APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

1956
July 20

MIRCHAEL ANTHONY RODRIQUES, APPELLANT (ORIGINAL PETITIONER) *v.* STATE OF BOMBAY AND OTHERS.*

Foreigners Act (XXXI of 1946), s. 3 (2) (c)—Change of domicile: what constitutes?

A person can acquire a domicile of choice only by a conscious act; he must not only give up the country of his origin, but he must make up his mind to stay for a indefinite period in the country where he wishes to acquire a domicile. Mere residence, however, long the duration, is not material. Not residence, however long its duration, but the quality and character of the residence is to be considered. Where the quality and character of the residence leads to the clear inference that it was not intended for a temporary purpose but in order to live permanently in the place (where he was residing), that the residence itself would have a bearing on the question of *animus*.

M. A. R. petitioner, whose father by nationality was a Goan, was born in Goa in 1918. He came to Bombay in 1927 and had ever since been staying in Bombay except for occasional visits to Goa for change of air. He had also been carrying on business in Bombay. In 1942-46, he served in the Royal Indian Navy. His name appeared on the Bombay Municipal Roll as a voter. As in the view of the Government, he was indulging in anti-social and anti-Indian activities, the State of Bombay served on him an order dated November 17, 1955 under s. 3 (2) (c) of the Foreigners Act, 1946 forbidding him to remain in India after the expiry of 24 hours from the date on which the order was served upon him. By his Petition for a *writ of Mandamus* against this order, the Petitioner claimed that he had acquired an Indian domicile and was not liable to be sent out of the country under the Foreigners' Act. The trial Court dismissed the Petition. On appeal,

Held, that the facts proved by the Petitioner clearly established that his intention was to stay in Bombay permanently and he had therefore acquired an Indian domicile.

Held, therefore, that the Petitioner was not liable to be sent out of India under Foreigners Act, 1946.

Winas v. *Attorney-General*,[1] referred to.

Davidson v. *Annesley*[2] and *Central Bank of India Ltd.*, v. *Ram Narain*,[3] relied on.

Facts are sufficiently stated in the Judgment.

D. P. Madan with *S. J. Sorabjee*, for the Appellant.

M. P. Amin, Advocate General, with *R. M. Kantavala*, for the Respondent.

Chagla C. J.—The appellant challenged before Mr. Justice Coyajee an order passed by the State of Bombay on November 17, 1955, that he shall not remain in India after the expiry of 24 hours from the date on which the order was served on him. This order was made in the exercise of the powers conferred by cl. (c) of sub-s. (2) of s. 3 of the Foreigners Act, 1946. The question that was agitated before Mr. Justice Coyajee was whether the appellant was a foreigner liable to be sent out of the

*Appeal No. 5 of 1956 : Miscellaneous No. 394 of 1955.

1. [1904] A. C. 287. 2. [1926] 1 Ch. D. 692.

3. [1955] 1 S. C. R. 697.

country under the Foreigners Act, or having acquired an Indian domicile he had become a citizen of India to whom the Foreigners Act could not apply. The learned Judge on a consideration of the materials before him held that the petitioner had failed to establish that he had acquired an Indian domicile and dismissed his petition. The appellant has now come in appeal.

In the first place, let us look at the undisputed facts in this case. The petitioner's father, who by nationality is a Goan, has been carrying on business of a tailor in Bombay for the last 40 years. The appellant himself was born in Goa in 1918 and he came to Bombay in 1927 when he was 9 years of age. He was educated in Bombay and having completed his school education in 1936 he joined the business of his father. In 1942 when the War broke out he served in the Royal Indian Force. He obtained a Burma Medal, and he was retrenched from that service in 1946. A discharge certificate was issued to him and in this certificate he gave as his permanent address his Bombay address for all necessary communications to him. From May 1947 to September 1948 he served with M/s. Turner Morrison and in 1948 he reverted to his father's business. He appears on the Municipal roll as a voter and that goes to show that he enjoys the civic franchise in this city. On these facts the question is whether the domicile of the appellant has been established.

Now, in order to determine what is the domicile of a particular person, certain principles have got to be borne in mind. The law attributes to every person a domicile. In the first place, there is the domicile of origin. It may be in the country where the person was born or it may be in the country where his parents were born. In this case the appellant was born in Goa and there is no doubt that his domicile of origin is Goa. But although a person may have a domicile of origin, he may acquire what is known as a domicile of choice and that he can only acquire by a conscious act. He must not only give up the country of his origin, but he must make up his mind to stay for an indefinite period in the country where he wants to acquire the domicile of choice. Therefore, when the appellant wishes to establish that his domicile of choice is India, he has to establish the fact of residence in India and he has also got to establish the animus of intending to reside permanently or for an unlimited time in India. It has been said that the character of the domicile of origin is of an enduring character and the ties that bind you to your country of origin are extremely strong, and therefore the authorities require that the intention to acquire a new domicile must be manifested and carried into execution. The authorities also require that the person acquiring the domicile of choice must show a fixed and settled purpose of residing permanently or for an indefinite time in the country where he seeks to acquire the new domicile. It is equally true that that burden cannot be

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discharged by merely proving residence, however long the duration of the residence may be. What the Court has got to consider is not residence by itself but the quality and character of that residence. If the quality and character of that residence leads to the clear inference that that residence was intended not merely for a temporary purpose but that that residence was intended in order permanently to live in the place where the person was residing, then the residence itself would have a bearing on the question of the animus.

Various authorities have been cited at the Bar, but they all emphasise the principles which we have just been considering. We might briefly glance at these authorities. In the first place we have Cheshire's Private International Law, 1952, 4th edn., and the learned author points out at p. 159:

"The two requisites for the acquisition of a fresh domicile are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. These two elements of *factum et animus* must concur, but this is not to say that there need be unity of time in their concurrence."

The learned author also points out lower down at that page:

"This much is clear, however, that a person's residence in a country is *prima facie* evidence that he is domiciled there. There is a presumption in favour of domicile which grows in strength with the length of the residence. Indeed, a residence may be so long and so continuous that, despite declarations of a contrary intention, it will raise a presumption that is rebuttable only by actual removal to a new place."

Then reliance was placed on the leading case of *Winans* v. *Attorney-General*.[4] The observations in that case must be read in the light of the rather peculiar facts on which that case had to be decided. The House of Lords was dealing with an American citizen who left the United States and lived many years in England, and his one main passion was to invent cigar-shaped boats which would be used by the American Navy against England in the eventuality of there being hostilities between the two countries, and what the House of Lords was considering was whether merely a long residence of this American citizen in England was sufficient to establish that he intended to make England his permanent home. Earl of Halsbury L. C. at p. 288 says that the law on the subject is plain and the law is that if domicile of origin is proved, it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile had a fixed and determined purpose to make the place of his new domicile his permanent home. And Lord Macnaghten at p. 290 says:

"Domicile of origin, or as it is sometimes called, perhaps less accurately, 'domicile of birth', differs from domicile of choice mainly in this —that its character is more enduring, its hold stronger, and less easily shaken off."

4. [1904] A. C. 287.

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And after reviewing the authorities at p. 292 the learned Law Lord poses the question:

"My Lords, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved 'with perfect clearness and satisfaction to yourselves' that Mr. Winans had at the time of his death formed a 'fixed and settled purpose'—'a determination'—'a final and deliberate intention'—to abandon his American domicile and settle in England."

And then the learned Law Lord reviews the facts of that case and answers the question that the Crown had not discharged the onus cast upon it that Mr. Winans had changed his domicile.

The other case which was referred to is *Annesley In re: Davidson* v. *Annesley*[5] and at p. 701, Mr. Justice Russel observes in his judgment that—

"The domicile flows from the combination of fact and intention, the fact of residence and the intention of remaining for an unlimited time. The intention required is not an intention specifically directed to a change of domicile, but an intention of residing in a country for an unlimited time."

Reference was also made to a judgment of the Supreme Court in *Central Bank of India Ltd.* v. *Ram Narain*,[6] and the learned Chief Justice after observing that (p. 703):

"Writers on Private International Law are agreed that it is impossible to lay down an absolute definition of "domicile",

accepts as the simplest definition the observation of Mr. Justice Chitty in *In re Craignish*: *Craignish* v. *Hewitt*,[7] (at p. 192):

"That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

Therefore, what we have to consider in the case before us on a careful review of the materials placed before the Court is whether the appellant, whose habitation is undoubtedly Bombay, had any present intention of removing himself from that habitation. Or, perhaps it may be even more strictly put in favour of the State, whether the appellant has shown a present intention to reside for ever in Bombay where he has taken up his residence. Clearly, this is not a case where the appellant is merely relying on his residence. Although the residence commenced from 1927 and has continued upto the present moment, there are various other circumstances which help us to determine the quality and character of this residence. The appellant came here when he was merely a boy, he was educated here, he earned his living here, he married here, had children here, and his children were also educated here. When the War broke out he served India by joining the Royal Indian Force. We really find it difficult to understand what more could a party prove in order to establish that his present intention is permanently to live in Bombay? We are not taking into account, as we indeed should not, the mere declaration of the appellant himself that he came to Bombay in 1927 with the intention of settling down in India permanently. But the facts just referred to are eloquent

5. (1926) 1 Ch. D. 692 at p. 701.
6. [1955] 1 S. C. R. 697.
7. (1892) 3 Ch. 180.

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and speak for themselves, and they in no way militate against the declaration made by the appellant. The Advocate General failed to draw our attention to any particular concrete thing which the appellant should have established in order to leave no doubt as to his intention and as to the character of his residence. As we shall presently point out, there was some suggestion as to certain negative things which the appellant should have established. But however heavy the burden that the appellant may carry in order to prove that he has changed his domicile, there is no law which casts the obligation upon the appellant to disprove something unless a prima facie case with regard to that has been made out. The only obligation upon him is to prove not merely his residence as a factum, but to prove those circumstances with regard to his residence, with regard to his other activities and with regard to his conduct which will go to show that the residence was intended for a particular purpose.

Now, let us see what are the circumstances upon which the Advocate General is relying in order to counter what has been definitely established by the appellant. The first circumstance on which strong reliance is placed is that on his own admission the appellant visits Goa and it is suggested that he has not cut off his connection with his domicile of origin. Now, the averment in the petition is clear and that is that the petitioner has never been out of India except for occasional visits to Goa for a change of air, and the rather surprising contention is put forward by the Advocate General that the petitioner must fail because he has not given particulars of his visits, nor has he established that his visits were only occasional or that the visits were merely for a change of air. If this averment had been clearly denied or if the appellant had been put to the proof of this averment, then perhaps it might have been said that the appellant has not discharged the burden because he has not given the necessary particulars as to when and how often he visited Goa and the purpose of his visit. But if the statement is accepted, as it seems from the affidavit it has been accepted, we do not see why it is obligatory upon the appellant to prove anything more. Mere occasional visits to the city of one's birth for a change of air cannot possibly affect the question of animus which we have to decide in this case.

The next circumstance relied upon is that the appellant's father has a house in Goa and his brother carries on business in Goa. The appellant has denied on oath that he has any interest in his father's house or any interest in his brother's business. There is nothing on the record before us to show that that denial is not true. The State has not placed before us any materials which go even to suggest that the appellant has some interest either in the property or in the business.

It is then said that the appellant admits that both his father and his mother visit Goa from time to time for change of air. We are not concerned with the question as to whether the father

and the mother had changed their domicile. If their domicile continues to be Goa, it is not surprising that they should visit Goa from time to time. But clearly the domicile of the father and the mother cannot be determinative of the question as to the domicile of the appellant himself.

Then strong reliance is placed on the application made by the father in 1955 when he had been to Goa for the purpose of returning to India, and it is pointed out that in this application he only asked for permission to stay in India for one year and he described as his nationality Goa. The appellant has met this contention by pointing out that after the father arrived in India with his permit, he immediately applied to the Commissioner of Police, Bombay, for permission to stay permanently in Bombay, and there he says that his visit to Goa was a temporary one, that he had made Bombay his permanent home, and as such the Government of Bombay would be pleased to permit him to stay in Bombay permanently. In our opinion, much importance cannot be attached to the application made by the father to return to India, because it is well known that in those days relations between Portuguese Government in Goa and our Government were strained and it was not easy for anyone in Goa to come to India and he could only come with a permit. But again, this application of the father would be perhaps strong evidence against the father if the father was claiming that his domicile was an Indian domicile. These admissions of the father cannot appropriately be used against the son, and it is rather interesting to note that even in his application for permit he has referred to his son as a person in India who can furnish full information with regard to the father. The fact has also been emphasised by the Advocate General that the father still claims to be of Goan nationality. Now, nationality and domicile are two entirely concepts in private international law. A man may have one nationality and a different domicile. He may owe allegiance to one country and he may have a domicile in another country. Therefore, although the father may continue to be a Goan national he can still change his domicile and give up his Goan domicile and acquire an Indian domicile.

Finally, the Advocate General drew our attention to the affidavit made on behalf of the State where an allegation is made by the Commissioner of Police that the appellant was a rabid anti-social person and was indulging in anti-social and anti-Indian activities. These averments have been denied by the appellant and we have no materials to decide what the real position is. But even assuming that the appellant is anti-social and anti-Indian, that conduct can have no bearing on the question as to whether he is a foreigner or not. Unfortunately there are many Indians whose domicile cannot be questioned and whose nationality cannot be questioned who indulge in anti-social and anti-Indian activities, and if the appellant is indulging in such activities surely our law is strong enough to deal with him

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without resorting to the provisions of the Foreigners' Act and trying to send him out of India as a foreigner.

In our opinion, with respect, the learned Judge was in error when he took the view that the appellant has failed to establish his Indian domicile. The result is that the appeal will be allowed, and a writ will be issued against the State in terms of prayer (*a*) of the petition. The appellant will be entitled to his costs throughout. Costs of the petitioner to be the costs fixed by the learned Judge.

Attorneys for Appellant: *Smetham Byrne & Lambert.*

Attorney for Respondent: *Little & Co.*

Appeal allowed.

P. M. P.