

(1982) 07 BOM CK 0019

In the Bombay High Court

Case No : Misc. Petition No"s. 28, 29, 86 and 178 etc. of 1982

In Re: Giovanni Marco Muzzu and etc. etc.

Date of Decision : 22-07-1982

Acts Referred:

Guardians and Wards Act, 1890 — Section 3, 9(1)

Citation : (1983) 85 BOMLR 106 : (1983) MhLj 607

Hon'ble Judges : Lentin, J

Bench : Single Bench

Advocate : B.D. Shenoj and C.D. Shenoj, for the Appellant; Indira Jaising, for the Respondent

Judgement

1. Is this Court to be the clearing house for the export of Indian children transported by devious means to his State from other States for the avowed purpose of being handed over in foreign adoption? That, bluntly put, is virtually the common question I must answer in these petitions. I do so by this common judgment.

2. The age of the minors offered for foreign adoption in these petitions range from 6 months to 8 years, five of them being under one year. All these children are born and are said to be abandoned in States other than the State of Maharashtra and were left in the care of institutions in those States, to wit, Karnataka, Gujarat and Andhra Pradesh, except in Miscellaneous Petition NO. 86 of 1982 where the minor is said to have been handed over at Andhra Pradesh to one Sister Mary Ella Stewart during he short visit to that State. Soon thereafter these institutions transferred these children ostensibly to certain institutions in Maharashtra, to wit, Norwegina Free Evangelical Mission at Jalgaon, Ishaprema Neketan at Poona, and Vimala Dermatological Centre, Catholic Nurses Guild and Missionaries of Charity at Bombay . The minor in Misc. Petition No. 86 of 1982 was also ostensibly transferred to the Catholic Nurses Guild at Bombay. However these institutions were deliberately and totally by-passed. Not for an instant were any of these minors kept at any of these institutions. They did not even arrive there. Nor were they intended to. The minor in Misc. Petition No. 86 of 1982 was

taken by Sister Mary Ella Stewart directly to her friend one Mrs. Sheela Agiar and kept at her residence at Bandra. The minors in the remaining petitions were brought to Bombay and were directly taken to Kindercare Centre of Shenoi Welfare Services (referred to hereafter as "the Shenoi Welfare Centre"), more of which later. Not less than 6 children (Misc. Petitions Nos. 29 of 1982, 234 of 1982, 265 of 1982, 296 of 1982, 400 of 1982 and 401 of 1982) were brought from the parent States to Bombay by the petitioners" learned advocate Mr. B. D. Shenoi himself. Shortly after minors were thus brought to Bombay , within periods ranging from 1 day to 3 1/2 months the present guardianship petitions were filed, except Misc. Petition No. 401 of 1982 where the minor was brought to Bombay on 13th July 1980 and the present petition was filed on 16th June 1982 after an earlier petition in respect of the same minor (Misc. Petition No. 439 of 1980) filed on 19th August 1980 was dismissed on 17th September 1980 and the appeal against the dismissal was withdrawn on 27th April 1982. Such are the undisputed facts touching the present preliminary issue which I am called upon to decide, namely, whether this Court has the jurisdiction to entertain these petitions.

3. Relying on Section 9(1) of the Guardians and Wards Act, 1890, it was urged by the Indian Council of Social Welfare (referred to hereafter as "the Council") that this Court has no jurisdiction to entertain these petitions as the minors do not ordinarily reside within the jurisdiction of this Court. To the contrary was urged by the petitioners.

4. Section 9(1) of the Guardians and Wards Act reads as under :--

"If the application is with respect of the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides."

(Underlining is mine.)

On behalf of the Council it was contended that the minors do not ordinarily reside in Bombay , as they have been temporarily brought to Bombay from various States, merely and for the express purpose of being pushed forward abroad in foreign adoption. On the other hand, it was urged on behalf of the petitioners that the minors having permanently left their States of origin and having come to Bombay , must necessarily be considered to ordinarily reside in Bombay , with the result that this Court has the jurisdiction to entertain these petitions.

5. To start with, residence may be transitory or permanent. The former is residence simpliciter or casual residence. The latter connotes the place where for all practical purposes a person is expected to be ordinarily found. That is the place he is said to ordinarily reside. To that end, residence must be genuine and with intent to make the State one's home, Smt. Satya Vs. Shri Teja Singh, . It connotes more than a mere temporary stay Smt. Jeewanti Pandey Vs. Kishan Chandra Pandey, Mere physical presence may not necessarily be the place where a person ordinarily resides. For instance, a person ordinarily residing in a State A

may go for some time to State B, say, for pleasure, business, medical treatment or recuperation and reside there for the purpose. He cannot be said to ordinarily reside in State B despite his physical presence in that State for that avowed purpose. He would still remain ordinarily resident in his parent State. Thus casual residence though factual, cannot be clothed with the garb of ordinarily resident. At times, though not necessarily, both may mean the same as for instance, a person born and bred and residing in State A is resident and ordinarily resident in State A. At times, a person may reside in more places than one and yet not be ordinarily resident in any of them. It is the intention to make a State one's home that must make a person ordinarily resident in that State. Thus the facts and circumstances of each case must be looked into in order to ascertain whether a person can be said to ordinarily reside at a given place.

6. Now what are the facts and circumstances in the present matters. Indisputably the minors were brought from the various States to Bombay, not with the intention that Bombay should be their permanent home or for their rehabilitation in the State of Maharashtra. Indisputably, they were brought to Bombay for one solitary purpose, namely, to send them abroad in foreign adoption and that too within the shortest time possible. This is amply manifest from the following undisputed facts and circumstances.

(A) The petitioners' advocate in all these petitions Mr. B. D. Shenoji himself brought down to Bombay no less than 6 children, namely, five from Karnataka (Misc. Petitions Nos. 234 of 1982, 265 of 1982, 296 of 1982, 400 of 1982 and 401 of 1982) and one from Andhra Pradesh (Misc. Petition No. 29 of 1982). In response to my query whether he did so in his capacity as an advocate, he stated across the Bar that he did so in the capacity as a social worker. The children in the other petitions were brought to Bombay by persons connected with the institutions in the parent States except in Misc. Petition No. 86 of 1982 where the child, said to have been abandoned to Sister Mary Ella Stewart during her short visit to Andhra Pradesh, was brought down to Bombay by her.

(B) Though all these children were ostensibly transferred from the parent institutions outside the State of Maharashtra to the named institutions in Maharashtra, they were never admitted in or even arrived at those institutions in Maharashtra which were by-passed and were brought directly and kept at the Shenoji Welfare Centre at Mazgaon and in one instance (Misc. petition No. 86 of 1982) at the residence of one Mr. Sheela Agiar, a friend of Sister Mary Stewart who brought the child with her from Andhra Pradesh.

(C) No esquires were made either by the institutions in the parent States or the named institution in Maharashtra to whom the children were transferred as to why the children never arrived at the latter institution. The irresistible inference is that the institutions, namely both those in the parent State and this State were hand-in-glove to the children being unauthorisedly diverted to places other than where they were supposed to go, namely to the residence of Mrs. Agiar in Misc. Petition No. 86 of 1982 and to Shenoji Welfare Centre in the remaining cases.

(D) From social worker, the petitioner's learned advocate Mr. B. D. Shenoi Welfare Centre is a charitable trust registered on 27th September 1981 under the Bombay Public Trusts Act, 1950, one of its objects stated in the Deed, of Trust be "child welfare activities". To that end it runs a creche (public babynursery) in a flat admeasuring 1071 sq. fit. "Prasanna" at Mazgaon. Mr. B. D. Shenoi who is the owner of this flat is under a lease dated 23rd October 1981, said to have given this flat on lease from 23rd October 1981 to Shenoi Welfare Centre for 999 years at an annual rent of rupee one. The trustees of Shenoi Welfare Centre are Mr. B.D. Shenoi himself (founder-trustee), his college-going son (who Mr. Shenoi. informed maintenance across the Bar is also a social worker) and his daughter.

(E) Now the petitioner who are foreigners many thousand miles away, would require the service of a constituted attorney. Who better than Mr. B. D. Shenoi's college-going sons/social worker/co-trustee (Misc. petition Nos. 178 of 1982, 29 of 1982, 175 of 1982, 254 of 1982, 265 of 1982, 296 of 1982 and 346 of 1982), and Miscellaneous Petition Nos. 400 of 1982 and 401 of 1982 one Miss Hyacinth Correya, who Mr. Shenoi stated across the Bar is connected with his social activities, and in Misc. Petition No. 86 of 1982 the same Mrs. Sheela Agiar at whose residence the minor was kept by the same Sister Mary Ella Stewart after brining the child with her from Andhra Pradesh.

(F) Except in Misc. Petition no. 401 of 1982, within period ranging from 1 day to 3 1/2 months of the minors begin transported to Bombay and kept by Mr. B. D. Shenoi in what is virtually his own creche after by-passing the named institutions in Maharashtra to which the minors were transferred, Mr. Shenoi. B. D. Senior the advocate takes over and files the present petitions.

(G) In Misc. Petition No. 401 of 1982 the minor was brought down to Bombay on 13th July 1980. Thereafter Misc. Petition No. 439 of 1980 was filed in this Court on 19th August 1980 for his adoption by a foreigner,. That petition was dismissed on 17th September 1980. An appeal was preferred and was withdrawn on 27th April 1982. Thereafter on 16th June 1982 the present petition was filed for the adoption of the same minor to another foreigner.

7. These machinations and macabre circumstance set out in (A) to (G) above, can possibly leave no room for doubt that the inter-State transportation of these minors was not intended to rehabilitate them in this State or to make this State their home. This inter-State transportation of these minors was indisputably for the sole and avowed purpose of pushing them abroad in foreign adoption and in the shortest possible time. And to that end, their residence in Bombay in manipulated. These minors, victims of circumstance, are merely birds of passage in Bombay, passengers in transit to whom Bombay is just a transit camp and Shenoi Welfare Centre and in one case the residence of Mrs. Shella Agiar merely transitory place of Shelter. I document not suggest that those infants are not properly cared for, much less ill-treated in Shenoi Welfare Center by or Mrs. Agiar. Such in not even the council's grievance. What is disturbing and

objectionable is the modus operandi resorted to as is manifest from the circumstance (A) to (G) earlier whereby the minors are thus transport to Bombay with the intention of foisting jurisdiction on this Court by holding them out to be ordinarily resident in Bombay. Manipulated residence, and blatantly so in these cases, in Bombay cannot given the minors the Status of being ordinarily resident in Bombay or for that matter in Maharashtra.

8. It is also not without significance that while in the petition it is averred, and correctly so, that these minors residence in the State of Maharashtra, it is not averred that they thus ordinarily reside here,. This by itself shows that the learned draftsman Mr. B. D. Shenoï was alive to the different between residence and ordinarily residence as contemplated by Section 9(1) of the Guardians and Wards Act where the words "ordinarily resides" are advisedly used. Those words must be given their natural meaning and must be construed so as to advance the intention of the Legislature rather than impede it.

9. The residence of these minors in Bombay cannot be comparable with their being ordinarily resident here. They document not cease to ordinarily reside in the State from where they were transport merely by reason of their manipulated presence and transient stay in Bombay. Modus operandi can never confer jurisdiction which by such devious means is sought to be thrust on this Court. The admitted facts reveal a grisly pattern of event manifold in their diverse ramifications.

10. It is futile for Mrs. Shenoï, the learned Counsel appearing for the petitioner in Misc. Petition No. 178 of 1982 (Mr. B. D. Shenoï, the learned advocate appearing her arguments) to suggest that transporting the minors to Bombay from other State was done with good intentions so as to protect them from appealing living conditions and for other reasons which though stated in the various affidavits were mercifully not canvassed before maintenance and perhaps discreetly so. Purported good intentions can be no argument to circumstance the provisions of status and much less where such circumstance is attempted by resorting to a modus operandi. That is a fraud on the Court itself. There is nothing to indicate nor was it suggested that the adoptive parents are parties to the fraud. It lies elsewhere. And, thereby the Council and the accredited investigative agencies of these State are prevented from making effective enquires inter alia about the bona fides of the purported abandonment of these children. To equate nobility of purpose with what has the overtones of a well-organised and Lucrative business, is a mistake.

11. Mrs. Shenoï spoke warranty and at some length of the trouble and effort taken by Mr. Shenoï during his inter- State wandering in search of "suitable" children to be brought to Bombay for foreign adoption. I administration reminded of Sheidan's School for Saqandal -- Methinks the lady protest too much. And totally unnecessary for the purpose of the present enquiry.

12. It is futile for the petitioner learned Counsel to urge that the minors

ordinarily reside in Bombay as there was no intention of send them back to their parent State. It was also not intended to make Maharashtra or Bombay their permanent home or to rehabilitate them here. I must frankly confess my inability to appreciate the parallel sought to be drawn between these minors and cancer and other patients who come to Bombay for medical treatment. I fail to see how it can be seriously urged was it was, that by reason of their stay it hospital in Bombay, such patients become ordinarily resident in Bombay.

13. The reliance placed on behalf of petitioner on certain decisions is totally unwarranted in the facts and circumstance of the matters before maintenance. In *Ram Sarup Vs. Chimman Lal and Others*, it was held that when a person leaves his permanent place of residence to good with no intention of returning was goes to some other place to live. the latter place becomes his ordinarily place of residence. In *Kamla Vs. Bhanu Mal*, , it was held this the past abode for however long a period it may be, cannot be considered to be the place where the minors are residing. It *Harbans Singh Vs. Vidya Wanti*, it was held that where. for the purpose of the better education and welfare of the minor his mother sent him to Chandausi where he was put to school and looked after by his under, the minor must be considered to be ordinarily resident of Chandausi. In AIR 1941 43 (Privy Council) relied on behalf of the petitioners, it was held that the jurisdiction of the District Court u/s 9 is confined to infants ordinarily resident in the district and cannot extent to infants who had months previously left India for education in England. None of these decision can possibly be of any assistance to the petitioner in the facts and circumstance of the present matters. I have referred to these decision not for their relevance but in deference to the solemnity with which they were cited.

14. On behalf of the petitioner, reliance was place on certain observations made by my learned Brother Kania in his order dated 29th April 1982 in Misc. Petition No 167 of 1982 (*Ciovanni Tuveri (Petitioner) and Jyuti Tuveri (minor)*). In that case after holding that there was some substance in the Council's objection that in case of inter- State adoptions it is difficult for the Council to make enquiries, it was observed:--

" . . . it would not be possible to lay down an absolute rule that such petitioner will not be entertained at all in the absence of any law or binding rule being framed to that effect".

After cautioning that in such cases great care should be taken before granting the order prayer for, it was observed-

"In the present case, looking to all the facts and document on the record, I am satisfied, that the transfer of the child from Andhra Pradesh to Maharashtra seems to have been effected bona fide and hence I administration not inclined to reject the application on that ground. Moreover, I find from the precedents cited by Mr. Shenoi that similar Petition have been entertained and orders in favour of the respective petitioner passed thereon over two hundred matters and hence it

would not be right to reject the Petition merely on the ground that the minor child has been transferred from another State"

These observation can avail the petitioner nothing. It is common ground that the jurisdiction aspect canvassed. before maintenance, had not been canvassed before my learned Brother as is manifest from his order itself.

15. Finally Clause 17 of the Letters Patent read with Section 3 of the Guardians and Wards Act was sought to be invoked in an attempt to confer jurisdiction on this Court. Reliance was placed on the decision in *Narsey Tokersey & Co. v. Sachindranath*, AIR 1929 Bombay , 475, where it was held that by virtue of Section 3 of the Guardians and Wards Act, the High Court has inherent jurisdiction to appoint guardian of the person and property of a member of a joint Hindu family so as to prolong his period of minority notwithstanding the provision in the Guardians and Wards Act forbidding the appointment of a guardian of a minor in a joint family where there is any adult coparcener. alive. Reliance was also placed on the decision in Respondent: Ratanji Ramji ILR (1942) Bom 39: AIR 1941 Bom 397, where it was held that the jurisdiction vested in the High Court under Clause 17 of the Letter Patent is not restricted to such persons within the town and island, of Bombay and that it also extends outside that area but within the province of Bombay to person under such disability provided they are subjects of the British Crown. In *Rajah of Viozianagaram v. Secretary of State* ILR (1937) Mad 383: AIR 1937 Mad 51 , it was held that the High Court has under Clause 17 of the Letter Patent, jurisdiction in regard to minors resident outside the limits of the Presidency-town and its jurisdiction to act under that clause is not affected by the Guardians and Wards Act. in *Pamela Williams Vs. Patrick Cyril Martin* , it was held that the High Court's jurisdiction as to infants and lunatics is not controlled by restrictions imposed on Courts exercising jurisdiction under the Guardians and Wards Act.

16. Seeking refuge under Clause 17 of the Letter Patent and Section 3 of the Guardians and Wards Act must in deed the thin end of the wedge. Section 3 of the Guardians and Wards Act provides inter alia that nothing in that Act shall be construed to affect or in any way derogate from the jurisdiction or authority of any Court of Wards or take away power possessed by any High Court. Clause 17 of the Letter Patent must be read with Clause 16. The combined, effect the these clause is that the High Court shall be a Court of Appeal from the Civil Court and all other Court subject to its superintendence and shall exercise appellate jurisdiction in such cases as are subject to appeal to the High Court and that High Court shall have like power and authority with respect inter alia to the persons and estates of infants within the stated jurisdiction.

17. It is bewildering how by any concept Clause 17 of the Letter Patent can bail the petitioner out of their present difficulty. At best, the jurisdiction of the High Court under this clause extends not merely over its ordinary original civil jurisdiction but to the entire State of Maharashtra. Clause 17 does not empower the High Court to appropriate to itself jurisdiction of Court outside the State of

Maharashtra and proceed to pass orders which these Court alone would have the jurisdiction and competence to do.

18. So also none of the decisions relied on, can be of the slightest assistance to the petitioner. They document not lay down, and rightly so, that a High Court in one State can usurp the powers and jurisdiction of another Court in another State. The very thought is appalling. To read into Clause 17 of the Letters Patent, authority for inter- State Court usurpation of power and jurisdiction is unthinkable and would result in predictable chaos. To countenance this argument would be graduating from inter State transportation of children to inter State usurpation of jurisdiction.

19. From the admitted fact in the present matters, I find it impossible to come to the conclusions that these minors ordinarily reside in Bombay as contemplated by Section 9(1) so as to confer jurisdiction on this Court to entertain these petition and I answer the question posed by maintenance in the opening of this judgment in the negative. The petition are ordered to be returned for presentation to the proper Court.

20. In these matters, the Council and its learned Advocate have put in tremed out labour but for which this distressing state of affairs would not have come to light. The petitioners shall pay to the Council costs of each petition fixed at Rs. 500/-

21. It is high time that the supposedly altruistic motives and the modus operandi of inter- State transpiration of minors be investigated by a respondent Government agency. I therefore direct the Prothonotary and Senior Mater to forward a certified copy of this judgment to (i) the Secretary to the Government of India, Ministry of Education and Social Welfare (Department of Social Welfare), New Delhi-1; (ii) the Secretary to the Government of Maharashtra, Department of Social Welfare, Cultural Affairs, Sports and Tourism; (iii) the Joint Director of Social Welfare, Somwarpeth, Pune-11; and (iv) the Chief Secretary to the State of Karnataka, Gujarat and Andhra Pradesh respectively, with a request that the same be forward to the department concerned in those States.

22. Order accordingly.