

(2011) 04 UK CK 0087

In the Uttarakhand High Court

Case No : Writ Petition (S/B) No. 33 of 2011

Smt. Dr. Madhu Arya

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Constitution of India, 1950 — Article 5
Succession Act, 1925 — Section 15, 16, 4

Citation : AIR 2011 Utt 50

Hon'ble Judges : Barin Ghosh, C.J;Sudhanshu Dhulia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—The Petitioner was born into a family of Ors. Backward Class (from hereinafter referred to as OBC), in the State of Uttarakhand and is a permanent resident of the State of Uttarakhand. She was subsequently married to one Rajendra Kumar, who is a permanent resident of Bulandshahr (which is in Uttar Pradesh). In order to get an. appointment in government service in Uttarakhand the Petitioner applied for a caste certificate from the authorities in the State of Uttarakhand, namely, from Tehsildar Roorkee, District-Hardwar. At this stage it must be stated that though she already had a Caste Certificate in her favour as back as of 1995 certifying that she belongs to "Saini" which is an O.B.C. in Uttar Pradesh, as it was then yet the new Caste Certificate was insisted upon by the authorities after the creation of the new State of Uttarakhand. Be that as it may, since the Caste Certificate was not given to her earlier, she was constrained to file a writ petition before this Court which was disposed of by an order of a Division Bench dated 26th November, 2010, directing the Respondent to dispose of the application made by the Petitioner as quickly as possible preferably within a month from the date of service of a copy of this order. The order dated 26th November, 2010 passed in Civil Writ Petition No. 271 of 2010(S/ B) is reproduced here under:

Before the State of Uttar Pradesh was divided, the appropriate authority of the Roorkee District acknowledged that the Petitioner belongs to Ors. Backward Classes, Subsequent to creation of the State of Uttarakhand, no such acknowledgement has been accorded by the appropriate authority of the District Roorkee. Petitioner has applied to Respondent No. 4 - Sub-Divisional Magistrate, Roorkee, District Haridwar for the purpose of obtaining such acknowledgment. If such acknowledgment is not accorded within a reasonable time then the Petitioner may lose the benefit of her selection by the Respondent No. 3. Hence, the Petitioner is before us in this writ petition.

2. Having regard to the facts as above, we request the Respondent No. 4 to dispose of the application made by the Petitioner for obtaining the acknowledgment that she belongs to Ors. Backward Class category as quickly as possible preferably within a month from the date of service of a copy of this order upon the said Respondent. Until then, the Respondent No. 3 is requested not to treat that the Petitioner does not belong to Ors. Backward Class category.

The writ petition is accordingly disposed of.

2. Consequent upon the above order of the Division Bench, Petitioner applied for a certificate of OBC from Sub Divisional Magistrate, Roorkee, District Haridwar, which was rejected by the Sub Divisional Magistrate, Roorkee vide order dated 17th January, 2011 for the reasons that though the Petitioner was earlier a resident of the State of Uttarakhand but since she has married to one Rajendra Kumar son of Sohan Lal, resident of District Bulandshahar (which is now in the State of Uttar Pradesh) on 27th April, 2011, therefore, as per the provisions of Sections 15 & 16 of the Indian Succession Act, 1925, her domicile will belong as that of her husband and therefore authorities in U.P. can only grant her the Caste Certificate.

3. This order of Sub Divisional Magistrate, Roorkee is absolutely illegal, inasmuch as, the provisions relied upon by the Sub Divisional Magistrate, Roorkee, namely, Sections 15 & 16 of the Indian Succession Act, 1925 form a part of Part II of the said Act and Section 4 of the said Act specifically states that this Part (Part II) shall not apply, if the deceased was a "Hindu, Muhammadan, Buddhist, Sikh or Jaina". In Ors. words Sections 15 and 16 of the Indian Succession Act, 1925 are not applicable in case of the Petitioner, who is admittedly a Hindu. Since, Petitioner is, admittedly, a Hindu, the provisions relied upon by the Sub Divisional Magistrate, Roorkee, while rejecting the claim of the Petitioner cannot be sustained.

4. Apart from this, the Indian Succession Act was enacted in the year 1925. This was the time when India was under a colonial rule. The country as we understand it today did not exist in the year 1925. In 1925, India had "different legal systems" in different parts of the country. It was only one part of India which was under one political and legal system which was called "British India", and the remaining was further fragmented into several princely States having

their own distinctive legal systems. Furthermore, there were pockets in India, which were either under Portuguese or French rule. In short, one legal system did not prevail in India in the year, 1925 and therefore, the concept of domicile had a relevance in the Indian Succession Act. Today in the present context, this has no relevance and the reliance upon it is totally misplaced.

5. It is further clarified that the Hon'ble Apex Court in its judgment in *Mrs. Valsamma Paul Vs. Cochin University and others*, has held that merely because a person is married into another community, which is backward class community or a scheduled caste community, she would not get benefit of that community, inasmuch as, she only marries into a family and not into a community and her caste will not change and she will not get benefits of that Caste to which she is married. It also goes without saying that this caste certificate can only be claimed by her in the State of Uttarakhand, where she originally resides and where her parents still reside and where the status of her caste is that of an OBC category. The Caste Certificate has to be given by the authorities in the State where the person claiming such certificate is born. Reference was made here by the learned Counsel for the Petitioner of a Kerala High Court judgment in *N. Pushpa Devi v. The Kerala Public Service Commission and Ors.* reported in 1996 Lab IC 874.

6. In paragraph 12 of the writ petition, Petitioner has categorically stated that she was born on 28th June, 1971 in Village Matlabpur, Tehsil Roorkee, District Haridwar, which is a part of State of Uttarakhand and was brought up in Uttarakhand. In reply to the counter affidavit, the State authorities have admitted this fact. As such, regarding the fact that the Petitioner was born and brought up in the State of Uttarakhand and is a permanent resident of the State of Uttarakhand, has not been denied. All the same, the claim of the Petitioner for grant of a caste certificate has only been rejected on the ground that her domicile has now changed to that of State of Uttar Pradesh,

7. There is a rampant misconception amongst the administrative authorities in the State as to the concept of domicile. This aspect has been dealt by this Court in *Neha Saini v. State of Uttarakhand and Anr.* AIR 2010 Uta 36 : 2010 (4) ALJ 246. The concept of domicile as it is understood in other countries is different than the concept of domicile which is applicable in India. Since in the entire country i.e. right from Kashmir to Kanyakumari and from Ran of Kutch in the west, to the east in Arunachal Pradesh, there is one "system of law" prevalent, therefore, there is no concept of domicile in India as it is understood in England and other countries. This concept has been elaborated in a judgment of this Court, namely, *Neha Saini v. State of Uttarakhand and Anr.* (Writ Petition (M/S) No. 146 of 2009) Reported in AIR 2010 Utr 36. In India there is only one domicile and each citizen of this country carries with him or her, one single domicile which is the "Domicile of India". The concept of regional or provincial domicile is alien to Indian legal system. Even the Constitution of India (Article 5) while explaining "citizenship" speaks of "domicile in the territory of India, and not in the territory

of a "Province" The difference in personal laws in India is also not regional based but religion or community based and a "muslim" or a "Hindu" will be governed by a single system of personal laws irrespective of where and in which State he resides.

8. The Hon"ble Supreme Court in its seminal judgment in Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, has held as under (Para 8):

Now it is clear on a reading of the Constitution that it recognises only one domicile, namely, domicile in India. Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the territory of India." Moreover, it must be remembered that India is not a federal State in the traditional sense of that term. It is not a compact of sovereign States which have come together to form a federation by ceding a part of their sovereignty to the federal State. It has undoubtedly certain federal features but it is still not a federal State and it has only one citizenship, namely, the citizenship of India. It has also one single unified legal system which extends throughout the country. It is not possible to say that a distinct and separate system of law prevails in each State forming part of the Union of India. The legal system which prevails throughout the territory of India is one single indivisible system with a single unified justicing system having the Supreme Court of India at the apex of the hierarchy, which lays down the law for the entire country. It is true that with respect to subjects set out in List II of the Seventh Schedule to the Constitution, the States have the power to make laws and subject to the overriding power of Parliament, the State can also make laws with respect to subjects enumerated in List III of the Seventh Schedule to the Constitution, but the legal system under the rubric of which such laws are made by the States is a single legal system which may truly be described as the Indian legal system. It would be absurd to suggest that the legal system varies from State to State or that the legal system of a State is different from the legal system of the Union of India, merely because with respect to the subjects within their legislative competence, the State have power to make laws. The concept of "domicile" has no relevance to the applicability of municipal laws, whether made by the Union of India or by the States. It would not, therefore, in our opinion be right to say that a citizen of India is domiciled in one State or another forming part of the Union of India. The domicile which he has is only one domicile, namely, domicile in the territory of India. When a person who is permanently resident in one State goes to another State with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice. His domicile remains the same, namely, Indian domicile. We think it highly detrimental to the concept of unity or integrity of India to think in terms of State domicile.

9. The Apex Court also took note of the common misconception of the various State Governments with the term domicile and observed that it is not uncommon for the State Governments to use the term "domicile" when what they actually

intend to state is "permanent residence". However, the Apex Court also cautioned the State Governments to desist from using the term domicile in any Ors. manner except what the word actually conveys or means.

10. In the above case, the argument that domiciliary requirement for admission to medical colleges and Ors. colleges situated within the State territory is actually used not in its technical legal sense but in a popular sense denoting residence or an intention to reside permanently was also discussed in this judgment and this practice of wrongly using the nomenclature "domicile" was severely depreciated. This is what the Apex Court had to say on this: (Para 9 of AIR)

We think it is dangerous to use a legal concept for conveying a sense different from that which is ordinarily associated with it as a result of legal usage over the years. When we use a word which has come to represent a concept or idea for conveying a different concept or idea, it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity or meaning. The concept of domicile if used for a purpose Ors. than its legitimate purpose may give rise to lethal radiations which may in the long run tend to break up the unity and integrity of the country. We would, therefore, strongly urge upon the State Governments to exercise this wrong use of the expression "domicile" from the rules regulating admissions to their educational institutions and particularly medical colleges and to desist from introducing and maintaining domiciliary requirement as a condition of eligibility for such admissions.

11. The judgment at another place speaks as under (Paras 3 & 4 of AIR):

...Now if India is one nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and equal protection of the law with Ors. citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamilnadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognize the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent states.

4. But, unfortunately, we find that in the last few years, owing to the emergence of narrow parochial loyalties fostered by interested parties with a view to gaining advantage for themselves, a serious threat has developed to the unity and

integrity of the nation and the very concept of India as a nation is in peril. The treat is obtrusive at some places while at Ors. it is still silent and is masquerading under the guise of apparently innocuous and rather attractive clap-trap. The reason is that when the Constitution came into operation, we took the spirit of nationhood for granted and paid little attention to nourish it, unmindful of the fact that it was a hardwon concept. We allowed "sons of the soil" demands to develop claiming special treatment on the basis of residence in the concerned State, because recognizing and conceding such demands had a populist appeal. The result is that "sons of the soil" claims, though not altogether illegitimate if confined within reasonable bounds, are breaking as under the unity and integrity of the nation by fostering and strengthening narrow parochial loyalties based on language and residence within a State. Today unfortunately, a citizen who has his permanent residence in a State entertains the feeling that he must have a preferential claim to be appointed to an office or post in the State or to be admitted to an educational institution within the State vis-a-vis a citizen who has his permanent residence in another State because the latter is an outsider and must yield place to a, citizen who is a permanent resident of the State, irrespective of merit. This, in our opinion, is a dangerous feeling which, if allowed to grow, indiscriminately, might one day break up the country into fragments.

12. Much prior to the above judgment of the Hon"ble Apex Court, learned Chief Justice of Bombay High Court Sri M.C. Chagla in another judgment in *The State Vs. Narayandas Mangilal Dayame*, regarding domicile has stated as under:

Now in our opinion, it is a total misapprehension of the position in law in our country to talk of a person being domiciled in a province or in a State. A person can only be domiciled in India as a whole. That is the only country that can be considered in the context of the expression "domicile" and the only system of law by which a person is governed in India is the system of law which prevails in the whole country and not any system of law which prevails in any province or State. It is hardly necessary to emphasize that unlike the United States of America, India has a single citizenship. It has a single system of Courts of law and a single judiciary and we do not have in India the problem of duality that often arises in the American Law, the problem which arises because of a federal citizenship and a State citizenship. Therefore, in India we have one citizenship, the citizenship of India. We have one domicile--the domicile in India and we have one legal system -the system that prevails in the whole country. The most that one can say about a person in a State is that he is permanently resident in a particular State. But as Halsbury points out, to which we have just made reference, the mere fact that a man's home may be fixed at a particular spot within the country does not make him domiciled in that spot but makes him domiciled in the whole country, and therefore, whether a man permanently resides in Bombay or Madras or Bengal or anywhere does not make him domiciled in Bombay, Madras or Bengal but makes him domiciled in India; Bombay, Madras and Bengal being particular spots in India as a country. It was further clarified that merely because a provincial legislature makes laws on certain subject-matters will not ipso fact to mean that

a person domiciled in that State has a provincial domicile:

The competence of the Legislature is not limited to passing of laws which would only apply to persons domiciled within the State. Any law passed by a State Legislature can be applied to any person within the State, and therefore the expression "domicile" has no relevancy whatever in constructing the competency of the State Legislature. If the State Legislature is legislating on a topic within its competence, that law can be made applicable to anyone in the State of Bombay whether he is a resident or not or even if he is a foreigner passing through the State of Bombay. Therefore, it is fallacious to suggest that the doctrine of domicile is introduced in our law by person of the fact that the State or the Provincial Legislature has been given the power to legislate with regard to certain subject-matters within its territorial ambit. It, therefore, seems to us that the expression "domicile" used in any State or Provincial law is a misnomer and it does not carry with the implications which that expression has when used in the context of international law.

13. The English Case laws on domicile are of little help to us as unlike in India in Great Britain, which would be England, Scotland and Wales, there are different systems of law operating, depending upon the territory. As such, the concept of domicile is of immense significance there, because the application of law there would defer depending upon the location or domicile of a person. Here in India, as already referred above, we do not have such different applications of law. The entire country has one legal system, denoting one single domicile and therefore, the concept of domicile in India as also the application of principles of domicile would be different to what its application would be in England, Scotland or Wales;

14. Consequently, the denial of caste certificate to the Petitioner by the authorities in Uttarakhand is based on a misconception of the term "domicile". Petitioner was never a domicile of Uttarakhand or Uttar Pradesh. She was, and continues to be a domicile of India, as there is nothing like a "domicile of Uttarakhand" or a "domicile of Uttar Pradesh" or of any Ors. State. It is emphasised, even at the cost of repetition, that in India each citizen has only one domicile, which is the "domicile of India". Thus, the denial of caste certificate to the Petitioner by the State authorities in Uttarakhand on the ground that she is presently a domicile of the State of Uttar Pradesh and not of Uttarakhand is clearly wrong, in fact misconceived. The Petitioner always had and presently possesses a domicile, which is called the "domicile of India". Similarly the assumption that with the marriage a woman changes her domicile to that of her husband is also not correct proposition in case of Hindus.

15. Now since the Petitioner is a domicile of India, it matters little whether she presently stays in Uttar Pradesh or Uttarakhand. What is important and what should be examined by the State authorities is that the Petitioner was born in a Backward Class which is notified as such in the State of Uttarakhand. The Petitioner was residing in the State of Uttarakhand prior to her marriage and therefore, she is entitled for caste certificate from the State authorities in the

State of Uttarakhand. The next question would be regarding the caste of the Petitioner. This certificate can only be granted to the Petitioner by the authorities in Uttarakhand. Therefore under law if the Petitioner demands such a certificate from the authorities in Uttarakhand, then such a certificate ought to be granted to her. It cannot be denied to her merely because she has now married in a different State or that her husband permanently resides in the State of Uttar Pradesh.

16. For the reasons referred in the preceding paragraphs, the reasoning, not to grant caste certificate to the Petitioner, is wholly wrong. The Petitioner was liable to get a caste certificate. The order dated 17th January, 2011 passed by Sub Divisional Magistrate, Roorkee, District Hardwar is set aside. He is, therefore, directed to give a caste certificate to the Petitioner within fifteen days from the date of service of a copy of this order upon him. While granting the interim order dated 17th February, 2011 to the Petitioner, Respondents were directed not to fill up the post in which the Petitioner could be appointed. Consequently, it is directed that after the Caste Certificate is produced before Respondent No. 3/ Uttarakhand Public Service Commission, the Commission shall make appropriate recommendation treating the Petitioner to be of that OBC category.

17. The writ petition is, accordingly, allowed.