1978 *Present:* **Samarakoon, C. J. , and Gunasekera, J.**

S. G. NISMALM *et al.* Applicants *and* SHANTHI *et al.* Respondents.

S.C. APN/GEN/31/78 – M.C. Wattala 83/AC.

Adoption of Children Ordinance – Distinction between "resident" and "domiciled" – Jurisdiction.

An applicant under the adoption of Children Ordinance should be a resident in Sri Lanka to make an application for adoption.

Held:

The word "resides" suggests some continuity or permanancy. A transient visitor for the purpose of business, a tourist who changes hotels from day to day and from time to time as occasion demands does not reside for the purposes of giving jurisdiction to a Court.

AN APPLICATION for adoption order by a person not domiciled in Sri Lanka can be entertained only by the Magistrate's Court of Colombo at Bambalapitiya. Any other Magistrate's Court in the island has no jurisdiction to entertain such an application.

Matter brought to notice of the Supreme Court.

Chula de Silva for Applicants.

S. C. Dickens, State Counsel for the Attorney-General.

Cur. adv. vult.

July 7, 1978. SAMARAKOON, C. J.

This is an application made under the provisions of the Adoption of Children Ordinance (Cap. 61) for the adoption of a female child named Shanthi born on the 11th May, 1978, to the 2nd respondent. At the time of the application the child was living at Ratuwatte, Walana in Panadura. The Probation Officer, Colombo was appointed the **Guardian ad Litem** of the child. The applicants are a married couple of foreign nationality residing at Scoravagen 54,951.49 Lulea, Sweden and presently staying at Pegasus Reef Hotel, Wattala. This is a well-known Tourist Hotel and it was conceded that

they were staying in this hotel pending the conclusion of these proceedings, upon which, they would return to Sweden. The husband is an Accountant and the wife a nurse, both employed in Sweden and drawing considerable income by way of salary. This and other applications were brought to my notice as being filed in the Magistrate's Court of Wattala. I called for all records as it was contended that that Court did not have jurisdiction to entertain these Applications.

Two matters arise for consideration. They are–

1. Have the applicants the necessary qualifications to make this application by virtue of the fact that they are staying in a hotel within the territorial jurisdiction of the Magistrate's Court of Wattala?

2. Can the Applicants in any event ask for an order by reason of the fact that they are non-residents?

It is necessary to look into the history of the relevant legislation. The Adoption of Children Ordinance by section 15(1) empowered a Court of Requests to make an Adoption Order. It reads as follows:–

> "15(1). The Court having jurisdiction to make an adoption order under this Part shall be the Court of Requests having jurisdiction in the place at which the applicant, or the child in respect of whom the application is made, resides"

Section 3(3) provided one of the restrictions as follows:–

> "3(6) An adoption order shall not be made in favour of any applicant who is not resident and domiciled in Ceylon or in respect of any child who is not a British subject and so resident."

Act No. 1 of 1964 added a proviso to section 4(6) as follows:–

> "Provided that the making of an adoption order in favour of an applicant who is not domiciled in Ceylon shall be deemed to be not prohibited where the Court is satisfied that there are special circumstances which justify the making of such an adoption order."

A further amendment to section 3 appeared in section 2 of Law No. 6 of 1977 which reads as follows:–

> "(6) An adoption order shall not be made in favour of any applicant who is not resident and domiciled in Sri Lanka or in respect of any child who is not resident."

At the relevant time jurisdiction vested in Magistrates' Courts as Courts of Request had been abolished.

It appears that a person who is not resident and domiciled in Sri Lanka cannot be granted an adoption order. However in the matter of domicile alone the Court is given a discretion if there are special circumstances in favour of the applicant *vis a vis* the child sought to be adopted. It is clear therefore that there is a distinction in this section between the words "resident" and "domiciled". If resident, though not domiciled, his application can be entertained. An applicant can be resident in Sri Lanka but still have a domicile in a foreign country, e.g. a domicile of origin. A man can have but one domicile at any moment but he can have one or more residences other than in his country of domicile. *Cassim v. Saibo.*[1] It is conceded that the applicants are domiciled in Sweden. For the purposes of this application do the applicants reside within the jurisdiction of the Court? The word "resident" in section 3(6) and the word "resides" in section 13(1) must mean the same thing in the context of this Ordinance. For the purposes of giving the Court jurisdiction, the applicant must reside within the territorial jurisdiction of the Court. Section 9(a) of the Civil Procedure Code confers jurisdiction if the Defendant resides within the jurisdiction of the Court. In the case of *Mendis v. Perera*[2] Pereira, A.J. held that a man resides where he has his family establishment and home. An insolvent who lived in a house in Galle with his mistress but resided at Matara for a few months in connection with his business was held to be a resident of Galle and not of Matara for the purposes of the Insolvency Ordinance — *In re Goonewardene*[3]. The word "resides" suggests some continuity or permanency. A transient visitor for the purposes of business, a tourist who changes hotels from day to day and from time to time as occasion demands, does not reside for the purposes of giving jurisdiction to a Court. In the case of *In re Adoption Application 52/1951*[4] the applicants (husband and wife) lived in Nigeria where the husband was a District Officer in the Colonial Service. Every 15 months they went to England during the husband's period of leave of 3 months. In 1951, while on such leave in England, they stayed with the parents of one spouse. They bought a house in England but did not occupy it hoping to occupy it when the husband's period of service was over in about 7 years. While holidaying they made an application for permission of Court to adopt a child. Pending such application the period of leave was over and the husband returned to his service in Nigeria. The wife remained in England intending to join the husband with child once the adoption order was granted to her. Harman, J. refused the order holding that the wife was merely a sojourner during the period of leave and was in fact resident in Nigeria. He said, at page 25:

[1]CLJ. 14.
[2](1911) 13 N.L.R. at 41.
[3](1924) 24 N.L.R. 431 at 434.
[4](1952) Ch. 16.

"The Court must be able to postulate at the critical date that the applicant is resident, and that is a question of fact. Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country. It seems dangerous to try to define what is meant by residence. It is very unfortunate that it is not possible to do so, but in my judgment, the question before the Court is in every such case whether the applicant is a person who resides in this country. In the present case I can only answer the question in the case of the wife by holding that she is not resident in this country; she is merely a sojourner here during a period of leave; she is resident in Nigeria, where her husband's duties are, and whether, in pursuance of her wifely duties, she accompanies him. I do not think either of the applicants is resident in England at present. They may be hereafter."

A mere fleeting residence cannot give the Court jurisdiction. The applicants are permanently resident in Sweden where they work and have their home. They are here residing in a hotel purely for the purposes of this application and will return with or without the child, depending on the order. They have no other interest in this land except, may be, as tourists. They live in a hotel as lodgers. It is a significant fact that section 13(1) stipulates "the place at which the applicant, or the child in respect of whom the application is made resides." The child is one under ten years and necessarily resides with its parent or parents or some orphanage to which custody has been duly given. It has a residence of some permanence in Sri Lanka. The same kind of residence must necessarily be attributed to the applicant. Otherwise it would be possible for a foreigner to bring a child from some foreign land, live in a hotel or lodgings in Sri Lanka, and obtain an adoption order from a Court here in respect of that child. Such acts will make a mockery of the Ordinance. Counsel for the Applicant stated that the intention of the legislature was to permit foreigners to obtain adoption orders in respect of children belonging to this country and take them away to a foreign land where they live. I am unable to accept this contention as the plain meaning of the words I am called upon to construe belies such an intention. I therefore hold that upon the averments in the petition the applicants do not "reside" within the jurisdiction of the Magistrate's Court of Wattala.

It is necessary to decide the other point of contest too in view of the reasons given by the Magistrate for entertaining this application. By notice published in Gazette No. 142/65 of 19th December, 1974, "all actions, proceedings or matters under the Children and Young Persons Ordinance and the Adoption of Children Ordinance within the judicial zone of Colombo" were vested in the Magistrate's Court of Colombo held at Bambalapitiya.

This categorically mentioned "Zone of Colombo". By a notice published in Gazette 243/9 of 17th December, 1976, the earlier schedule was replaced by a new schedule which gave the said Court jurisdiction as follows:–

COLUMN II

"All actions, proceedings or matters under the Children and Young Persons Ordinance arising within the judicial zone of Colombo; and all actions, proceedings or matters under the Adoption of Children Ordinance arising within the judicial zone of Sri Lanka in which the applicant is not domiciled in Sri Lanka and all other actions, proceedings or matters under the Adoption of Children Ordinance arising within the judicial zone of Colombo."

This makes a clear distinction between those concerning "Zone of Colombo" and those of the "Zone of Sri Lanka". Persons not domiciled in Sri Lanka, wherever they may be within the "Judicial Zone of Sri Lanka" can make application only to the Magistrate's Court of Colombo at Bambalapitiya. Any application for an adoption order by a person not domiciled in Sri Lanka cannot be entertained by any other Magistrate's Court in the Island as they have no jurisdiction. The Magistrate has stated that he assumed jurisdiction because the Gazette "does **not state** that the other Magistrate's Courts have been deprived of their jurisdiction in these matters." Suffice it to state that in this case jurisdiction depends on what the Gazette **states** and not on what it **does not state**.

Counsel for the applicant argued that the regulations published in these Gazettes are *ultra vires* because the Minister who purported to act under powers given him by section 46 of the Administration of Justice Law, No. 44 of 1973 in making these regulations did not in fact have power under that section. Section 46(1) reads as follows:–

"46(1). The Minister may, by regulation, nominate a Court or Courts situated anywhere in Sri Lanka for the purpose of trial and disposal of such categories of actions, proceedings or matters as shall be specified in such regulation, and accordingly, subject to the provisions of subsection (2), such Court or Courts shall, notwithstanding anything to the contrary in this or any other written law in regard to the territorial limits of the jurisdiction of such Court, have jurisdiction to hear, try and determine all such actions, proceedings or matters, as the case may be."

Counsel conceded that the Minister can categorise actions, proceedings or matters and also deal with the disposal of proceedings or matters; Category, he stated, meant type of matter, but in this case the Minister, was categorising in reference to persons which he had no power to do. I do not think the regulation was personal to any persons. All it did was to state that

applications made by non-domiciled persons should be instituted in a particular Court. The category was based on"domicile", a well-known concept and the type of matter was the applications of the non-domiciled persons. I am of opinion that the regulation is not *ultra vires.*

For the above reasons I declare the proceedings null and void and dismiss this application. I also called for applications made in the same Magistrate's Court which bore the numbers AC/79, AC/80, AC/81, AC/82 and AC/84. The applicants in all of them are Swedes, domiciled in Sweden. However they have obtained adoption orders and I am informed by the Counsel who appeared for the applicant in AC/83 that they have left the Island, each with the child in respect of which the order was obtained. No useful purpose will be served by setting aside those orders because the applicants and children are now beyond the reach of the Courts of this Island.

WALPITA, J. — I agree.

GUNASEKERA, J. — I agree.

Application dismissed.