

(2015) 09 GUJ CK 0031

In the Gujarat High Court

Case No : Special Civil Application No. 10635 of 2015

Kolasani Sai Yashwanth Reddy

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 16, 16(2)
Gujarat Professional Technical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Act, 2007 — Section 2(i), 20(1), 4
Penal Code, 1860 (IPC) — Section 377

Citation : AIR 2015 Guj 188

Hon'ble Judges : Jayant M. Patel, Actg. C.J. and N.V. Anjaria, J.

Bench : Division Bench

Advocate : Guntant R. Thakar, for the Appellant; Abhishek M. Mehta and Riddhesh Trivedi, for the Respondent

Final Decision : Allowed

Judgement

N.V. Anjaria, J.—Whether Rule 7(1)C(4) of Gujarat Professional Medical Educational Courses (Regulation of Admission and Payment of Fees) (Amendment) Rule, 2015, extracted herein below in its material part, stand valid on the touchstone of Article 14 of the Constitution, and whether it has in its operation, a rational nexus with the objects sought to be achieved thereby, are the forefront questions posed for consideration in the present petition.

"7. Admissions.

a.....

B.....

C. Non-resident Indian Seats

(4) Admission on me Non-Resident Indian seats shall be given by the management of the respective Professional Medical Educational College or

Institution on the basis of inter-se merit list of the candidates (total theory marks-obtained in Physics, Chemistry and Biology subject only), who have applied for admission against the Non-Resident Indian Seats in the following manner, namely:---

(i) The candidate who is Non-Resident Indian as also the candidate whose parents and in the absence of his/her parents, his/her legal guardian who is Non-Resident Indian, shall be Offered the Non-Resident Indian seats, if remains vacant, shall be offered to the candidate who is dependent of NRI in merit list shown against item (a) below shall be considered first and thereafter candidates falling in the merit lists shown against items (b), (c) and (d) shall be considered respectively, Merit list shall be prepared and operated in the following order:

(a) Merit list of genuine NRI who are domicile of Gujarat

(b) Merit list of genuine NRI who are not domicile of Gujarat

(c) Merit list of dependent NRI who domicile of Gujarat

(d) Merit list of dependent NRI who not domicile of Gujarat"

The other concomitant questions arising are whether the categories (a), (b), (c) and (d) are a classification based on intelligible differentia, whether the concept of "Non-Resident Indian" and the concept of "domicile of Gujarat" are reconcilable to be grouped together, whether the Rule and the categories contemplated bear a rational nexus with the object sought to be achieved, whether in operating the Rule for the purpose of admission and preparation of merit list as per the order provided in the Rule, the merit would be a casualty, and whether Rule suffers from vice of arbitrariness in the very method envisaged thereunder for the admission to the professional medical educational courses.

2. The petitioner who is resident of State of Andhra Pradesh, has approached this Court through his natural guardian and father. The petitioner passed SSC Examination in March 2013 with 57 grade points from Board of Secondary Education, State of Andhra Pradesh. He passed Second Year Intermediate Public Examination in March 2015 with A-Grade also from State of Andhra Pradesh. Petitioner has stated that he obtained 96.66 percentage in theoretical subjects in 12th Standard and his average marks of 11th and 12th Standards are 97.91 percentage. The petitioner is going to apply in MBBS course in N.R.I. seats in the category of N.R.I. dependent not domiciled in Gujarat for the academic year 2015-2016 in Gujarat Medical Education & Research Society, Medical College, Ahmedabad-respondent No. 4 herein. It is stated that 161 N.R.I., quota seats for Government Medical Colleges and 122 N.R.I. quota seats in Self Finance Medical Colleges are likely to be thrown open for admission.

2.1 It is the case of the petitioner that since he belongs to the State of Andhra Pradesh, he does not have the domicile in Gujarat. The grievance of the petitioner is that because of operation of Rule 7(1)C(4) and on preparation of merit list in the order of categories (a) to (d) in the Rule, he may be deprived of

the admission though may otherwise rank higher on merit position. The petitioner has further stated that there are other students who despite being meritorious seeking admission in N.R.I. or N.R.I. dependent quota, may not get admission because of me Rule. In para 3.5 of the petition, names of such probable students together with percentage average marks secured by them in standard 11th and 12th are mentioned. They are, (i) Gurijala Nagaharshitha with 91.66%, (ii) Kothagundla Proveen with 94.79%, (iii) Koneru Hari Priya with 93.12%, (iv) Pendyala Vamsi Krishna with 90.62%, (v) Reddy Bathula Priyanka with 91.66%, (vi) Mutyala Raviraj with 92.78% and (vii) Komirisetty Srinadh with 88.95%. In other words, the petitioner is aggrieved and feels adversely affected by the action on part of the respondent No. 1 in giving primacy and priority to the candidates/parents who are domiciled of State of Gujarat in N.R.I. quota as provided in sub-clause (i) of Clause (4) of sub-rule (C) of Rule 7 of the Rules.

2.2 The petitioner has prayed to declare and hold that sub-clause (i) of Clause 4 of sub-rule (C) of Rule 7 of the Rules to the extent it provides that "candidates/parents who are domicile of Gujarat State falling under merit list shown against them in category (a) shall be considered first and thereafter the candidates falling in the merit list shown against the categories (b), (c) and (d) shall be considered respectively", as violative of Articles 14 , 15(1) read with Article 29(2) and Article 16(2) of the Constitution. The petitioner has prayed that the Rule in question particularly providing for preparation of merit list in the N.R.I. seat quota as per the categories (a), (b), (c) and (d) in that order is ultra vires.

2.3 The private respondent Nos. 5 to 11 are the students-candidates who got themselves impleaded upon order permitting them to become party respondents passed in their Civil Application No. 7923 of 2015 and Civil Application No. 8353 of 2015.

2.4 By order dated 02nd July, 2015, this Court stayed Rule 7(1)C(4) observing,

"Till the next date of listing, Rule 7(1)(C)(4) of me Gujarat Professional Medical Educational Courses (Regulation of Admission and Payment of Fees) (Amendment) Rules, 2015 shall remain stayed. However, it shall be open to the respondents to fill up NRI seats in pursuance of the earlier Rules of the year 2014, i.e. Gujarat Professional Medical Educational Courses (Regulation of Admission and Payment of. Fees) (Amendment) Rules, 2014."

2.5 As per order dated 20th August, 2015 upon completion of arguments in the case, it was provided that interim relief shall continue till 07th September, 2015, further providing that,

"Interim relief shall continue till then with the further observations that in order to save time, the State/Admission Committee may undertake the process and prepare the merit list as per the old Rules which are in operations by virtue of the interim relief as well as, as per the new Rules which are under challenge and stayed by this Court."

2.6 Before proceeding to consider the contentions canvassed and addressing the controversy, the Rules called Gujarat Professional Medical Education Courses (Regulation of Admission and Payment of Fees) (Amendment) Rules, 2015 may be looked into with requisite elaboration. These Rules are framed by the State Government in exercise of powers under Section 20(1) read with Section 4 of the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Act, 2007, and published under Notification dated 27th May, 2014, by Health and Family Welfare Department. They relate to the admissions to the first year of the degree in the professional medical educational courses. The "professional medical educational course" has defined in Rule 2(g) include the following degree courses-(i) Bachelor of Medicine and Bachelor of Surgery, (ii) Bachelor of Dental Surgery, (iii) Bachelor of Ayurveda, Medicine and Surgery, (iv) Bachelor of Homeopathic Medicine and Surgery, (v) Bachelor of Physiotherapy, (vi) Bachelor of Science (Nursing), (vii) Bachelor of Orthotics and Prosthetics, (viii) Bachelor of Optometry, (ix) Bachelor of Occupational Therapy, (x) Bachelor of Naturopathy and (xi) Bachelor of Audiology and Speech Language Pathology.

2.6.1 Rule 3 of the Rules, about admissions to the professional medical educational courses provides for filling in the Government seats on the basis of merit list; all the management seats by consortium by single window system on the basis of inter se merit, and all the Non-Resident Indian seats to be filled by the management of the respective professional educational colleges or institutions on the basis of inter se merit of the students to be admitted against Non-Resident Indian seats. A seat remaining vacant either in the management quota or in the Non-Resident Indian seat category is provided to be filled-in from the Government seats and the management seats respectively.

2.6.2 Rule 4 of the Rules deals with the seats available for admission as under.

"4. Seats Available for Admission-For the purpose of admission to the first year Professional Medical Courses, available seats shall include,-

A. Government Seats.-

- (1) All the sanctioned seats of the Professional Medical Courses in the Government Colleges or Institutions of the State,
- (2) All the sanctioned seats of the Professional Medical Courses in the aided Colleges or Institutions, and
- (3) seventy-five percent of the total sanctioned seats of the Professional Medical Courses in the unaided Colleges or Institutions.

B. Management Seats.-

- (1) Twenty-five percent seats of the total sanctioned seats of the Professional Medical Courses in the unaided Colleges or Institutions of the State including fifteen per cent Non-Resident Indian seats.

(2) The intimation received, in respect of sanction of seats, by the Admission Committee three days prior to the commencement of the counselling program, shall be considered as available seats.

(3) Before commencement of admission process, if any unaided College or Institution requests to fill up the Management Seats by the Admission Committee, such Management seats shall also be considered as available for giving admissions.

C. Non-Resident Indian Seats.-

(1) Fifteen percent seats of the total sanctioned seats of the Professional Medical Courses in the Colleges or Institutions of the State.

(2) The intimation received, in respect of sanction of seats, by the Admission Committee three days prior to the commencement of the counselling program, shall be considered as available seats."

2.6.3 Rule 5 deals with eligibility for admission in general. Rule 6 provides for eligibility criteria for different seats, that is Government Seats, Management Seats and Non-Resident Indian Seats. For Non-Resident Indian Seats Rule 6(B) reads as under for laying down eligibility criteria.

"B. For Non-Resident Indian Seats:--

(1) (i) A candidate shall be Non-Resident Indian, or

(ii) his/her parents or in absence of his/her parents, his/her legal guardian shall be Non-Resident Indian, or

(iii) he/she shall be dependent of Non-Resident Indian for the educational purposes and shall have necessary proof/evidence in support of his/her dependent.

(2) A candidate shall have completed 17 years of age on the 31st December of the Academic Year for which the admissions are being conducted:

Provided that in case of under age candidate, he/she may be granted admission at the time of counseling but his/her term in the concerned Professional Medical Educational College or Institution shall commence after completion of age of 17 years.

(3) A candidate shall eligible for admission under the provisions of these rules."

2.6.4 Rule 7 provides for admission. As noted above, Rule 7(1)C(4) is the bone of contention for its constitutionality and validity. The said Rule in its full text may be usefully reproduced.

"C. Non-Resident Indian Seats

(1) The College or Institution shall, by an advertisement in two English and two Gujarati leading newspapers widely circulated in the State, invite the application

from the eligible candidates for the admissions to the Professional Medical Educational Courses on the Non-Resident Indian seats. The advertisement shall contain the date of issue of application forms, last date of submission of application forms, details of fees to be paid and eligibility criteria numbers of seats available for admission on the Non-Resident Indian seats and such other information as may be necessary in this behalf.

The candidate shall meet with the minimum standards for admission as prescribed by the respective Council and where there is no Council, the minimum standards prescribed by the University shall be applicable for the admission.

(2) The Candidate shall be required to provide necessary documentary evidence of proof showing the status of Non-Resident Indian or his/her own or of his/her parents and in absence of parents of his/her legal guardian or of the person on whom he/she is dependent for education purpose.

(3) The Candidate shall be required to produce equivalence certificate, from the Gujarat Higher Secondary Education Board, Gandhinagar or Association of Indian Universities, New Delhi, of his passing the qualifying examination of the country of which such examination relates.

(4) Admission on the Non-Resident Indian seats shall be given by the management of the respective Professional Medical Educational College or Institution on the basis of inter-se merit list of the candidates (total theory marks obtained in Physics, Chemistry and Biology subject only), who have applied for admission against the Non-Resident Indian Seats in the following manner, namely:---

(i) The Candidate who is Non-Resident Indian as also the candidate whose parents and in the absence of his/her parents, his/her legal guardian who is Non-Resident Indian, shall be offered the Non-Resident Indian seats, if remains vacant, shall be offered to the candidate who is dependent of NRI in merit list shown against item (a) below shall be considered first and thereafter candidates falling in the merit lists shown against items (b), (c) and (d) shall be considered respectively,

Merit list shall be prepared and operated in the following order:

(a) Merit list of Genuine NRI who are domicile of Gujarat

(b) Merit list of Genuine NRI who are not domicile of Gujarat

(c) Merit list of dependent NRI who domicile of Gujarat

(d) Merit list of dependent NRI who not domicile of Gujarat

(ii) The candidate whose guardian is Non-Resident Indian shall have to produce necessary proof to the satisfaction of the concerned College or Institution establishing that in the absence of his/her parents, the concerned person has been legally appointed as his/her guardian; and

(iii) The candidate who is dependent of Non-Resident Indian shall have to produce necessary proof in support thereof to the satisfaction of the concerned College or Institution.

(iv) The Admission Committee shall supervise, monitor and co-ordinate the counseling of NRI Seats in various disciplines.

(5) In case of NRI seats, the date and venue for counselling of NRI seats shall be such as may be determined by the Admission Committee."

2.7 In the admission notice for N.R.I. quota seats in M.B.B.S. Academic Year 2014-15 published by Gujarat Medical Education and Research Society, important instructions had also been published. In such important instructions, definition of N.R.I. is provided as under. "NRI" means a Non-Resident Indian as defined under Income Tax Act, 1961 read with Foreign Exchange Management Act, 1999. Non-Resident Indian is "a person who is not resident in India."

2.8 It may be noted that for the year 2014-15, Gujarat Professional Medical Educational Courses (Regulation of Admission and Payment of Fees) (Amendment) Rules, 2014 were notified by Health and Family Welfare Department, Gandhinagar on 27th May, 2014. So far as admission of NRI candidates is concerned, Rule 7(1)C(4) of the aforesaid Rules provided as under:

"7(1)C(4). Admission on the Non-resident Indian seats shall be given by the management of the respective Professional Medical Educational College or Institution on the basis of inter-se merit list of the candidates (total theory marks obtained in Physics, Chemistry and Biology subject only), who have applied for admission against the Non-Resident Indian seats in the following manner, namely:--

(i) The candidate who is Non-Resident Indians as also the candidate whose parents and in the absence of his/her parents, his/her legal guardian who is Non-Resident Indian, shall be offered the Non-Resident Indian seats in the first instance, and thereafter, the Non-Resident Indian seats, if remains vacant, shall be offered to the candidate who is dependent of the Non-Resident Indian;

(ii) The candidate whose guardian is Non-Resident Indian shall have to produce necessary proof to the satisfaction of the concerned College or Institution establishing that in the absence of his/her parents, the concerned person has been legally appointed as his/her guardian; and

(iii) The candidate who is dependent of Non-Resident Indian shall have to produce necessary proof in support thereof to the satisfaction of the concerned College or Institution.

(iv) The Admission Committee shall supervise, monitor and co-ordinate the counselling of NRI Seats in various disciplines."

2.9 From reading of the above Rule, existed for the previous academic year, admission to the Non-Resident Indian (N.R.I.) seats given by the management to

the respective professional medical college or institution was on the basis of inter se merit, for which list of the candidates was to be prepared. The domicile was not a consideration mentioned in the said earlier Rule. All the students belonging to the Non-Resident Indian category were entitled to compete in N.R.I. seats. The order of merit in the list was dependent upon the merit marks a candidate may have secured in the qualifying examination. The new Rule as per the above mentioned Notification was notified whereunder admissions to the N.R.I. seats are provided to be governed by Amended Rule 7(1)C(4).

3. Learned advocate for the petitioner Mr. Gunvant Thaker submitted that the provision of sub-clause (1) of clause (4) of Sub-rule (C) of Rule 7 of the Rules is violative of Article 14 , 15(1) read with Article 29(2) and 16 of the Constitution. He submitted that the effect of the Rule is that it provides cent percent and total reservation for residents of the State of Gujarat. This territorial classification, submitted learned advocate for the petitioner, does not have any rational link or the purpose. He submitted that the classification made is not on the grounds of scheduled caste, schedule tribe, SEBC or any other recognised category where classification and reservation may be permissible. The provision of the Rule, learned advocate continued to submit, denies equal opportunity and equal protection to the meritorious students competing in the category of N.R.I. seats, hailing from other States other than State of Gujarat. He submitted that while preparing merit list; a clear preference amounting to wholesale reservation is given as per sub-clause (a) to the N.R. Is. domiciled in Gujarat. Learned advocate for the petitioner relied on Article 15(1) of the Constitution which provides that the State shall not discriminate any citizens on the grounds only of religion, race, caste, sex, place of birth or any of them. He submitted that one who is N.R.I, cannot have domicile in Gujarat. He submitted that the categories (a) to (d) are artificially created categories in the sense that N.R. Is. are classified on the basis of domicile requirements which is neither permissible nor practical nor it is the real classification. It was submitted that when the merit list is prepared on the basis of categories so evinced, a more meritorious student may stand without admission whereas a student with lesser merit may get admission in the N.R.I, quota because he may be falling in the earlier category.

3.1 Learned advocate in support of his submissions relied on the decisions in (i) Minor P. Rajendran Vs. State of Madras and Others, , (ii) Radhey Shyam Singh and others, etc. Vs. Union of India and others, , (iii) Dr. Jagadish Saran and Others Vs. Union of India (UOI), . By pressing into service the decisions in (iv) Association of Management of Unaided Private Medical and Dental College v. Pravesh Niyantran Samiti [(2005) 13 SCC 704] and (v) Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others, learned advocate emphasised that selection has to be on merit alone, whatever procedure is followed.

3.2 On behalf of respondent No. 1-State of Gujarat, affidavit-in-reply is filed by the Under Secretary, Health and Family Welfare Department, raising various contentions and making submissions to defend the Rule. It is contended that the

Rule 7(1)C(4) is absolutely legal and valid and in consonance with the principles propounded by the Hon"ble Supreme Court as well as this Court in various judgments with reference to filling-up of N.R.I. seats. In paragraph 4.1 of the affidavit, decision in P.A. Inamdar and others v. State of Maharashtra [(2004) 8 SCC 139] is relied on with reference to its following paragraph quoted in the reply.

"Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ("NRI. for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to certain number of students under such quota by charging a higher amount of fee. In fact, the term "NRI" in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen its level of education and also to enlarge its educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%. in our opinion. may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to Islamic Academy"s direction to regulate."

(Emphasis is as supplied by the deponent)

3.3 Treading on the lines of affidavit-in-reply, learned Advocate General Mr. Kamal B. Trivedi defended the Rule and submitted that 15% quota for Non-Resident Indians has been approved by the Apex Court and the same was based on certain relevant considerations. It was submitted that the Supreme Court considered factors regarding allocation of seats to N.R.I. category, which, as set out in the reply affidavit were (i) The money brought by students seeking admission to N.R.I, seats enables the educational institutions to strengthen the

quality-level of education and also to enlarge their educational activities; (ii) The number of such seats in N.R.I. quota should not exceed 15%; (iii) Within the "NRI quota" merit, should not be given a complete go-bye; (iv) The amount of money in whatever form collected from N.R. Is. should also be utilized for benefit of students such as economically weaker sections of the society, whom the educational institution may admit on subsidized payment of fees.

3.4 Learned Advocate General further submitted that the Legislature is entitled to consider the weightage or priority to be accorded to the factors which are relevant. According to him, in P.A. Inamdar (supra), one of the relevant factors considered by the Supreme Court was that medical colleges required high amount of finance to maintain and run medical education, therefore according to him, it is not unreasonable on part of the State to see that educational system prevalent in the State is designed to ensure benefit for the State. He submitted that more weightage is given to the aspect relating to domicile while giving admission to N.R.I. seats in the medical colleges. He further submitted that money which may flow from N.R.I. quota aspirants could be utilised for uplifting the facilities in the field of medical education, benefit of which may ultimately pass on to the economically weaker sections of the society. When asked as to what role domicile would play and how a Non-Resident Indian can have a domicile in the State of Gujarat he became ingenious in his submission that the concept of domicile is incorporated under the Rule which would help the Non-Resident Indians which otherwise belong to Gujarat, to retain and cultivate cultural affinity with the State and by sending their wards to study in India, may want to offer them an opening to culture and ethos of the State of their origin.

3.5 Learned Advocate General lastly, in alternative, submitted that if the Court is to view the Rule to be not standing the test of validity, instead of striking down it, the same may be read down. He submitted that when provision of law or Rule is found directly to be in conflict with the constitutional provision or the fundamental right, then only the same may be struck down. The Court should attempt to save the Rule by applying the doctrine of reading down or reading-in the Rule making it workable, thereby saving it from being declared unconstitutional.

3.6 Learned Advocate General pressed into service the following decisions in support of his submissions-(i) Dhruvit M. Patel and Others Vs. C.U. Shah Medical College and Others, , (ii) Parth Keyur Parikh being a Minor thro" His Father Dr. Keyur Harshadai Parikh v. Smt. N.H.L. Municipal Medial College decided by this Court in Special Civil Application No. 8747 of 2008 decided on 22nd September, 2008 (AIR 2009 (NOC) 410 (Guj)), in particular paragraphs 18, (iii) Vishakha Vs. State of Gujarat and Another,) in particular paragraphs 5 and 5.1, and (iv) Sheetal Yeshwantkumar Parmar Vs. State of Gujarat and Another, in particular paragraphs 11, 12 and 13.

3.7 On behalf of private respondent Nos. 6 to 11 whose stand was in support of validity in constitutionality of Rule 7(1)C(4), learned senior counsel Mr. Shalin

Mehta assisted by learned advocate Mr. Abhishek Mehta submitted that the Rule is intra vires and is well within the scope and ambit of permissible extent of 15% admissions in the NRI category students. His argument was that what the categories (a) to (d) in the Rule provided was not the reservation but they were the order of preference given to the genuine NRI students of the domicile of Gujarat. It was submitted that the merit list would be prepared wherein preference would be given to the genuine NRI students of Gujarat domicile and thereafter to the dependent of NRI having domicile of Gujarat and the said classification cannot be said to be providing for 100% reservation. Learned senior counsel was however at the receiving end when confronted with the query as to how the concept of Non-Resident Indian and criteria of domicile could go together.

3.8 Learned senior counsel for respondent Nos. 6 to 11 relied on decision of the Apex Court in D.P. Joshi Vs. The State of Madhya Bharat and Another, , in particular observations in paragraph 8 thereof which discussed import of the word "domicile".

"A more serious question is that as the law knows only of domicile of a country as a whole and not of any particular place therein, whether there can be such a thing as Madhya Bharat domicile apart from Indian domicile. To answer this question we must examine what the word "domicile" in law imports. When we speak of a person as having a domicile of a particular country, we mean that in certain matters such as succession, minority and marriage he is governed by the law of that country.

Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage, might not be the same all over the country, and that different areas in the State might have different laws in respect of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile." (Para 8)

4. Adverting now to consider the controversy and analyzing the Rule for judging its constitutionality, it emerges from the bare reading of the Rule 7(1)C(4) that under the said new Rule, for the admission to the professional medical educational courses in the N.R.I. seats, the preparation of merit list shall be in accordance with the categories in sub-clauses (a) to (d). In the first category merit list of Genuine N.R.I., who are domicile of Gujarat, would be admitted. Thereafter second category admissions take place and thereafter third category admissions would be offered and thereafter, if any seat is left, then the candidate belonging to fourth category would be admitted. Thus the State Government has provided to make 100% seats reserved for those who are the domicile of Gujarat State. Just to take an example, if there are 100 MBBS seats available in a medical college, then 15 seats are to be reserved for N.R.I. candidates and if there are 15 N.R.I. candidates, who are domicile of Gujarat, then all the 15 seats would be filled from them and no admission would be granted to Category B, C

and D irrespective of fact as to whether they have secured more marks than the N.R.I. who are domicile of Gujarat. It is the case that the manner and method put into play by the aforesaid Rule and the provision of categories for preparing the merit list for the admission, is totally discriminatory, arbitrary and violative of Article 14 of the Constitution. The Rule as operated in the preference-wise categories, gives cent percent reservation on domicile basis.

4.1 The order of preparation of merit list contemplated under the said provision is that first would be the list of what are described as "genuine N.R.I, who are domicile of Gujarat" being category (a). The category (b) contemplates group of students to stand next in the merit list who are "genuine N.R.I. not domicile of Gujarat". The third and fourth category, that is (c) and (d), are of those N.R. Is. who are mentioned as "dependent NRI" domicile of Gujarat and "dependent NIR" who are not domicile of Gujarat.

4.2 As the Rule manifests, the criteria assigned is of domicile of Gujarat further to classify and sub-classify "Non-Resident Indian" as genuine Non-Resident Indian and dependent Non-Resident Indian with reference to the domicile. On a bare consideration and reading, the two concepts are incongruent. A striking irrationality in the Rule and the classification is that it divides N.R. Is. on the footing of domicile in the State. This brings out a conceptual irreconcilability. One who is N.R.I, and having a domicile in Gujarat does not go-to-gather. In conceiving a category of those who are not residing in India but domiciled of Gujarat, the nexus is broken rather bridged. This by itself could be said to be rendering the Rule irrational on the face of it. Irrationality is a recognized form of arbitrariness.

4.3 It would be relevant to focus on this conceptual anomaly in the Rule and in enacting the categories. The word "domicile" has been subject matter of consideration in various judgments. In D.P. Joshi Vs. The State of Madhya Bharat and Another, , the Hon"ble Supreme Court stated that the word "domicile" in its popular sense conveys the idea of residence. In N. Vasundara Vs. State of Mysore and Another, , while considering Rule 3 of Selection Rules of the Government for admission to pre-professional courses in medical colleges, observed that the word "domicile" as used in Rule 3 is used to convey the idea of intention to reside or remain in the State of Mysore. The Hon"ble Supreme Court referred to an English decision in Memullen v. Wadsworth [(1989) 14 AC 63] which observed that the word "domicile" was used in the sense of residence and did not refer to international domicile.

4.3.1 In Corpus Juris Secundum (Volume 28, Page 5), it is stated that "the term "bona fide residence" means residence with domiciliary intent". The word "domicile" is defined in Black's Law Dictionary (7th Edition, 1999) as the place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. Also termed permanent abode.

"By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign language will very much help you to it." Whicker v. Hume (1857) 7 H.L.C. 124, 160 (per Lord Cranworth).

"It is difficult to give a definition of domicile that will cover at once domicile by operation of law and domicile by choice. The idea of domicile certainly includes the idea of home that it seems desirable to include that idea in any definition, and yet the idea is not applicable to many kinds of domicile by operation of law. It has therefore seemed best to state this element in the alternative. If a home is in the place, that is sufficient. If there is no home, or if the party is not sui juris, then the place is assigned by law without his will." 1 Joseph H. Beale, A Treatise on the Conflict of Laws 9.1, at 89-90(1935).

"Though the idea of permanent home is the central practical feature of domicile, Lord Cranworth's definition has a deceptive simplicity; for domicile... is a conception of law employed for the purpose of establishing a connection for certain legal purposes between an individual and the legal system of the territory with which he either has the closest connection in fact or is considered by law so to have because of his dependence on some other person." R.H. Graveson, Conflict of Laws 185 (7th ed. 1974)."

4.3.2 The concept of one's domicile has a definite implication and is directly linked with the situs of one's residence. The term in its ordinary acceptation, means a place where a person lives or has his home. It is a place where a person has his actual residence, inhabitancy or commorancy.

4.4 Given this accepted meaning of "domicile" when the same is juxtaposed with the concept of "Non-Resident Indian", the both convey a divergent meaning and concept. In Rule 7(1)C(4) under consideration, when the categories (a),(b),(c), and (d) therein grouped together the "Non-Resident Indian" and "Domicile of Gujarat", they stand inconsistent to each other conveying an idea incongruent in itself in common sense; illegal and irrational for classifying a group of persons-subjects.

4.5 The domicile being the criteria indicated, the issue to be addressed is whether the operation of Rule for the purpose of preparation of merit list as per the categories classifying the N.R. Is. amounts to providing for cent percent reservation or preference to the candidates in N.R.I. seats on the basis of the domicile of the State and if that is the import and effect of the Rule, whether it can withstand the vice for which the Rule is being assailed.

5. Having noticed the irrationality and incongruity in the Rule in the above broad way, it would be seen, as is discussed hereinafter, that not only in its reading, in its working also, the Rule perpetuates arbitrariness. One of the moot questions is whether categorization in (a) above of the Rule has the effect of providing cent percent reservation on the basis of domicile. In the preparation of merit list, students claiming in category (a) may exhaust all the N.R.I. seats. It would

mean total reservation for those "NRIs" domiciled in Gujarat, leaving the Rule and the rest of the categories illusory.

5.1 The issue as regards validity of reservation provided for on the basis of residence requirement or on the criteria of domicile and the permissible extent of such reservation or preference is not in the virgin field. Visiting with the decisions on the aspect in *Dr. Prachi Almeida Vs. The Dean, Goa Medical College and Others*, , the Hon''ble Apex Court considered Rule 3 of the Goa (Rules for Admission for Postgraduate Degree Courses of Goa University at the Goa Medical College) Rules, 1998, which inter alia provided for determination of eligibility that the candidates applying for the Post Graduate Degree/Diploma Course shall have to possess MBBS Degree of the Goa University or any other university recognized as equivalent thereto by the Goa University and the Medical Council of India and further that they must have resided in the State of Goa for a minimum period of 10 years preceding the date of application. The petitioner in that case Prachi Almeida was admitted to Goa Medical College under 15% All India Quota, she had passed MBBS Examination from Goa University, but she was denied admission in the Post Graduate Course on the ground that she did not fulfill condition relating to State of Goa for a period of 10 years in terms of Rules. The Hon''ble Supreme Court held that the criteria adopted by the respondents in not allowing the petitioner to get admission on the ground of residential requirement, was unjustified.

5.1.1 The Apex Court negated the contention that if graduates under 15% quota of outside State are allowed to compete with the students of State, it would be disadvantaged to the students hailing from the State of Goa. The Supreme Court ruled that the students falling under 15% All India Quota should be allowed to participate to compete in the State where they have studied irrespective of the rule of residence. In other words, the Hon''ble Supreme Court held that the classification based on the residence in 15% All India Quota was not justified and the admission in that quota was required to be operated uniformly.

5.2 In *Magan Mehrotra and Others Vs. Union of India (UOI) and Others*, , it was held by the Hon''ble Supreme Court that in view of what is laid down in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, , apart from institutional preference, no other preference including reservation on the basis of residence is envisaged in the Constitution. In *Saurabh Chaudri and Others Vs. Union of India (UOI) and Others*, , the Hon''ble Supreme Court proceeded to distinguish between the term "place of birth" and "domicile". The term "place of birth" occurs in Article 15(1) , but not the word "domicile". Article 16(2) mentions both "domicile" and "residence" in addition to "place of birth".

5.3 The Apex Court in *Vishal Goyal and Others Vs. State of Karnataka and Others*, , tested the validity of Rule 2.1(a) for Post Graduate Entrance Test, 2014 for admission to the State quota seats in Karnataka Government colleges and institutions, and Karnataka Government quota seats in private colleges/

institutions/deemed universities. The relevant portion of the Rule contained in the Information Bulletin, was as under,

"2.1. No candidate shall be admitted to a professional educational institution unless the candidate possesses the following qualifications or eligibility to appear for the entrance test namely:

(a) He is a citizen of India who is of Karnataka origin and has studied MBBS/BDS degree in a medical/dental college situated in Karnataka or outside Karnataka, and affiliated to any university established by law in India recognised by Medical Council of India and the Government of India.

Explanation.-"A candidate of Karnataka Origin" means a candidate found eligible under clause (i) or (ii) below, namely:

(i) A candidate who has studied and passed in one or more government recognised educational institutions located in the State of Karnataka for a minimum period of TEN academic years as on the last date fixed for the submission of application form, commencing from 1st standard to MBBS/BDS and must have appeared and passed either SSLC/10th standard or 2nd PUC/12th standard examination from Karnataka State. In case of the candidate who has taken more than one year to pass a class or standard, the years of academic study is counted as one year only.

(ii) The candidate should have studied and passed 1st and 2nd years Pre-University Examination or 11th and 12th standard examination within the State of Karnataka from an educational institution run or recognised by the State Government or MBBS/BDS from a professional educational institution located in Karnataka and that either of the parents should have studied in Karnataka for a minimum period of 10 years."

5.3.1 The Apex Court referring to Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, stated,

"The basis of the judgment in Pradeep Jain case is that Article 14 of the Constitution guarantees to every person equality before the law and equal protection of the laws. And that excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and will affect the right to equality of opportunity under Article 14 of the Constitution. Institutional preference can be given by a State, but such decision of the State to give institutional preference can be invalidated by the court in the even it is shown that the decision of the State is ultra vires the right to equality under Article 14 of the Constitution." (Paras 10 and 11)

5.3.2 It was further observed and held,

"The principle in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, would be applicable even to private medical colleges if they are

instrumentalities or agencies of the State or opt to join the scheme formulated in Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, . The reason for this is that private medical and dental colleges or institutions not being State or the instrumentalities or its agencies are not subject to the equality clause in Article 14 of the Constitution, but the moment some seats in the private medical and dental colleges or institutions come to the State quota, which have to be filled up by the State or its instrumentality or its agency which are subject to the equality clause in Article 14 of the Constitution, the principles laid down by the Supreme Court in Pradeep Jain case will have to be followed while granting admissions to the seats allotted to the State quota in postgraduate medical and dental courses even in private colleges." (Para 14)

5.4 In Priyanka Verma C/o. Vishambhar Nath Verma Vs. State of Gujarat and Others, , a Full Bench of this court was dealing with the decision of the State Government to admit only those students in PTC Course who had passed 10 + 2 examinations from schools situated within the State of Gujarat excluding students from outside State. On the context of National Council for Teachers Education Act, 1993 and National Council for Teachers Education (Recognition, Norms and Procedure) Regulations, 2009, and Gujarat Educational Institutions (Pre-primary and Primary Teachers Training College) Rules, 1984. The Full Bench discussed the position of law emerging from several decisions starting from Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , finally held,

"From the aforesaid three decisions of the Apex Court, the law is clear that there can be no absolute or wholesale reservation or preference for candidates of a particular State or absolute institutional preference. For local candidates, the State Government is empowered to make reservation of seats or provide institutional preference, to a reasonable percentage, then only the reservation would be valid. But absolute, wholesale or 100% reservation for local candidates who passed the qualifying examination from institutions in State of Gujarat is impermissible and unconstitutional being violative of Article 14 of the Constitution." (Para 39)

5.5 Pausing at this stage to refer to the decision in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , from which the statement of law in respect of permissible limit of providing reservation on the basis of residence requirement originated and which holds good, it was observed that certain percentage of reservation on the basis of residence requirement may be legitimately made in order to equalize opportunities for medical admission on a broader basis and to bring out real and not formal, actual and not merely legal, equality. It was observed,

"The only question which remains to be considered is as to what should be the extent of reservation based on residence requirement and institutional preference. There can be no doubt that such reservation cannot completely exclude admission of students from other universities and States on the basis of merit judged in open competition. Krishna Iyer, J. rightly remarked in Dr.

Jagadish Saran and Others Vs. Union of India (UOI), of the Report:

.....reservation must be kept in check by the demands of competence. You cannot extend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservation. So, a certain percentage which may be available, must be kept open for meritorious performance regardless of university, State and the like. Complete exclusion of the rest of the country for the sake of a province, wholesale banishment of proven ability to open up, hopefully, some dalit talent, total sacrifice of excellence at the altar of equalisation - when the Constitution mandates for every one equality before and equal protection of the law -may be fatal folly, self-defeating educational technology and anti-national if made a routine rule of State policy. A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potential of the weak with the partial recognition of the presence of competitive merit -such is the dynamics of social justice which animates the three egalitarian articles of the Constitution.

We agree wholly with these observations made by the learned Judge and we unreservedly condemn wholesale reservation made by some of the State Governments on the basis of "domicile" or residence requirement within the State or on the basis of institutional preference for students who have passed the qualifying examination held by the university of the State excluding all students not satisfying this requirement, regardless of merit. We declare such wholesale reservation to be unconstitutional and void as being in violation of Art. 14 of the Constitution." (Para 20)

6. In Dr. Jagadish Saran and Others Vs. Union of India (UOI), , the Apex Court underlined the mandate flowing from Articles 14 and 15 of the Constitution.

"The primary imperative of Articles 14 and 15 is equal opportunity for all across the nation to attain excellence and this has burning relevance to our times when the country is gradually being "broken up into fragments by narrow domestic walls" in politics, economics and education, undoing the founding faith of an undivided integrated India by surrender to lesser appeals and grosser passions. What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personalities. Anyone anywhere, humble or high, agrestic or urban, man or woman, and whatever his religion or irreligion, shall be afforded equal chance for admission to any secular educational course or school for cultural growth, training facility, speciality or employment/Each according to his ability", is of pervasive validity, and it is a latent, though radical, fundamental that, given propitious environments, talent is more or less evenly distributed and everyone has a prospect of rising to the peak. Environmental inhibitions mostly "freeze the genial current of the soul" of many a humble human whose failure is "inflicted", not innate. Be it from the secular perspective of human equality or the spiritual insight of divinity in everyone, the inherent superiority cult with a her renvolk tint, is contrary to our

axiom of equality. That is why, equal protection of the laws" for full growth is guaranteed, apart from equality before the law". Even so, in our, imperfect society, some objective standards like common admission tests are prescribed to measure merit, without subjective manipulation or university-wise invidiousness. In one sense, it is a false dilemma to think that there is rivalry between equality and excellence, although superficially they are competing values. In the long run, when every member of the society has equal opportunity, genetically and environmentally, to develop his potential, each will be able, in his own way, to manifest his faculty fully. The philosophy and pragmatism of universal excellence through universal equal opportunity is part of our culture and constitutional creed." (Para 16)

6.1 There is no gainsaying that merit is the pre-dominant consideration and it is the object sought to be achieved in admissions to the higher education courses. The rule that merit has have its way in the admission process is an absolute rule and all stakeholders and the authorities concerned are required to follow this rule strictly and without demur. Therefore, may be that valid categories or classes of students are recognised for the purpose of offering them quota of seats for admission, but within that class, it is the order of merit which must have its play and way.

6.2 It has been spelt out in caravan of decisions of the Supreme Court as well as this court that the criteria for selection to the admission of higher educational courses has to be merit alone. In *Asha Vs. Pt. B.D. Sharma University of Health Sciences and Others*, , it was observed,

"In fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be travesty of the scheme formulated by this Court and duly notified by the States, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the Rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casualty. It will be useful to refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but is also abuse of the process of law." (Para 21)

6.3 The selection by merit being the criteria to be followed, in the rules of admission, classifying the sources for admission must satisfy the test of reasonableness and non-arbitrariness. In *Minor P. Rajendran Vs. State of Madras and Others*, , the Supreme Court dealt with the rules made by the State of Madras which allocated seats on districtwise basis for the selection of the candidates for admission to 1st year integrated MBBS course. While striking down the rules, the Apex Court made the following observations as to what testifies the requirement of Article 14 , which redeemingly hold good,

"It cannot be and has not been denied that the object of selection is to secure the best possible talent from the two sources so that the country may have the

best possible doctors. If that is the object, the argument on behalf of the petitioners/appellant is that that object cannot possibly be served by allocating seats districtwise. It is true that Article 14 does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved, even assuming that territorial classification may be a reasonable classification. The fact however that the classification by itself is, reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats districtwise has no reasonable relation with the object to be achieved. If anything, such allocation will result in many cases in the object being destroyed and if that is so, the classification, even if reasonable, would result in discrimination, inasmuch as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted from either of the two sources."

6.4 The very proposition of law emanates from the decisions in *Priya Gupta Vs. State of Chhatisgarh and Others*, , *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, , *Sharwan Kumar and etc. Vs. Director General of Health Services and another*, , *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, , *Guru Nanak Dev University v. Saumil Garg* [2005 (13) SCC 749] and *A.I.I.M.S. Students Union Vs. A.I.I.M.S. and Others*, .

6.5 In *Kumari Chitra Ghosh and Another Vs. Union of India (UOI) and Others*, , the Supreme Court distinguished decision in *Minor P. Rajendran Vs. State of Madras and Others*, on the ground that the classification, though district-wise, since had been made on the basis of reasonable rationale with the object sought to be achieved, was liable to be upheld.

7. Dealing with the submissions of learned Advocate General, the issue with regard to Rule 7(1)C(4) is just not of earmarking certain percentage of seats for N.R. Is, but the controversy falls in entirely a different realm. The question is not validity of allocation of N.R.I. seats, but a sub-classification in the said quota and providing for different categories amongst the N.R. Is. based on and with special reference of domicile. When Rule 7(1)C(4) enacts categories (a), (b), (c) and (d) for the purpose of preparation of merit list for admissions to N.R. Is on the criteria whether they are "domicile of Gujarat" or not, it assumes different colour, complex and context. From the affidavit-in-reply learned Advocate General submitted that other States such as Madhya Pradesh, Union Territory of Chandigarh, Jharkhand, Punjab have also framed Rules on the basis of domicile. As regards the Rules framed by the other States and relied on, the Court cannot consider the validity of the Rule under consideration with reference to the Rules in the other States. The impugned Rule has to meet with the requirement of Article 14 and non-arbitrariness.

7.1 The contention that the domicile concept is inserted in the Rule for cultivating

affinity is too theoretical proposition to be accepted for the purpose of judging legal validity of the Rule, apart that the submission is too nebulous to be countenanced. As regards the say that N.R. Is. would bring money which would be utilised for uplifting the standards of medical education, etc., it is a common phenomenon for all N.R.I. whether domiciled of Gujarat or not and the said aspect or contention hardly carries further the case of the respondents.

7.2 Dealing with the decisions relied on by learned Advocate General, the decision in *Dhruvit M. Patel and Others Vs. C.U. Shah Medical College and Others*, was with regard to Rule 6 of the Gujarat Professional Medical Educational Colleges or Institutions (Regulation of Admission and Fixation of Fees) Rules, 2008 wherein the Division Bench of this Court upheld district-wise reservation of seats by unaided medical college. It reasoned that medical center was established with the help of various philanthropist hailing from the specified districts and earmarking of four seats for the students which qualified from the schools of specified districts was not irrational or violative of Article 14. In that case, the Trust was running the medical college with an object was to cater the educational needs of students hailing from specified districts.

7.3 In *Parth Keyur Parikh (AIR 2009 (NOC) 410 (Guj)) (supra)*, Section 2(i) of the Act of 2007 defining "Non-Resident Indian seats" was under scanner. The Non-Resident Indian seats were defined to mean 15% seats reserved for children or wards of the dependent for the education purpose of the Non-Resident Indian, to whom admission was to be given in the professional education colleges or institutions. The Court held that, Section 2(i) of the Act defined N.R.I. seats as seats reserved for children of wards or dependents for the education purpose of the Non-Resident Indian; there was nothing in the Act or the Rules to indicate that the Legislature or the Rule-making authority had given any higher preference to students who were themselves N.R. Is. or to children or wards of N.R. Is. The facts and the context in both the above decisions had a different background.

7.4 The decision in *Vishakha Vs. State of Gujarat and Another*, dealt with vires of Rule 5(1) and 5(2) of Rules for admission to M.B.B.S./B.D.S. providing for the students who had passed 12th standard examination from school in Gujarat shall be eligible for admission. The challenge was based on the contention by the appellants that Rule was violative of Article 15 inasmuch as it did not extend benefit of exemption to children of persons having original of Gujarat serving in armed forces at par with those of I.A.S. Officers. The Court negated the challenge and held that Rule provided for 15% quota to be field-in by All India Entrance Examination. Reservation upto 85% was permissible as per the law laid down by the Apex Court in *Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others*, .

7.5 The decision in *Sheetal Yeshwantkumar (supra)* does not help the respondents in any manner. In that, the Court found that there was an intelligible differentia and a nexus in the classification made by Rule 5(1) of the Gujarat

Professional Medical Education Courses (Regulation of Admission and Payment of Fees) (Amendment) Rules, 2013 restricting 85% seats to the students who had passed qualifying 12th standard examination from the school situated within the State of Gujarat. The said classification was made, viewed the Court, for the purpose of providing a fair opportunity for making education to the student community in the State of Gujarat. There is a conspicuous absence of any such intelligible differentia in the Rule which provides the categories (a) to (d). Rule 7(1)C(4) miserably fails in supplying a rationale. It does not stand to reason when Non-Resident Indian category is further sub-classified on the basis of irrelevant concept of domicile.

8. The case of Radhey Shyam Singh and others, etc. Vs. Union of India and others, was with regard to the recruitment to All India Services. Though in the field of service jurisprudence, the principle laid down therein applies to the facts of the present case with equal force. In that, selection process for various posts pursuant to the advertisement by the Staff Selection Committee was undertaken on zonal basis as per the procedure prescribed in paragraph 16 of the advertisement. The Court held that method of recruitment from different zones were discriminatory. It was observed that the purpose and object of holding recruitment is to select suitable and best candidates out of the lot and such an object can only be achieved by making a common select list of the successful candidates belonging to all the zones. If zone-wise selection is made, stated the Apex Court, then various candidates who appeared in some of the zones and secured more marks than those who are selected from other zones would be deprived of their selection, resulting into injustice and discrimination. It was held that there can be said to exist no nexus between the process of zone-wise selection and the object to be achieved, that is, selection of the best candidates. When the process result into devaluation of merit of selecting a candidate having lesser mark over meritorious candidate who has secured more marks, consequently rule of equal chance for equal marks would be violated.

8.1 The question essentially is of properly identifying and applying the sources or categories for admission. Even though the sources are on territorial or geographical or other reasonable basis, but if they are classified properly and identified appropriately, the courts would not interfere with the manner and method of making the classification. A reasonable basis implies that it is not arbitrary or fanciful. It means that the classification bears a just, rational and intelligible relation with the object sought to be achieved by the intended classification. A classification, categorization or identification of sources doing mischief to the mandate of equality clause would not stand valid.

8.2 Observance of merit criteria for the purpose of admission is in itself ensuring the equality clause and adherence to tenets of Article 14 . In all admissions, especially to the higher courses, the object sought to be achieved is maintaining the merit order. Therefore, any rule or mechanism flowing from the provisions of law or rules which have a tendency of compromising with merit selection, cannot

be said to have rational nexus with the object intended to be achieved. Any classification which negates accounting for merit as criteria cannot be said to be based on intelligible differentia.

8.3 The clauses (a), (b), (c) and (d) envisaged in the Rule indeed devise zones of considerations in such a manner that by preparing a merit list of the candidates for admission from those different categories-zones. The categories so devised suffer from vice of clubbing together the concepts of different nature-"Non-Resident Indian" and "Domicile of Gujarat", further providing thereby for wholesale reservation on the basis of residence, that is the criteria of domicile.

8.4 If the categories (a) to (d) are operated as they stand, they are bound to tinker with the merit amongst the aspirants in Non-Resident Indian seats. A student falling in category (a) on the ground that he is "domiciled in Gujarat" would take march vis-?-vis, even though less meritorious, over a student having scored higher merit marks, but falling in category (b), and so on. Styling the categories as order of preference is therefore an eye-wash. What the Rule provide is the reservation wholesale in nature based on domicile requirement, taking toll of the merit criteria otherwise supposed to be paramount in admission to the medical courses, in its ultimate analysis.

9. Tested on the anvil of the above position and parameters, Rule 7(1)C(4) offends Article 14 of the Constitution. The Rule is unreasonable and irrational. The categories (a), (b), (c) and (d) mentioned in the Rule to be followed for preparation and determination of order of merit list cannot be said to be based on any intelligible differentia. They sub-divide the single homogeneous class of N.R. Is. and further divides the N.R.I. quota seats into categories which clash inter se with a definite tendency to so as to dilute the merit. The very basis of the categorization (a) to (d), namely the domicile, is not only a mismatch to the N.R.I. category seat quota, but the same operates mischievous vis-?-vis a desired order of merit to be observed for admission of students in the courses. The Rule in question and the categories therein are artificial in nature and arbitrary in their effect having no rational nexus with the object of giving admission to the students in N.R.I. category seats by maintaining merit order amongst them.

9.1 When Rule would operate, the admissions in the category (a) would be exhausted first and preferentially. It would leave a situation where in a given set of circumstances, the students less meritorious but classified in category (a), may out rightly secure admission,, though the students categorized under (b), (c) or (d), even if stand higher in merit, would be sure to loose the admission. This would be true for the respective categories upon their operation. Though the candidates aspiring for N.R.I. seats otherwise belong to a single homogeneous class of Non-Resident Indians, the sub-classification of this one class would result into arbitrary operation of merit-list discriminating a student against another student similarly situated and belonging to the same class. It would lead to a pointed discrimination meted out to a meritorious student against the less

meritorious one.

10. While above is the position obtainable in respect of the Rule in question with reference to the categories provided for preparation of order of merit list for admission, this Court is conscious that a provision of law or Rule should be saved from being declared unconstitutional as far as it is possible. The Court is also alive to the aspect that when the admissions to the courses in question for the present Academic Year are at its doorstep, striking down the Rule may delay and disturb the process of admissions and consequently lead to a chaotic situation for the student community.

11. Keeping the above in view, alternative contention raised on behalf of the respondents about reading down the Rule was anxiously considered by the Court. It is well settled that doctrine of reading down may be attracted where the provision of law or a rule in the realm of subordinate legislation contain an unintended omission on part of the Legislature or the rule making authority, which can be reasonably supplied by reading down or reading into the Rule, but without otherwise altering the provision or the Rule.

11.1 In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, , the Supreme Court observed as under.

"It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible -one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it." (Para 255)

11.2 In *Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others*, , the Apex Court stated about the rule of "reading down" as under:

"The rule of "reading down" a provision of law is now well recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. In the garb of "reading down", however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of

reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view of the scheme of the statute and to fulfil its purpose." (para-35)

11.3 The principal of reading down was highlighted in *Subramanian Swamy and Others Vs. Raju Thr. Member Juvenile Justice Board and Another*, which observed that the Court must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the Court must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking, what would be a legislative exercise, the Act may be read down to save it from unconstitutionality.

12. In the present case, as far as Rule 7(1)C(4) is concerned, it does not book any ambiguity, nor it contain, to be so-called, any intended legislative omission. The categories (a), (b), (c) and (d) and the order of providing for preparation of merit are expressly envisaged by the Rule making authority. It is neither possible nor feasible to read down the Rule, for, in order to read it down, the Rule would have to be retained in its text and language, and that a meaning would have to be supplied to it so as to weed out the element of arbitrariness and irrationality. Any attempt to reading down the Rule would amount to re-writing the Rule. There is no conceivable way whereby the Rule can be read down or something can be read into it. Such exercise would be in nature of legislative exercise and same is not permissible.

13. It is but trite principle also that by applying the doctrine of severance if a provision of law or Rule could be saved for its constitutionality for the rest of its part, by distancing the provision or Rule from the part, portion, group of words or word which are the genesis of arbitrariness and because of which the provision is exposed to irrationality and deflects from the object it seeks to achieve. The process of interpretation is viewed as a creative process to cure in the ultimate vice of arbitrariness. In a given case, the interpretational process may involve partial striking down and thereby ironing out the creases.

14. In *Suresh Kumar Koushal and Another Vs. NAZ Foundation and Others*, though in the context while examining the constitutionality of different statute, that is, Section 377 of the Penal Code, 1860, stated on the principle of doctrine of severability in these words-"The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the legislature and should be avoided where the two portions are inextricably mixed with one another".

14.1 In *Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and Others*, , the Apex Court stated, "To sustain a law by interpretation is the rule. To be trigger-happy in shooting at sight every suspect law is judicial legicide."

15. If reading down of Rule is not possible, than also the Court would made an endeavour to save a portion of Rule to the extent it stands valid by striking down to the extent found invalid. However the Court while doing so needs to clear up about operation of the severed portion of the Rule and ensure that it does not result into non-functionality.

16. The ultimate vice in the Rule 7(1)C(4) is the introduction of the concept of domicile of the State in the category of Non-Resident Indian seats. As discussed hereinabove, if the Rule is allowed to be operated with reference to the criteria of domicile and the order of merit is prepared in accordance therewith under the categories (a) to (d), the arbitrariness creeps in and the merit order gets tinkered with without any rationality. The Rule under consideration is capable of being severed for its portion which suffers from vice of arbitrariness and irrationality as discussed above.

17. In light of the above position of law and focusing on the criteria of domicile in the Rule in question, it is the root cause of rendering the Rule arbitrary in its operation, Rule 7(1)C(4) to the extent it provides for domicile of the State as the basis and further provides the categories devised on that criteria for the preparation of merit list in that order is declared violative of Article 14 and ultra vires.

18. The said criteria of domicile in Gujarat is ordered to be deleted by striking down the said words "who are domicile of Gujarat" occurring in the categories (a), (b), (c) and (d).

18.1 In the preceding part of the Rule, the group of words "shown against item (a) below shall be considered first and thereafter candidates falling in the merit lists shown against item (b), (c) and (d) shall be considered respectively" shall also stand struck down.

18.2 The Rule is declared ultra vires to the extent indicated above.

18.3 The rest of the Rule can be maintained and stands valid for the purpose of giving admission in the courses in the category concerned.

18.4 When the operationality of the Rule 7(1)C is further examined, the resultant effect would be that Clauses (a) and (b) as well as Clauses (c) and (d) would operate in the same sub-classified field. Furthermore, there cannot be two Clauses for same class of students. The moment Clause (a) and Clause (c) operates in their respective field, Clause (b) and Clause (d) without the words "who are not domicile of Gujarat" would be rendered redundant. As a necessary implication of the above declaration and direction, the categories (a) to (d) provided for in the Rule for the purpose of preparation and operating the merit list in that order, shall stand obliterated and vanish from the arena of the Rule.

18.5 The rest of the portion of Clauses (a) and (c) and held to be unconstitutional and therefore void. In view of aforesaid requirement and operationality of Clause (b) and Clause (d) would be lost, hence it is further

observed and held that Clauses (b) and (d) would stand redundant and would not meet the test of Article 14 of the Constitution and therefore are declared as ultra vires and unconstitutional.

18.6 The effect of what is held hereinabove would be that the Rule 7(1)C(4)(i) would, barring the struck of portion would stand as under "(4).....(i) The Candidate who is Non-Resident Indian as also the candidate whose parents and in the absence of his/her parents, his/her legal guardian who is Non-Resident Indian, shall be offered the Non-Resident Indian seats, if remains vacant, shall be offered to the candidate who is dependent of NRI in merit list". Rule 7(1)C shall for its all other parts except above shall continue to operate.

18.7 It is further held that in view of striking down of the group of words "who are domicile of Gujarat" in Clause (a) and Clause (c) and the group of words "who are not domicile of Gujarat" in Clause (b) and Clause (d), the rest of the portion of Clause (b) an Clause (d) would have no operational efficacy and would stand redundant, hence will not have their operability. As a result thus, Rule 7(1)C(4) shall stand valid for its Clauses as under-

"(a) Merit List of genuine N.R.I.,

(c) Merit List of dependent N.R.I."

19. The admissions to the Professional Medical Educational Courses in the category of N.R.I. shall be governed under the present Rules including Rule 7(1)C(4) except the part of it struck down and declared ultra vires as above. The respondents are directed to commence and complete the admission process in light of the aforesaid declarations and directions, without delaying the Academic Year. Petition is allowed in the terms and to the extent above. Rule is made absolute accordingly. No order as to cost.

FURTHER ORDER

After the pronouncement of the judgment, Mr. Trivedi learned Advocate General prayed that the operation of this judgment be stayed for some time so as to enable the State to carry the matter before the higher court. It appears that pending the petition, by interim order dated 02.07.2015, the Rule was completely stayed. By present judgment, Rule is maintained to the extent found valid. Furthermore, the matter pertains to admission process in medical faculty and the same should not be deferred, otherwise it may result into wastage of academic year for the students concerned. Hence, the said prayer is not accepted.