foreign adoption and on permission being granted, selected Gulab and Laxmi for being considered to be given in foreign adoption. Mrs. Rao thereafter, as constituted attorney of one Lidrot of Sweden, filed Miscellaneous Petition No. 365 of 1980 for appointment as guardian of Gulab in accordance with provisions of Section 9 of the Guardians and Wards Act, 1890, Miscellaneous Petition No. 452 of 1980 was filed by Mrs. Rao on August 20, 1980, as constituted attorney of one Eriksson of Sweden for being appointed as guardian of Laxmi. The necessary documents in support of the claim in the two applications were filed. Miscellaneous Petition No. 365 of 1980 was dismissed by a single Judge of this Court on September 17, 1980 on the ground that Gulab and Laxmi were siblings and they should not be separated. Miscellaneous Petition No. 452 of 1980 was withdrawn on September 2, 1980. Prior to this date, on August 4, 1980 the Juvenile Court had passed order declaring both the girls to be destitute u/s 45 of the Bombay Children Act.

5. Mrs. Rao, as constituted attorney of Bengt Ingmar Eriksson of Sweden, filed Miscellaneous Petition No. 570 of 1980 on October 8, 1980 for appointment as guardian of both the minor girls with a view to eventual adoption. Mr. Eriksson

and his wife filed requisite papers expressing their desire to adopt both the girls. Application made by the proposed guardian was supported by Social Welfare Committee of Skurup, Sweden, the place where Mr. Eriksson was residing with his wife. The proposed guardian also produced other requisite documents to substantiate the desirability of his appointment as guardian. In accordance with the Rules framed by this Court, a notice of this application was given to the representative of Indian Council of Social Welfare and on December 15, 1980 the Indian Council of Social Welfare filed their representation expressing some reservation about the proposed appointment. After considering the representation, a single Judge of this Court allowed the petition on December 17, 1980 and granted leave to remove the two girls to Sweden. In pursuance of the order passed by this Court. Mr. Eriksson furnished the requisite bond and thereafter an application was made to the Juvenile Court to hand over custody of the two girls. The custody was handed over on February 10, 1981 and Mr. Eriksson with his wife and two girls reached Sweden on February 21, 1981. On February 26, 1981 the Juvenile Court disposed of the two cases in respect of the two girls and numbered as Case Nos. 859/J/80 and 860/J/80.

6. On July 7, 1981 the Court-house of Ystad granted permission for adoption of both the girls in favour of Mr. Eriksson and his wife, and that decree of adoption has become final. The Swedish Department of Immigration granted the adopted children Swedish Citizenship on August 3, 1981 and on being adopted Gulab and Laxmi were granted Swedish names of Anna and Sofia respectively. The Swedish authorities forwarded the follow-up report to Indian Council of Social Welfare as per the requirement of this Court. In the meanwhile Jamnibai was continuously making efforts from March 20, 1980 onwards to trace the two daughters and in the beginning of the year 1982 D'Souza, the Social Worker, reached Additional Observation Home, Umerkhadi and made inquiries about the two girls. On February 15, 1982, the Remand Home at Umerkhadi informed D'Souza that both the girls were transferred to the Observation Home at Mankhurd. Jamnibai made inquiries at Mankhurd and then made an application on February 25, 1982 to the Juvenile Court claiming custody of the two girls. The application filed by Jamnibai was disposed of by the Juvenile Magistrate expressing inability to hand over the two girls as they had already left for Sweden in pursuance of the order passed by the High Court. For a period of about two years thereafter no steps were taken by Jamnibai but on October 31, 1984 Jamnibai's advocate addressed a letter to Indian Council of Social Welfare seeking information about the two girls. Almost a year thereafter on September 4, 1985 Jamnibai took out Notice of Motion No. 1738 of 1985 claiming that she should be added as a party respondent to Miscellaneous Petition No. 570 of 1980 in which Mr. Eriksson was appointed as guardian and was permitted to take the two girls to Sweden for eventual adoption. Jamnibai also prayed for reopening the matter and for setting aside the order passed in favour of Mr. Eriksson. The principal relief claimed was directing Mr. Eriksson to produce and hand over the two girls, to the mother and natural guardian. Jamnibai also sought an interim relief for direction that the two girls

should be brought down to Bombay and for arranging a meeting with the natural parents. Notices were issued to the adopted parents in regard to the relief claimed by Jamnibai and in answer Mrs. Kerstin E. Christiansson, Executive Officer of the Family Association for Inter-Country Adoption, Sweden, filed her affidavit sworn on February 25, 1987 resisting the relief. Mr. Eriksson also filed affidavit pointing out the reasons why interim order should not be passed. In support of the claim, reliance was placed on reports of the school where the girls are studying and the reports of the Social Welfare Association and of Pro. Cederblad. Head of Clinic, Professor of Child and Adolescent Psychiatry, University of Lund. It was also pointed out that on March 29, 1984 the adoptive parents had taken mutual divorce on the ground of incompatibility and by the order of the Swedish Court the elder girl is given in the custody of the adoptive father, while the younger one remains with the adoptive mother. After separation, the adoptive parents are residing separately in the same village and at a distance of 100 metres and both the girls meet each other and their parents every day and are reading in the same school.

7. On March 5, 1986 a single Judge of this Court directed that the adoptive parents should at their own costs bring the children to Bombay on June 16, 1986 and lodge them at a suitable place. The children were to be kept in Bombay for a minimum period of three weeks and during which the natural parents were given access during day time. The order also provided that if the children so desire they should be kept in Bombay for as long as they like but not beyond their school vacation. The single Judge also directed that the Indian Embassy in Sweden should contact the children and try to make them familiar with Indian dialect preferably Marathi and failing which Hindi, in order to enable them to communicate with their natural parents. Mr. Eriksson filed Appeal No. 335 of 1986 challenging the correctness of the order, but the appeal was dismissed with some variation by order dated April 29, 1986.

8. Mr. Eriksson communicated the order of this Court to the Social Welfare Committee of the Municipality of Skurup and by orders dated April 22, 1986 and May 30, 1986 opinion was given that the children should not be removed as they are living under great mental pressure and feel uncertain of the future and afraid of losing their Swedish parents. It was also opined that the girls were showing symptoms of anxiety and nervousness and it was extremely important for them to be allowed to remain in settled and secured conditions with their adoptive parents in Sweden. It was also opined that visit to India would be positively harmful to their mental health and therefore the Social Committee opposed the demand of removing the children from Sweden and bringing them down to Bombay. The Social Welfare Committee held that in case the adoptive parents considered carrying out the directions of this Court, then the children would be required to be taken in care, in accordance with the law making special provision concerning the care of young people and would be placed in other private home or in a community home. In view of the fiat issued by the Social Welfare Committee adoptive parents did not comply with the interim order passed by this

Court, but took out Notice of Motion No. 1801 of 1986 on August 12, 1986 for cancellation of the interim order. The motion was disposed of by a single Judge by order dated December 3, 1986 directing that the adoptive parents may explain their failure to comply with the order in case contempt proceedings are adopted by Jamnibai. Jamnibai in the mean-while on November 5, 1986 took out Notice of Motion No. 2554 of 1986 for adopting contempt proceedings against Mr. Eriksson and his constituted attorney Mrs. Rao. Both these motions are now posted before me for final hearing and disposal and very able arguments were advanced by Ms. Jaising and by Mr. Parekh in support of their respective claims.

9. Ms. Jaising submitted that the order passed by the Juvenile Court declaring the two girls as destitute is clearly bad and was passed under a mistaken impression and therefore cannot be sustained, and so also the subsequent order passed by the High Court appointing guardian under the Guardians and Wards Act, 1890. The order appointing Mr. Eriksson as guardian should be quashed, says the learned Counsel, and both the girls should be brought back in accordance with the undertaking given by the guardian and handed over to the natural mother. The learned Counsel submitted that even though the girls are adopted in Sweden in accordance with the Swedish law, it may be possible for the natural mother to adopt proceedings in Swedish Court for setting aside the decree of adoption, once the order appointing Mr. Eriksson as guardian is quashed. It was also contended that even assuming that the order appointing guardian cannot be set aside, still the direction should be issued to the adoptive parents to teach an Indian language to the girl so as to enable them to have regular contacts with the natural parents. The learned Counsel made it clear that it is not possible for the natural mother to travel over to Sweden but taking into consideration the fact that the girls were lost for no fault of the natural mother direction should be given for having regular access to the girls. Shri Parekh, learned Counsel appearing on behalf of the adoptive parents, on the other hand urged that the adoptive parents were not responsible for passing of order of destitute by the Juvenile Court and indeed the adoptive parents are totally innocent and are not responsible for anything that transpired prior to the order passed by the Juvenile Court, and were not even aware of the existence of the natural parents till filing of these motions. Shri Parekh submitted that the order appointing guardian is no longer of any effect as the girls are already adopted under the Swedish laws and those decrees of adoption cannot be set aside by this Court. The learned Counsel further submitted that both the girls are now Swedish nationals and cannot be compelled to be brought back and the Swedish authorities have restrained the adoptive parents from removing them from the jurisdiction of Swedish courts. The Swedish law does not permit setting aside adoption decrees. It was also contended that welfare of the children should be the dominant factor and the material produced on record indicates that order to bring back the girls would destroy their welfare and therefore such order should not be passed after lapse of several years. Shri Parekh very fairly stated that adoptive parents are willing to permit some contacts of natural parents with the

girls, but any such scheme should be a voluntary one and this Court should not issue directions as to which language should be taught to the girls when the adoption has become final and it is the discretion of the adoptive parents and the Social Welfare Authorities of Sweden to determine what is best in the interest of the children.

10. Apart from the question whether it is permissible in law to compel the adoptive parents to bring back the children to this Country, it is necessary to examine whether such an order should be passed on the facts and circumstances of the present case. It is not in dispute that adoptive parents are not responsible for anything that transpired prior to passing of the order by the Juvenile Magistrate declaring both the girls; as destitute. The question as to what precaution should be taken by the Juvenile Court before declaring a child as a destitute will be dealt with in the later part of the judgment, but it is sufficient to state at this juncture that neither the Juvenile Magistrate nor this Court while passing the order appointing Mr. Eriksson as guardian of the two girls were aware of the existence of the natural parents. A guardian would not have been appointed if either the Court or the representative of Indian Council of Social Welfare were conscious of the fact that the natural parents were searching for their missing daughters. It is also necessary to bear in mind the fact that considerable time has lapsed from the date when the two girls went to Sweden and are adopted and both the girls are used to different life than one they were living in India. The girls were hardly five and three years old at the time of proceeding to Sweden and more than six years have lapsed from that date. The submission that the natural mother has a legal right to the custody of the children and that right cannot be deprived for any reason whatsoever cannot be accepted. It is now well settled that whenever a question arises before the Court pertaining to custody of a minor child, the matter has to be decided not on considerations of legal rights of parties, but on the sole and predominant criteria of what would best serve the interest and welfare of the minor. Reference can be usefully made in this connection to the decision in *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*. In a civilized society the importance of child welfare cannot be overemphasized, because the welfare of the entire community, its growth and development depend on the health and well-being of its children. The House of Lords in the decision reported in *J. v. C* [1970] A.C. 669 observed that parental rights are not absolute and remain qualified when the question of total welfare of the child arises. The dominant matter for consideration of the Court is always the welfare of the child. The word "welfare" must be understood in its widest sense and is not to be measured by money only not by physical comforts. The Court cannot sacrifice child's welfare to the fetish of parental authority by fearing child away from happy and comfortable home of an adoptive parents only with a view to establish the legal rights. A reference can be usefully made in this connection to two English cases. In the decision in *In re E. (D) an infant* (1967) Ch. Div. 761 a girl was born in United States of America in the year 1959 and the parents were both American citizens. The mother obtained a divorce in the year 1960

and the custody of the minor girl was given to the father in the year 1962 on the ground that mother was not fit and proper person to have custody. In the year 1965 the mother married again and went to live at a distance of about 3000 miles from where the child lived with the father. Within a few months the father was killed in a motor accident and the child was removed surreptitiously by her aunt to England. The child was removed in spite of an order by the American Court restraining removal of the child from United States. The mother followed the child to England and the aunt filed proceedings in English Court restraining the mother from removing the child from her custody. The trial Judge held on evidence that it would be disastrous to the ward to take her away from her aunt, with whom she had built up a good relationship and had settled down happily, and that she should continue to be brought up in England in the care and control of the aunt. The appeal preferred by the mother was dismissed holding that the English Court should pay regard to the orders of the proper foreign court unless satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. The Appeal Court upheld the order of retaining custody with the aunt by holding that the welfare of the child demands that she should remain in custody of her aunt in England even though the aunt was guilty of removing her from the jurisdiction of the American Court in spite of the restraint order.

11. The other decision is of House of Lords in *J. v. C.* (supra). In the case before the House of Lords, the infant, a boy, was born in England out of Spanish parents in May 1958 and because of mother's illness was taken care of by English foster parents. The natural parents returned to Spain in February 1960 and the child went with them, but as his health suffered the natural parents requested that the child should be returned to England and stay with foster parents for indefinite duration. After a couple of years, natural parents asked for the return of the child and the foster parents sought an order for keeping custody, care and control of the infant. The trial Judge held that it was for the welfare of the child to remain in England as the foster parents had a good home and happy and united family with which the infant had become well integrated. The appeal was dismissed with the observation that the growing experience has shown that serious harm will be caused even to young children by change in custody. The child's future, happiness and sense of security are always important factors and the effect of a change of custody requires close and anxious attention. It was also observed that in case of a happy and normal infant, general evidence of the psychiatrist on the change of custody may be valuable and can be used to support the general knowledge and experience of the Judge.

12. It is, therefore, necessary to closely examine whether the welfare of the children demands that they should be brought back from Sweden and handed over to the natural parents. After institution of the present notice of motion, this Court requested Social Welfare Committee in Skurup to forward a report about the up-bringing of the two girls, and accordingly the Skurup Municipal authority forwarded the report on January 14, 1986. The report, inter alia, discloses that from the time of the arrival of the two girls in Sweden on February 21, 1981 a

strong attachment was found between the mother and Sophia and between the father and Anna. The two girls live in close proximity and see each other daily. Both the girls attend the same school and during week ends and holidays stay overnight at one or the other home. The girls have fully adjusted to living in Sweden with the values and mode of living prevalent there. Both have formed many friendship and have spare time interests. Sophia does not remember anything of India as she was too young when she left the country; while Anna remembers her childhood home, but has no clear recollections of her natural family and does not remember the names of her parents or brother. Anna has lost the language and only remembers occasional words. The school report prepared by the school teacher of Rydsgard School on November 15, 1985 indicates that both the girls are cheerful and have adjusted with the environments. Professor Marianne Cederblad, Head of Clinic, Professor of Child and Adolescent Psychiatry, University of Lund, in his certificate dated February 19, 1986 given after examination of the two girls, has certified that the younger girl is of normal intelligence and shows stable personality, well adjusted at home and in school with good peer-relations and is totally integrated in the present family with no recollections of her time in India. As regards the elder girl, the Psychiatrist has opined that she has certain neurological handicaps which can be best treated and compensated in her present family and school and which will not cause any development problem in Sweden, but could make readjustment to Indian living conditions very difficult. The Psychiatrist observed that to repatriate the girls to Indian family would mean a severe emotional trauma leaving a beloved adoptive family for a family of origin, which consists of total strangers living in extremely different living circumstances. The Psychiatrist felt that though the girls are emotionally stable and of normal intelligence, shifting to another country may cause irreparable harm to their further development. Apart from these reports it is obvious that the girls are settled in Sweden for more than six years and are well assimilated and integrated in the new environments and after such a duration it may be difficult for the grown-up girls to get acclimatized to new surroundings in different land. Both the girls are now attached to the adoptive parents and to separate them from their adoptive parents would cause serious psychological problems not only to the children but to the parents who have developed love and affection for the adoptive children. The affidavit dated February 25, 1986 sworn by Mrs. Christiansson, the Executive Officer of the Family Association for Inter-country Adoption, indicates that both the girls are desirous of living in Sweden with their adoptive parents and do not desire to come to India as they are afraid of what may happen to them as they are unable to speak Indian language and can converse only in Swedish and French languages. In my judgment, having regard to all the circumstances including the time interval, it is in the interest and welfare of the girls that they should continue to have their status of adoptive children and to live in Sweden in their adoptive homes. Removing the children from the adoptive home would cause serious psychological problems and would be detrimental to the interest of the minors and would destroy their welfare.

13. I am conscious that the decision would make the natural mother very sad and I cannot refrain from expressing my sympathy with the mother who has fought valiantly to recover care and control of her daughters. I have no doubt that in the course of doing so she has subjected herself to great deal of expenses and hardship and I feel sympathy all the more because it is not possible to make provision for regular access in view of the language difficulty, totally different culture, and geographical distance of the place where the mother resides and the children reside. In spite of the sympathy which I feel for the natural mother, I have no hesitation in concluding that the effect of removing the girls from the care and control of the adoptive parents would lead to disastrous consequences and that must be avoided. In my judgment, therefore, it is not in the interest of the children to grant relief sought in the motion.

14. It is also not possible to grant the relief because the two girls are no longer Indian nationals but have acquired Swedish nationality after passing of the adoption decrees by the Swedish Court. Chapter 4 of "Parenthood and Guardianship Code", which is the existing law in Sweden, deals with the subject of "adoption" and Section 6 prescribes that the Court shall examine whether the adoption can suitably take place before the permission is granted. The Court has to satisfy that adoption is for the benefit of the child. Section 8 prescribes that the adoptive child shall be considered as if it was the adopter's child and not as a child of its biological parents. On adoption the adopter is responsible for the care, guardianship and maintenance of the child. The adopted child also secures the right of inheritance. The two girls are adopted in accordance with the provisions of Swedish laws and the Court has approved the adoption by order dated July 7, 1981. The Emigration authorities have granted Swedish citizenship to the two girls. In view of these developments it is not possible for this Court to have any control over the two girls and it is not permissible to pass any order directing Mr. Eriksson, a Swedish national to bring back the two girls who are also Swedish nationals to this country. Any order passed by this Court cannot be enforced and would not bind a Swedish national. An adoption order vests the parental rights and duties relating to a child in the adopters and extinguishes old rights and duties so far as they are vested in any other person. The adoptive child is treated in law as if he had been born to the adopters in wedlock. Adoption affects status, and traditionally the law of the domicile has a paramount controlling influence over the creation of status. On adoption decree being passed, the rights of care and custody in respect of the two girls will be determined by the law of their domicile and that is the Swedish law. The Swedish authorities were fully conscious of this position and therefore when the: interim order was passed by this Court calling upon Mr. Eriksson to bring the two girls to Bombay for having a meeting with their natural mother, the Social Welfare Committee of the Municipality of Skurup opined that for the sake of children's mental health and because of the risk of long term effects it is not advisable to disturb the settled and secured conditions of the girls in Sweden and in case the adoptive parents considered carrying out the directions of the High Court of

Bombay, then the Social Welfare Committee of the Municipality would consider whether the children need to be taken into care in accordance with the law making special provision concerning the care of young people and placed in another private home or in a community home. In other words, an injunction was issued restraining the adoptive parents from removing the two girls outside the jurisdiction of the Swedish Court. Care of Young Persons (Special Provisions) Act was published on June 19, 1980 after approval by the Swedish Parliament, and inter alia, provides that care should be provided to persons under age of 18 if necessary care cannot be given to such persons by those who are having custody. Section 2 prescribes that orders for placing young persons under care are issued by the country administrative court of appeal at the instance of the Social Welfare Committee. The Social Welfare Committee of Municipality of Skurup would have taken custody of the two girls in accordance with provisions of law in case the adoptive parents had submitted to the interim order passed by this Court. It is, therefore, obvious that it is not possible in law for this Court to exercise jurisdiction in respect of custody of the two girls.

15. Ms. Jaising submitted that the adoptive father had given undertaking to this Court, at the time of passing of the order appointing him as guardian, that the minor girls would be repatriated to India as and when it becomes necessary, and accordingly surety bond was executed in favour of the Protho-notary and Senior Master. The bond furnished is in the sum of Rs. 15,000/-and recites that the petitioner would repatriate the minor to India by air, if it becomes necessary for any reason to do so. The learned Counsel submitted that it is open for this Court to enforce this undertaking and direct repatriation of the two girls. It is not possible to accept the submission of the learned Counsel, because the undertaking cannot be availed of after passing of decree of adoption by the Swedish Court". The undertaking could have been enforced as long as the girls were not adopted in accordance with the Swedish law and continued to be Indian citizens. Once the girls become Swedish nationals and were duly adopted, then the undertaking to repatriate them comes to an end and cannot be enforced.

16. In my judgment, both in law and on account of the welfare of the children, it is not possible to pass order directing the adoptive parents to bring back the two girls to Bombay. Adoption of children in a foreign country and appointment of a foreigner as a guardian with the ultimate aim of taking the child in adoption is now an accepted practice in this country, and the Supreme Court in the decision in *Lakshmi Kant Pandey v. Union of India* [1984] AIR S.C. 469 has prescribed several measures to guard against any exploitation in the destitute. Indeed foreign adoption of children is approved as it provides the children opportunity to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and as the child would be able to realise full potential of growth. The children are settled in foreign countries after a foreigner adopts the children according to law of that country and thereafter there is a close bond between the adopter and the adoptive child. In case the adoption is challenged and set aside after a considerable period, that too when the adopter is not at any

fault, then such action would discourage the people from taking children in adoption. Irrespective of the fact whether a child is adopted in the foreign country or in this country, the Court should be extremely reluctant and slow in either setting aside the adoption or ignoring it as it would lead to serious consequences both to the adopter and the adoptive child. The Court may exercise the jurisdiction in exceptional cases where it is established that the adoption is secured by fraud or misrepresentation and such fraud and misrepresentation is at the instance of the adopter. In all other cases it is desirable that the Court should decline to exercise jurisdiction. Any other view of the matter would keep the sword hanging over the head of the adopter for all time to come and would certainly discourage the people from taking any child in adoption and that would cause, serious hardship to innocent children who are destitute or abandoned. For these reasons I am not inclined to grant relief to the natural mother.

17. I am also not inclined to issue any direction to the adoptive parents in respect of up-bringing of the daughters or making them learn any Indian language. It would not be fair to give directions to the adoptive parents when the custody of the children was handed over to them after being satisfied that the adoptive parents are fit persons to look after welfare of the children. It is also not proper to give directions which cannot be enforced by this Court. In my judgment, it would be appropriate to leave it to the good senses of the adoptive parents to determine whether the girls should maintain any contact with the natural parents and in what form. The adoptive parents should determine this aspect of the matter in consultation with the Social Welfare Committee of Sweden and Shri Parekh assures me that the needful would be done.

18. Notice of Motion No. 2554 of 1986 was taken out by the natural mother on November 5, 1986 requesting that contempt proceedings should be adopted against Mr. Eriksson for non-compliance with the interim order passed by this Court. A prayer was also made that in the alternative contempt notice should be issued against Mrs. Rao, the Constituted Attorney for Mr. Eriksson, for non-compliance with the order. In my judgment, it is not possible to take any action under the Contempt of Courts Act against Mr. Eriksson for more than one reason. In the first instance Mr. Eriksson is a Swedish national and is not available to the jurisdiction of this Court. Secondly, it is not possible to hold that Mr. Eriksson has deliberately flouted the interim order passed by this Court. As mentioned hereinabove, the Social Welfare Committee of Municipality of Skurup had issued a proclamation on April 22, 1986 and May 30, 1986 that the two girls should not be removed from the jurisdiction of the Swedish authorities and any attempt in that respect would lead to taking over the care and custody of the children under the provisions of Care of Young Persons Act. In view of the fiat issued by the Social Welfare Committee, Mr. Eriksson could not have complied with the interim order passed by this Court. In deed Mr. Eriksson took out Notice of Motion No. 1801 of 1986 for cancellation of interim order in view of the proclamation issued by the Swedish authorities. Thirdly, after careful examination of all the facets of

the matter, it is found that it is not in the interest of the children to be brought down to Bombay. In these circumstances, in my judgment, it is not proper to initiate any action against Mr. Eriksson under the provisions of the Contempt of Courts Act. No action can be initiated against Mrs. Rao, who merely acted as a constituted attorney of Mr. Eriksson at the time of filing of the petition for appointment as guardian. The interim order passed by this Court has to be carried out by Mr. Eriksson and in any view of the matter Mrs. Rao cannot be held liable for having committed contempt of the interim order. In my judgment, the proceedings adopted for taking action under the Contempt of Courts Act are misconceived and the motion is required to be dismissed.

19. The facts disclosed in these proceedings would make it clear that more precautions are required to be taken before declaring a child as a destitute under the provisions of the Bombay Children Act, 1948. The Bombay Children's Act, 1948 received assent of the Governor General on December 23, 1948 and was enacted to consolidate and amend the law for the custody, protection, treatment and rehabilitation of children in the State of Maharashtra. The expression "child" has been defined u/s 4(e) and means a boy who has not completed the age of sixteen years or a girl who has not completed the age of eighteen years. The State Government is required to establish one or more Juvenile Courts for any local area u/s 7 of this Act, and Section 9 prescribes that where a Juvenile Court has been established for any local area, such court should try all cases and proceedings arising under the Act, The State Government in pursuance of the powers conferred under this Act has established Juvenile Court at Umerkhadi for the local area of Bombay city. The State Government has also established institution for reception of children and those are known as approved centers and approved institutions, and observation homes. The State Government appoints various officers dealing with the child welfare, such as Probation, Placement and Liaison and Case Work. Part V of the Act deals with "measures for the care and protection of destitute and neglected children etc.". Section 40 prescribes that any police officer may bring before the juvenile court any person who in his opinion is a child and who (a) has no home or is found wandering without any settled place of abode and without visible means of subsistence, or is found begging or is found doing for a consideration any act under circumstances contrary to the well-being of the child; or (b) is destitute or is illegitimate without means of subsistence, other than that of charity or has no parent or guardian.... Section 44 prescribes that the Court before which a child is brought u/s 40 shall examine the police officer or the person who has brought the child and record the substance of such examination and send the child to an observation home for further inquiries. Sub-section (2) of Section 44 prescribes that on the date fixed for the production of the child or for the inquiry or on any subsequent date to which the proceedings may be adjourned, the Court shall hear and record all evidence which may be adduced, consider any cause which may be shown as to why an order committing the child to a classifying centre or to the care of a fit person should not be passed. Sub-section (1) of Section 45 enables the Juvenile

Court to order the child to be committed to a classifying centre until the child, if a boy, completes the age of 18 years and if a girl age of 20 years.

20. In this city a large number of children, either illegitimate or abandoned by their parents out of poverty or kidnapped by unsocial elements are found on the road and on most occasions these children are of a tender age and are not able to give any information about their parents to the Juvenile Court. Normally the children found wandering on the streets are taken in custody by the police constables and produced at the police station. The experience shows that a large number of children are found missing from the residence their bread and the children are left unattended due to lack of help from relations. The parents on realisation that the child is missing, approach the police station and lodge a missing report, but it is not uncommon that such reports are not properly attended to, as has happened in the present case. The parents, and more so in case of poor parents, run from place to place to find out their missing children, but it is almost impossible to trace the children in a large city and more so if the children are brought to the city from outside. It is required to be emphasised that the police authorities should take more interest in dealing with the missing children and should make more efforts to find out their parents. It is the duty of the State Government to issue directions to all the police officers and all the police stations in the city to maintain appropriate record and give wide publicity to the fact of children being found on the road, so as to enable the unfortunate parents to get back their child's custody. It is desirable that the State Government should immediately issue the following instructions to the police authorities in the State.

(a) A separate register of missing children should be maintained at each police station;

(b) An entry should be made immediately on production of any missing child at the police station and the child's photograph is kept in the register;

(c) Copies of the entries in the register with the copies of the photograph should be forwarded at the end of each month by each police station to the office of the Commissioner of Police in Greater Bombay and a central register should be maintained at the office of the Commissioner of Police. In the mofussil the copies should be forwarded to the office of the District Superintendent of Police and a central register each District Head Quarters should be maintained;

(d) The State Government should give wide publicity to the fact of recovery of the missing children in local news-papers, on the radio and on the television. This information shall be given within a period of 15 days from the date of production of the child before the Juvenile Court.

In case these directions are carried out with utmost seriousness, then occasions would not be repeated when in spite of the complaint lodged about the missing child the police authorities fail to trace the children and fail to give any assistance to the unfortunate parents. In case the directions are scrupulously enforced by

the State Government, then the parents would be able to go to a central place where the registers are maintained and would be able to secure the custody of their children. I hope and trust that the State Government, would take immediate action to carry out the directions in respect of maintenance of registers and giving wide publicity through public media about the missing children.

21. It is also necessary to give directions to the Juvenile Courts which are authorised u/s 40 of the Bombay Children Act, 1948 to determine whether a child is destitute. It is necessary that the Juvenile Court takes absolute care before committing the child to a classifying centre as prescribed under Sub-section (1) of Section 45 on the basis that the child is destitute within provisions of Section 40 of the Act. The provisions of Section 7 of the Guardians and Wards Act, 1890 enables the Court to appoint a guardian of the person of a minor on being satisfied that it is for the welfare of the minor. In respect of appointment of foreigner as a guardian with the view to ultimately enabling the foreigner to adopt the child, orders are passed by this Court and in case the child is detained in remand or observation home, then the order is passed only after the Juvenile Court certifies that the minor is a destitute. The expression "destitute" is not defined under the Bombay Children Act. The dictionary meaning is "without resources, in want of necessities". The child is considered destitute when the parents are not known and the child is found wandering without any settled place of abode and without visible means of subsistence. In large number of cases, which come before the Juvenile Court, the children are very tender in age and are unable to furnish information about their parents or their place of abode. It is, therefore, absolutely necessary that Juvenile Court exercises jurisdiction with utmost care before declaring the child as destitute. Even if a missing child is unable to information about his parents, it is necessary that the Magistrate should make detailed inquiry to ascertain whether parents could be traced. The Juvenile Court should permit reasonable time to expire before declaring a child as destitute and it would be proper, if such declaration is made only after lapse of a period of three months from the date of production of the child before the Juvenile Court. The period of three months would be enough for the police to trace the parents and during this period the State Government should give wide publicity in the public media about the fact of missing child and that would enable the parents to trace back the child. It is also desirable and the Juvenile Court must follow the practice of interviewing the child before proceeding to pass order declaring the child as destitute. It is true such interview is not possible in case where the child is unable to communicate, but when the child is able to communicate then the Juvenile Court should not merely rely upon the reports made by the police officer or by the Social Welfare Officer, but should personally interview the child to find out whether the parents could be traced. The experience indicates that the record maintained by the Juvenile Court while exercising powers u/s 40 and 45 of the Bombay Children Act is in most slipshod manner and that practice deserves to be deprecated. The proceedings before the

Juvenile Court are not contested proceedings, but seriously affects status of the child and therefore the Juvenile Court shall keep the proper record and the Roznama should indicate why the proceedings are postponed and set out briefly what steps are taken to trace the parents. The order declaring the child as destitute seriously affects the future of the child and therefore the Juvenile Court should pass a reasoned order setting out the efforts made to trace the parents or any other relations and also whether the child was able to furnish any information in that respect. The Juvenile Court may also consider whether social agencies can be associated for ascertaining whether the missing child is taken away from the custody of the parents without their knowledge and whether it is possible to restore the child to the natural parents. Ms. Jaising submitted that there are two or three recognised social agencies in Bombay and these agencies would be happy to associate with the working of Juvenile Court in respect of the children who are found homeless or whose parents could not be traced. The Juvenile Court should take assistance of such social agencies, in case the social agencies are voluntarily willing to come forward to help the court in determining the future of the child.

22. For the reasons recorded hereinabove, both the Motions are dismissed, but without any order as to costs.

23. A copy of this judgment should be forwarded to the Social Welfare Department of the Government of Maharashtra for necessary action and also to the Juvenile Courts in the State of Maharashtra, and to Indian Council of Social Welfare.