
(2011) 09 AHC CK 0264

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No.39002 of 2011

Usha Singh and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Citation : (2011) 09 AHC CK 0264

Hon'ble Judges : V.K.Shukla, J

Final Decision : Disposed Of

Judgement

V.K. Shukla, J.—Shrish Kumar Singh son of Sri Ajay Singh and Usha Sing wife of Sri Ajay Singh, both the mother and son team, have approached this Court for quashing of the remark dated 28.06.2011 made by the University authorities, and further prayer has been made for not insisting for producing MOOLL NIVAS PRAMAN PATRA and further to accept the same duly issued by the competent authority, and consequently, accept the candidature of petitioner No.2 for admission to B. Tech Course2011.

2. Brief background of the case is that petitioner No.2, Shrish Kumar Singh, who is son of petitioner No.1, had applied for admission to B. Tech course, for which Mahamaya Technical University, Noida, proceeded to conduct the U.P. State Entrance Examination2011 (UPSEE2011). He was issued admit card with Roll No.4030530 and centre of examination was allotted at B.M.A.S Engineering College, Keetham, Agra. Result of the said examination was declared on 24.05.2011, wherein petitioner No.2 had secured 1607 rank as general candidate. Counseling was to commence in the month of July, 2011. The University concerned directed the candidates to apply for verification of documents on 25.06.2011 at their respective allotted centres. Petitioner No.2 claims to have appeared at the allotted centre, namely, B.M.A.S Engineering College, Keetham, Agra and produced his documents for verification, including the domicile certificate duly issued by the competent authority. Said domicile certificate was not accepted by the University authorities. They asked the

petitioner to make available the residence certificate in format of Certificate3, and again certificate was issued describing him as SAMANYA NIWASI. The petitioner No.2 has made specific statement of fact that on the production of format before the SubDivisional Magistrate, Gorakhpur, he himself altered the Certificate3 format by scoring out the word ?MOOL? and inserting in its place ? Samanya?, and then issued the said certificate on 27.06.2011. The petitioner has stated that the said certificate was produced before the University authorities, and on the said certificate itself, the University authorities made endorsement that the same was not acceptable, and thereafter, the petitioner has rushed to this Court, contending therein that the treatment which has been meted to petitioner No.2, is arbitrary, illegal and unreasonable, whereas petitioners are to be accepted as residents of the State of U.P.

3. Counter affidavit has been filed, and therein insistence has been made that as per Information Brochure all the students are required to submit domicile certificate of permanent residence, but in the present case, the SubDivisional Magistrate has issued certificate of normal residence, as such the said certificate cannot be treated as domicile certificate of the petitioner; in such a situation and in this background paragraph 6 of the Information Brochure clearly proceeds to mention that entrance examination was open to only those candidates, who had passed their qualifying examination from U.P. or those whose parents are domicile in U.P., subject to other eligibility conditions as given in the Information Brochure, and as petitioner No.2 could not produce the residence certificate, therefore, he was not entitled to appear in the examination, and further as per paragraph 13 of the Information Brochure, it was the responsibility of the incumbent concerned to have ensured his eligibility, and in this background, the petitioner No.2 was not at all eligible to undertake the examination. Thus, he has no claim, whatsoever, for admission in any course through U.P.S.E.E.2011.

4. To the said counter affidavit, rejoinder affidavit has been filed, and therein much emphasis has been laid on the fact that petitioners' family has settled finally at Gorakhpur and has been residing at house No.160Q, Civil Lines, Tehsil Sadar Gorakhpur in their own house, and further this much has also been stated that the father of petitioner No.2 had passed his High School and Intermediate Examinations from Maharana Pratap Inter College, Gorakhpur, affiliated to U.P. Board of High School and Intermediate Education, Allahabad; further electricity connection pertaining to house in question is in the name of the grandfather of petitioner No.2; in such a situation and in this background, it has been sought to be contended that the petitioner's claim is squarely covered under the Government Order dated 18.02.2003, and the petitioner has to be treated as permanent resident of Gorakhpur, U.P., and in this background totally impermissible view has been taken. Further it has also been stated that the petitioners' family has least concern and connection with the State of Bihar, instead they are the permanent residents of Gorakhpur, U.P. It has also been stated that interpretation of Government Order dated 18.02.2003 done by the respondents is absolutely misconceived and incorrect. Further it has been stated

that paragraph 3 of the Government Order should be harmonized with paragraph 9 thereof and on being harmonized, the petitioner cannot be treated as an outsider for the purposes of getting admission to B. Tech course in U.P. In this background, writ petition deserves to be allowed.

5. After the pleadings mentioned above have been exchanged, present writ petition has been taken up for final hearing and disposal with the consent of the parties.

6. Sri Pradeep Upadhyaya, learned counsel for the petitioner, contended with vehemence that in the present case, by all means the petitioners are to be treated as permanent residents of U.P. and the SubDivisional Magistrate, Gorakhpur has erred in law by providing the certificate to petitioners showing to be ordinary resident, whereas fact of the matter is that the petitioners are permanent residents of the State of U.P. with no intention to move; in such a situation and in this background nonsuiting the candidature of petitioner No.2 on the ground that his mother is not domicile or permanent resident of U.P. is uncalled for; in such a situation, the writ petition deserves to be allowed.

7. Countering the said submissions, learned standing counsel as well as Sri Niraj Tiwari, Advocate, representing the University, on the other hand, contended that the petitioner No.2 was not at all fulfilling the requisite minimum eligibility criteria, as he failed to produce the certificate that he was permanent resident of U.P., and such his candidature has rightly been nonsuited, in the facts of the case, as such writ petition deserves to be dismissed.

8. After respective arguments have been advanced, factual situation which emerges in the present case is that the petitioners claim that their family belonged to the State of Bihar, but at present their family has shifted to Gorakhpur, where they have constructed their own house and their family has been staying therein. This fact is also fortified from the fact that father of petitioner No.2 had passed his High School examination in the year 1984 and the Intermediate Examination in the year 1986 from Maharana Pratap Inter College, Gorakhpur. Petitioners claim of their home and claim to be residing in House No.160Q, Civil Lines, Tehsil Sadar, District Gorakhpur, and further claim that in the aforesaid house, in the name of grandfather of petitioner No.2, electricity connection is there and the bill is also raised in the name of grandfather and paid by him. The petitioner has passed his High School examination from the State of Rajasthan and Intermediate examination from the State of Bihar. The University in question has proceeded for holding of the examination known as U.P. State Entrance Examination 2011 for according admission to Engineering Colleges, wherein petitioner No.2 was also one of the candidates and had applied for consideration of his candidature. After the result of the said examination was declared, the petitioner secured 1607 rank as general candidate and had been called for counseling. One of the prerequisite eligibility criterion was that the examination in question was open to only those candidates, who had passed their qualifying examination from the State of U.P. or whose parents are domicile/

permanent resident of U.P., subject to other conditions as given in the Information Brochure. It was also provided that if the candidate had passed qualifying examination from outside State of U.P., the candidate had to produce domicile certificate of his/her father or mother only at the time of verification of documents. The petitioner at the point of time while appearing in the counseling had produced residence certificate; it contained endorsement of being ordinary resident qua petitioner No.1; said certificate was not accepted and the petitioner No.2 was treated outside the zone of consideration.

9. The question is, can in the facts of the case, candidature of the petitioner No.2, be held to be valid on the basis of the certificate which was so produced by him at the point of time when he appeared for verification of documents. The State Government has issued an Order dated 18.02.2003 in respect of issuance of domicile certificate, therein it has been mentioned that certificates so issued are meant for getting admission to educational institutions or for getting the employment, and further, it has been provided that the District Magistrate of the district or the Subdivisional Magistrate or the Additional District Magistrate authorized in this behalf would be the competent authority to issue such certificate. Relevant extract of the aforesaid Government Order is being extracted below:

10. A bare perusal of the aforesaid Government Order would go to show that in order to get the said certificate issued, it would be necessary that the applicant, his mother or father should be original resident of the district concerned or alternatively, the applicant should have been residing temporarily in the district for the last three years. Paragraph 9 of the said Government Order further provides that before proceeding to accord the certificate, the competent authority would satisfy himself as to whether the applicant, his father or his mother is the original resident of the aforementioned district or they have been residing in the district from the last three years, and then in the prescribed format certificate is to be issued. Paragraph 3 of the Government Order deals with prerequisite eligibility criteria for getting the certificate, whereas paragraph 9 deals with exercise which is to be undertaken before issuance of certificate and same obligates the competent authority to record its satisfaction as to whether the applicant or his family members are original residents of the district in question or have been residing therein for the last three years.

11. The relevant portion of the Information Brochure of the University reads as follows:

?This Entrance Examination is open only to the candidates, who have passed the qualifying examination from any institution located in U.P. or whose parents are domicile of U.P., subject to eligibility conditions given in this Information Brochure. If the candidate has passed qualifying examination from outside of U.P., he/she has to produce domicile certificate of his/her parents (father and/or mother only), at the time of verification of documents. However, 20% seats of B. Tech and B. Arch courses in all institutions shall be filled based on merit of

AIEEE2011 out of which 10% seats shall be through All India merit without reservation and rest 10% on State of U.P. merit as per U.P. reservation Act, 2006.?

12. Format of certificate has been provided as follows in the Information Brochure:

13. In the present case accepted position is that the certificate³ produced by petitioner No.2 was in reference to petitioner No.1, the mother of petitioner No.2, and the same is in consonance with the Government Order dated 18.02.2003 In the Note appended to Certificate³, which has been extracted above, same clearly proceeds to mention that Certificate³ should be of mother/father, as the candidate has passed qualifying examination from outside the State of U.P., and it has also been mentioned that if his parents are original/permanent resident of the State, then such incumbents are eligible to appear in the Entrance Examination.

14. The word 'residence' has been subject matter of interpretation by Apex Court in various cases. In the case of Smt. Jeewanti Pandey v. Kishan Chandra Pandey, AIR 1982 SC 3, while considering the provisions of Hindu Marriage Act, wherein jurisdiction is also related to ordinary place of residence . Therein it has been held as follows:

¶8. In arriving at that conclusion, the High Court was obviously influenced by the fact that the parties never had any permanent residence. While it is true that mere casual or temporary visits do not constitute "residence" within the meaning of cl. (ii) of Section 19 of the Act, it cannot be said that the parties came to Delhi on a temporary sojourn for a day or two. The appellant's case is that she had left her parental home at village Bagyan as her father did not consent to the marriage. If that be so, the irresistible conclusion is that she came to reside with the respondent at Delhi. It was frankly conceded before us that the finding of the High Court that she should be so regarded as having her residence at village Bagyan in the district of Pithoragarh is based on no evidence. It is agreed on all hands that ever since the marriage, the appellant has been residing with her uncle Basant Kumar at Lajwanti Garden, New Delhi.

12. In order to give jurisdiction on the ground of "residence". something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense residence, is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time: to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In

Webster's Dictionary, "to reside" has been defined as meaning "to dwell permanently or for any length of time", and words like "dwelling place" or "abode" are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides.

13. It is plain in the context of cl. (ii) of Section 19 of the Act, that the word "resides" must mean the actual place of residence and not a legal or constructive residence, it certainly does not connote the place of origin. The word "resides" is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora, had Jurisdiction or not. That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act.?

15. In reference to admission to Medical College, the question of residential requirement has been dealt with in detail in the case of Dr. Pradeep Jain v. Union of India, AIR 1984 SC 1420, and therein Hon'ble Apex Court has noted that there are two main classes of domicile: domicile of origin that is communicated by operation of law to each person at birth, i.e. the domicile of his father or his mother according as he is legitimate or illegitimate, and domicile of choice which every person of full age is free to acquire in substitution for that which he presently possesses. The domicile of origin attaches to an individual by birth while the domicile of choice is acquired by residence in a territory subject to a distinctive legal system, with the intention to reside there permanently or indefinitely. Paragraphs 8, 9, 12, 13, 14 and 21 of the aforesaid judgment being relevant are being extracted below:

?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 states. 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 States 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 States 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 and integrity of India to think in terms of State domicile. It is true and there we agree with the argument advanced on behalf of the State Governments, that the word "domicile" in the Rules of some of the State Governments prescribing domiciliary requirement for admission to medical colleges situate within their territories, is used not in its technical legal sense but in a popular sense as meaning residence and is intended to convey the idea of intention to reside permanently or indefinitely. That is, in fact the sense in which the word "domicile" was understood by a five Judge Bench of this Court in D. P. Joshi's case (supra) while construing a Rule prescribing capitation fee for admission to a medical college in the State of Madhya Bharat and it was in the same sense that word "domicile" was understood in Rule 3 of the Selection Rules made by the State of Mysore in Vasundra v. State of Mysore. We would also, therefore, interpret the word "domicile" used in the Rules regulating admissions to medical colleges framed by some of the States in the same loose sense of permanent residence and not in the technical sense in which it is used in private international law. But even so we wish to warn against the use of the word "domicile" with reference to States forming part of the Union of India, because it is a word which is likely to conjure up the notion of an independent State and encourage in a subtle and insidious manner the dormant sovereign impulses of different regions. 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 of meaning. The concept of domicile if used for a purpose other 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.

9. We may now proceed to consider whether residential requirement or institutional preference in admissions to technical and medical colleges can be regarded as constitutionally permissible. Can it stand the test of Article 14 or does it fall foul of it and must be struck down as constitutionally invalid. It is not possible to answer this question by a simple 'yes' or 'no'. It raises a delicate but complex problem involving consideration of diverse factors in the light of varying social and economic facts and calls for a balanced and harmonious adjustment of competing interests. But, before we embark upon a consideration of this question, it may be pointed out that there is before us one Civil Appeal, namely, C.A.No. 6392 of 1983 filed by Rita Nirankari and five writ petitions, namely, Writ Petition Nos. 8882 of 1983, 8883 of 1983, 9618 of 1981, 10658 of 1983 and 10761 of 1983 filed by Nitin Aggarwal, Seema Garg, Menakshi, Alka Aggarwal and Shalini Shailendra Kumar respectively. These civil appeal and writ petitions relate to admissions to medical colleges affiliated to the Delhi University and situate in the Union Territory of Delhi. Then we have writ petition No. 982 of 1983 filed by Dr. Mrs. Reena Ranjit Kumar and writ petition No. 9219 of 1983 filed by Nandini Daftary which relate to admission to the M.D.S. Course and M.B.B.S. Course respectively of Karnataka University. We have also writ petition No. 6091 of 1983 filed by Dr. Pradeep Jain seeking admission to the M.D.S. course in King George Medical College, Lucknow affiliated to the Lucknow University. When these writ petitions and civil appeal were admitted, we made interim orders in some of them granting provisional admission to the petitioners and we may make it clear that wherever we have granted provisional admissions shall not be disturbed, irrespective of the result of these civil appeal and writ petitions. We may also point out that since these civil appeal and writ petitions challenged the constitutional validity of residential requirement and institutional preference in regard to admissions in medical colleges in the States of Karnataka and Uttar Pradesh and the Union Territory of Delhi and we were informed that it is the uniform and consistent practice in almost all States to provide for such residential requirement or institutional preference we directed that notices of these civil appeal and writ petitions may be issued to the Union of India and the States of Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamilnadu and West Bengal and the State Governments to which such notices are issued shall file their counter affidavits dealing in particular with the question of reservation in admission on the basis of domicile

or residential requirement within two weeks from the date of service of such notices. Some of the State Governments could not file their counter affidavits within the time granted by us and they accordingly made an application for extension of time and by an order dated 30th August, 1983 we extended the time for filing of counter affidavits 962 and directed the State Governments to set out in their counter affidavits facts and figures showing as to what is the procedure which is being followed by them so far as admissions to medical colleges in their States are concerned. It appears that most of the state Governments to whom notices were issued filed their counter affidavits and though no notice was directed to be issued to the State of Himachal Pradesh, the Government of that State also filed a counter affidavit. The Delhi University in its counter affidavit gave a brief synopsis summarising the domicile or residential requirement or institutional preference followed by each State Government for admission to the medical colleges situate within its territory. It is not necessary for the purpose of the present judgement to reproduce in detail the precise domicile or residential requirement or institutional preference adopted and prevailing in different States in regard to admissions to medical colleges. Suffice it to state that for admission to M.B.B.S. course, domicile or permanent residence is required in some States, residence for a specified number of years ranging from three to twenty years is required in some other States while in a few States the requirement is that the candidate should have studied in an educational institution in the State for a continuous period varying from four to ten years or the candidate should be a bona fide resident of one State and in case of admissions to M.D.S. Course in Uttar Pradesh the candidate should be either a citizen of India, domicile of whose father is in Uttar Pradesh and who himself is domiciled in Uttar Pradesh or a citizen of India, domicile of whose father may not be in Uttar Pradesh but who himself has resided in Uttar Pradesh for not less than five years at the time of making the application and so far as admissions to M.D.S. Course in Karnataka are concerned, the candidate should have studied for at least five years in an educational institution in the State of Karnataka prior to his joining B.D.S. Course. The position in regard to admissions in medical colleges in the Union Territory of Delhi is a little different, because there, out of a total of 410 seats available for admission to the M.B.B.S. Course in the three medical colleges affiliated to the Delhi university, 148 are reserved seats and 262 are nonreserved seats and for filling in the 262 nonreserved seats, an entrance examination is held and the first 50 seats are filled from amongst the eligible candidates who pass the entrance examination in order of merit and the remaining 212 seats are filled, again on merit, but by candidates who have passed their qualifying examination from the schools situate in the Union Territory of Delhi 963 only. It will thus be seen that in almost all States and Union Territories admissions to medical colleges are based either on residence requirements or on institutional preferences. The question is whether such reservations or preferences are constitutionally valid when tested on the touchstone of Article 14.

21. But, then to what extent can reservation based on residence requirement within the State or on institutional preference for students passing the qualifying examination held by the university or the state be regarded as constitutionally permissible? It is not possible to provide a categorical answer to this question for, as pointed out by the policy statement of Government of India, the extent of such reservation would depend on several factors including opportunities for professional education in that particular area, the extent of competition, level of educational development of the area and other relevant factors. It may be that in a State where the level of educational development is woefully low, there are comparatively inadequate opportunities for training in the medical speciality and there is large scale social and economic backwardness, there may be justification for reservation of a higher percentage of seats in the medical colleges in the State and such higher percentage may not militate against the equality mandate viewed in the perspective of social justice. So many variables depending on social and economic facts in the context of educational opportunities would enter into the determination of the question as to what in the case of any particular State, should be the limit of reservation based on residence requirement within the State or on institutional preference. But, in our opinion, such reservation should in no event exceed the outer limit of 70 per cent of the total number of open seats after taking into account other kinds of reservations validly made. The Medical Education Review Committee has suggested that the outer limit should not exceed 75 per cent but we are of the view that it would be fair and just to fix the outer limit at 70 per cent. We are laying down this outer limit of reservation in an attempt to reconcile the apparently conflicting claims of equality and excellence. We may make it clear that this outer limit fixed by us will be subject to any reduction or attenuation which may be made by the Indian Medical Council which is the statutory body of medical practitioners whose functional obligations include setting standards for medical education and providing for its regulation and coordination. We are of the opinion that this outer limit fixed by us must gradually over the years be progressively reduced but that is a task which would have to be performed by the Indian Medical Council. We would direct the Indian Medical Council to consider within a period of nine months from today whether the outer limit of 70 per cent fixed by us needs to be reduced and if the Indian Medical Council determines a shorter outer limit, it will be binding on the States and the Union Territories. We would also direct the Indian Medical Council to subject the outer limit so fixed to reconsideration at the end of every three years but in no event should the outer limit exceed 70 per cent fixed by us. The result is that in any event at least 30 per cent of the open seats shall be available for admission of students on all India basis irrespective of the State or university from which they come and such admissions shall be granted purely on merit on the basis of either all India Entrance Examination or entrance examination to be held by the State. Of course, we need not add that even where reservation on the basis of residence requirement or institutional

preference is made in accordance with the directions given in this judgment, admissions from the source or sources indicated by such reservation shall be based only on merit, because the object must be to select the best and most meritorious student from within such source or sources.?

16. Hon"ble Apex Court in the case of Dr. Yogendra Bharadwaj v. State of U.P. And others, AIR 1991 SC 356, has considered the meaning of of word ?domicile? visavis bona fide residence. Paragraphs 8, 9, 10, 11, 15, 16, 17, 18, 21, 23 of the aforesaid judgment are being quoted below:

?8. A person is treated as a "bona fide resident of Uttar Pradesh" in terms of subclause (a) and (b) of Cl. (4) by reason of either his "domicile" or "residence" in that State. While subclause (a) speaks of the domicile of the candidate and his father, subclause (b) speaks of a person, whose father was not domiciled in the State and who himself has resided for not less than five years in the State. The concept of "domicile" is irrelevant to the construction of subclause (b) in respect of the residence qualification of the candidate. All that it requires is his requisite residence.

9. Domicile which is a private international law or conflict of laws concept identifies a person, in cases having a foreign element, with a territory subject to a single system of law, which is regarded as his personal law. A person is domiciled in the country in which he is considered to have his permanent home. His domicile is of the whole country, being governed by common rules of law, and not confined to a part of it. No one can be without a domicile and no one can have two domiciles.

10. A domicile of origin is attributed to every person at birth by operation of law. This domicile is not decided by his place of birth, or by the place of residence of his father or mother, but by the domicile of the appropriate parent at the time of his birth, according as he is legitimate or illegitimate. It is possible for the domicile of origin to be ?transmitted through several generations no member of which has ever resided for any length of time in the country of the domicile of origin. ? (See Dicey and Morris, The Conflict of Laws, Vol 1 Rule 9, p. 108). The domicile of origin continues until he acquires a domicile of choice in another country. Upon abandonment of a domicile of choice, he may acquire a new domicile of choice, or his domicile of origin, which remained abeyance, revives. The burden of proving change of domicile is on him who asserts it. The domicile of origin is more tenacious. ?Its character is more enduring, its hold stronger and less easily shaken off.? Per Lord Macnaghten Winans v. A.G., (1904) AC 287, 290. The burden of proving that a domicile of origin is abandoned is indeed much heavier than in the case of a domicile of choice. No domicile of choice can be acquired by entering a country illegally.

11. The domicile of choice is a combination of residence and intention. Residence which is a physical fact means ?bodily presence as an inhabitant? (Re Newcomb, (1908) 192 NY 238 84 NE 950. See Dicey, op. cit). Such residence must be

combined with intention to reside permanently or for an unlimited time in a country. It is such intention coupled with residence that acquires him a new domicile. It is immaterial for this purpose that the residence is for a short duration, provided it is coupled with the requisite state of the mind, namely the intention to reside there permanently. ?If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency? (Re Fuld's Estate (No. 3) 1968 (P) 675.), such as, the end of his studies, he lacks the intention required by law. His ?tastes, habits, conduct, actions, ambitions, health " hopes, and projects? (Casdagli v. Casdagli, (1919) AC 145, 178) are keys to his intention. ?That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home?. (Lord v. Colvin, (1859) 4 Drew 366 at 376).

15. "Domicile" for the purpose of cl. 4 must, nevertheless, be understood and applied in a limited sense and in contradistinction to "residence", for that clause uses both the expressions and demands compliance with either of them with reference to the State of Uttar Pradesh. Unlike "residence" which is only bodily presence, "domicile" in this context must necessarily mean physical residence coupled with the intention to settle down in Uttar Pradesh, although, being confined to a particular region rather than the whole area of operation of the territorial legal system and lacking in any foreign complexion or unconcerned with any foreign element, the animus manendi required for the purpose of Cl. 4 is much less in quality and contents than what is required in Private International Law. Subcl. (a) of Cl. 4 prescribes no minimum length of residence or minimum degree of intention, and, however short or insignificant the two elements may be, their combination " in whatever proportion, is sufficient to constitute "domicile" for the purpose of cl. 4(a).

16. In the present case, the appellant came to the State of Uttar Pradesh with a predetermined mind, namely, to complete the chosen course of studies and return to the State which had nominated him for the purpose. Having regard to the time and duration, the object and obligation, and the uncontroverted facts, the appellant was undoubtedly a bona fide student who resided in Uttar Pradesh for over five years, but whose residence did not acquire the attributes of "domicile" within the meaning of cl. 4(a). The question then is whether the appellant is a "bona fide resident of Uttar Pradesh" within the meaning of clause 4(b).

17. Residence is a physical fact. No volition is needed to establish it. Unlike in the case of a domicile of choice, animus manendi is not an essential requirement of" residence. Any period of physical presence, however short, may constitute residence provided it is not transitory, fleeting or casual. Intention is not relevant to prove the physical fact of residence except to the extent of showing that it is

not a mere fleeting or transitory existence. To insist on an element of volition is to confuse the features of "residence" with those of "domicile".¹

1. For an interesting discussion on The Meaning of Residence, see J. D. McClean, International and Comparative Law Quarterly (1962) Vol. II pp. 1153 et seq.

18. A person is ordinarily resident in a country if his residence there is no casual or uncertain, but is in the ordinary course of his life.² A man may be ordinarily resident or habitually resident in more than one place. While "ordinary residence" is the physical residence in regard to which intention is irrelevant, except to show that the residence is not merely fleeting, "habitual residence" may denote a quality of endurance longer than ordinary residence, although duration, past or prospective, is only one of the many relevant factors, and there is no requirement of any particular minimum period.

21. While residence and intention are the two essential elements constituting the "domicile of choice", residence in its own right is a connecting factor in a national legal system for purposes of taxation, jurisdiction, service of summons, voting etc. To read into residence volition as a necessary element is, as stated above, to mistake residence for domicile of choice, and that is the error which the High Court appears to have committed. Where residence is prescribed within a unified legal system as a qualifying condition, it is essential that the expression is so understood as to have the widest room for the full enjoyment of the right of equality before the law. Any construction which works to the disadvantage of the citizen lawfully seeking legitimate avenues of progress within the country will be out of harmony with the guaranteed rights under the Constitution, and such a construction must necessarily be avoided.

23. Viewed in this light, we have no doubt that the construction placed by the High Court upon subcl. (b) of cl. 4 of the Notification is unsustainable. In our opinion, a person, such as the appellant, who resided in the State of Uttar Pradesh specifically for the purpose of undergoing a course of studies for not less than five years, albeit with the intention of finally returning to his home State, also comes within the meaning of the expression "bona fide resident" as defined in the said clause.

17. Hon'ble Apex Court in the case of Bhagwan Dass and another v. Kamal Abrol and others, AIR 2005 SC 2583, has considered the meaning of the word residence. Relevant paragraphs 10, 11 and 12 of the said judgment are being quoted below:

¶10. The court has further said in paragraph 13 that it is plain in the context of clause (ii) of Section 19 of the Act, that the word "resides" meant actual place of residence and not a legal or constructive residence. It clearly does not indicate the place of origin. The word residence is flexible and has many shades of meaning but it must take its colour and content from the context in which it appears and it cannot be read in isolation. By this decision another dimension was added to the concept of residence in the form of concept of de facto

residence and the concept of de jure residence. The Supreme Court in this case has clearly distinguished between the concept of actual residence or de facto residence and legal residence or de jure residence. The actual residence means the place where the person is residing actually at a given point of time. On the other hand concept of de jure residence or the legal residence means the place at which the person is residing in law. The latter form of residence may or may not be the actual residence or the place where the person actually stays or reside. A person holding property or land in a particular place or city or having some ancestral roots to the city may be a resident of that particular place in the legal sense, but his actual residence will be the place where he is presently residing and coupled with the fact of animus manendi or an intention to stay for a considerable period. The concept of de facto and de jure residence can also be understood by the following example. If a person suppose has the residency certificate of a place say "A", but actually for his living he stays at the place "B". Then de jure he can be said to be the resident of place "A" but de facto he is the resident of the place "B".

11. In *U.O.I. v. Dudh Nath Mishra and Ors.*, AIR 2000 SC 525, Division Bench of this Court has held that the word "resides" has to be interpreted in the context of the purpose of the statute in which the words "resides" is used. The word resident is read with word ordinarily hence making the phrase "ordinarily resident". It is clear that the person, before he can be said to be ordinarily residing at a particular place has to have an intention to stay at that place for a considerable length of time and it would not include a visit of a short or casual presence at that place. 2000 AIR SCW 56 : 2000 Lab IC 384

12. From the aforesaid analysis it is apparent that the word "residence" is generally understood as referring to a person in connection with the place where he lives, and may be defined as one who resides in a place or one who dwells in a place for a considerable period of time as distinguished from one who merely works in a certain locality or comes casually for a visit and the place of work or the place of casual visit are different from the place of "residence". There are two classifications of the meaning of the word "residence". First is in the form of permanent and temporary residence and the second classification is based on de facto and de jure residence. The de facto concept of residence can also be understood clearly by the meaning of the word "residence" as given in the Black Law Dictionary, 8th Edition. It is given that the word "residence" means bodily presence as an inhabitant in a given place. Thus de facto residence is also to be understood as the place where one regularly resides as different to the places where he is connected to by mere ancestral connections or political connections or connection by marriage.?

18. Hon'ble Apex Court in the case of *Union of India and others v. Doodh Nath Prasad*, AIR 2000 SC 525, has considered in extenso as to what would be the meaning of of word ?ordinarily residing?. Paragraphs 12, 13, 14, 15, 17, 23, 25 and 26 are being extracted below:

12. Section 20 which is part of the law enacted for purpose of election to Parliament or State Legislature contemplates many categories of persons including those who are in service. It lays down as to when they would be treated to be ordinarily residing in a particular constituency. Subsection (1) and subsection (1A) of Section 20 are couched in a negative language. Subsection (1) of Section 20 provides that if a person holds or is in possession of a dwelling house in a particular constituency, he would not, merely on that ground, be deemed to be 'ordinarily resident' in that constituency. Subsection (1A) provides that temporary absence of a person from the place of his 'ordinary residence,' would be ineffective and a person would not cease to be an 'ordinary resident' in that constituency merely for that reason. Thus, in determining the question whether person was ordinarily residing in a particular constituency, the factors mentioned in subsection (1) and subsection (1A) of Section 20 alone would not be determinative of the status and the question would have to be determined on a consideration of all other relevant factors. This is also clear from a reading of subsection (7) of Section 20 which lays down that if a question arises as to whether a person was ordinarily residing in any constituency at the relevant time it would be determined with reference to all the facts of the case as also with reference to the Rules that may have been made in that behalf by the Central Govt. in consultation with the Election Commissioner.

13. The word 'reside' has been defined in the Oxford Dictionary as 'dwell permanently or for a considerable time to have once settled or usual abode; to live in or at a particular place.' The meaning, therefore, covers not only the place where the person has a permanent residence but also the place where the person has resided for a 'considerable time.'

14. In Black's Law Dictionary, 5th Edition, the word 'reside' has been given the following meaning:

'Live dwell, abide, sojourn, stay, remain, lodge; to settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right.'

In the same Dictionary the word 'residence' has been defined as under:

'Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently. Bodily presence and the intention of remaining in a place, to sit down, to settle in a place, to settle, to remain, and is made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Residence implied something more than mere physical presence and something (sic) than domicile.'

15. If the two meanings referred to above are to be read along with the word ?

ordinarily?, it becomes clear that a person, before he can be said to be ? ordinarily residing? at a particular place, has to have an intention to stay at that place for a considerably long time. It would not include a flying visit of a short or casual presence at that place.

17. Considering the facts this case in the light of the statutory provisions contained in Section 20 of the Representation of the People Act, 1950 as also the provision contained in paragraph 5 of the ?Instructions? since the parents of the respondent were admittedly, residing in District Howrah for more than 30 years, they would be treated to be ordinarily residing in that District and the mere fact that they held some property in a village in District Siwan in the State of Bihar would not affect their status.

Learned counsel for the appellants then attempted to import the concept of domicile as understood in Private International law, in his arguments and contended that before a person can be said to be ordinarily residing at a particular place, he must satisfy all the requirements which go to constitute domicile. He further contended that since the respondent was born in a village in the State of Bihar, he shall be treated to have his domicile of nativity in that State we are not prepared to accept this contention.

23. Etymologically. ?residence? and ?domicile? carry the same meaning, inasmuch as both refer to the permanent home, but under Private International law, ?domicile? carries a little different sense and exhibits many facets. In spite of having a permanent home, a person may have a commercial, a political or forensic domicile. "Domicile" may also take many colours; it may be domicile of origin, domicile of choice, domicile by operation of law or domicile of dependance. In Private International Law domicile? jurisprudentially has a different concept altogether. It plays an important role in the Conflict of Laws. The subject has been elaborately considered by Dicey in his book ?Conflict of Laws? (6th Edition) as also in another book by Phillimore on Domicile. Equally valuable discussion is to be found in Private international jurisprudence by Foote and by Westlake on Private International Law.

25. In view of the above, the concept of ?domicile? as canvassed by learned counsel for the appellants with reference to change of nationality or change of domicile from one country to another, cannot be imported in the present case. Moreover, Domicile and ?Residence? are relative concepts and have to be understood in the context in which they are used. having regard to the nature and purpose of the statute in which these words are used. We are principally concerned with the expression ?ordinarily reside? as used in the Note to Paragraph 5 of the ?Instructions? and the expression ?ordinarily resident? used in Section 20 of the Representation of the People Act, 1950. This Act and the Representation of the People Act, 1951 both deal with the election matters including delimitation of constituencies, right to contest the election as also right to vote in a constituency.

26. We have already explained the meanings of the words 'ordinarily resident' and have found that notwithstanding that the warrants or the respondent lived at one time in a village in District Siwan in the State of Bihar and that they owned some property also there, they had shifted to the State of West Bengal long ago and had been living there since then. For all intents and purposes, therefore, they be treated to be 'ordinarily residing in the State of West Bengal.' For the State of West Bengal, the President, in exercise of his powers under Article 341 (1) read with Article 366 (24) had already declared 'Nuniya' Caste as a Scheduled Caste and, therefore, the respondent was, rightly treated to be a Scheduled Caste candidate and was rightly appointed against a Reserved vacancy, after being declared successful at the examination held by the UPSC for the Indian Administrative and Allied Services in 1966.

19. 'Domicile' is the place where a man has his home (Tomlin's Law Dictionary) A persons regular place of abode. A person's domicile means generally speaking, the place where he has his permanent house (Whicker v. Hume, 28 L.J. Ch 396, 400). The word 'domicile' has been dealt with in the Law of Lexicon by describing the same as a place whereof one is permanent resident to which, if absent, he has the intention of returning. 'Domicile' relates to a place where a person or his parents reside. Domicile can be divided into domicile of choice and domicile of origin and domicile by operation of law. Domicile of origin is that which every infant has upon attaining majority, being the domicile of the parents at that time and the said domicile of origin prevails until a new domicile has been acquired. Domicile of origin adheres to him until he actually settles with the requisite intention to some other place. Domicile of choice is that which the individual has elected and chosen for himself to displace the domicile previously obtained. Domicile by operation of law is the domicile of a wife following that of the husband, brought about by reason of marriage.

20. Government Order dated 18.02.2003 covers the field of issuance of Domicile/ Ordinarily resident certificate. Condition No.3 is clear and categorical, that for acquiring certificate applicant or his mother/father has to be original resident of the said District or alternatively the applicant must have been residing in the aforementioned district for the last three years temporarily. Condition No.4 clearly proceeds to mention that the said Rules should be relaxed qua incumbents serving Central/State Government and whose services are transferable. Condition No. 9 deals with the satisfaction which is to be recorded by the Competent Authority, that the applicant or his/her mother/father are original residents of the aforementioned District or have been residing in the aforementioned District for the last three years, are entitled to get ordinary residence certificate. In between condition Nos. (3) and (9), the common factor is original resident of District of the applicant, mother and father, then there is no difficulty in issuance of certificate. In condition No.(3) applicant is entitled to get certificate, even if he is temporarily residing in the aforementioned District for the last three years. Condition No. (9) does not talk of temporary residence of the applicant for the last three years, rather it is inclusive of applicant, mother/

father residing for minimum three years in the District. The most surprising feature of the Government Order is that it deals with the original resident, ordinarily residing for more than three years, but it does not deal with incumbents, whose mother/father have changed their domicile by choice, by constructing house and shifting to another State, and by becoming permanent resident thereof. The Note mentioned in Certificate³ talks of permanent residence of parents and makes candidate taking examination from outside as eligible and falling within the zone of consideration. Item No.6 of the brochure, Hindi version clearly proceeds to mention that said examination is open only for original/permanent residents of the State of U.P. and further qua those candidates who have passed their examination from outside, but their parents should be original/permanent resident of State of U.P.

21. On the aforesaid parameters, claim of the petitioners is being adverted to as to whether petitioner No.1 can be treated as domicile/permanent resident of State of U.P., as accepted position is that qualifying examination has been passed by petitioner No.2 from outside the State of U.P. This much has been sought to be stated that grand parents of petitioner No.2 had migrated from Bihar and shifted to the State of U.P., and said fact has been sought to be fortified from the circumstance that father of petitioner No.2 had passed his High School and Intermediate examinations in the years 1984 and 1986 respectively from Maharana Pratap Inter College, Gorakhpur, U.P. It has also been stated that the parents of petitioner No.2 have also got constructed their own house and claim to have been residing therein. Electricity connection is also in the name of the grandfather of petitioner No.2, bills are raised in his name and the amount is also paid by him. Petitioner No. 2 appeared in the Entrance Examination in question as general candidate and qualified the same, but his candidature has been sought to be nonsuited on the ground that in Certificate³ the word 'MOOL' has been scored out by the competent authority and in its place the word 'SAMANYA' has been substituted. Accordingly, the certificate has been held to be invalid, being not in consonance with the format prescribed.

22. As to whether mother/father of petitioner No.2 are permanent residents of U.P., is essentially question of fact, which has to be examined by authorities concerned. In normal course of business, once husband of petitioner No.1 is Government Servant, holding transferable post, then presumption is that wife is staying with the husband, and this is the reason that in Government Order dated 18.02.2003 relaxation has been accorded to such employees. Much emphasis has been laid on passing of High School and Intermediate Examinations from Maharana Pratap Inter College, Gorakhpur qua husband of petitioner No.1. Further details are completely lacking and missing from where husband of petitioner No.1 has pursued his further studies, and at what point of time he had taken his job, and what is the permanent address mentioned and disclosed in his service book. It has been mentioned that residential house has been constructed, and electricity bills are in the name of grandfather. Before this Court no documentary proof has been filed to show and substantiate that house in

question has been constructed at Gorakhpur with all intention to reside at Gorakhpur, even electricity bills are of the year 2002 in the name of grandfather, and that the fatherinlaw and motherinlaw are residing therein, even as of now, has to be substantiated. Petitioner No.2 can be treated as eligible only when finding is returned that his parents are original/permanent residents of the State of U.P. Petitioner's parents are certainly not the original residents, but if this much is substantiated that they are permanent residents of the State of U.P., then the candidature of petitioner No.2 can be held to be valid.

23. Here certificate issued in favour of mother is of ordinary resident. Once petitioner No.2 has passed qualifying examination from outside State of U.P., he can be treated as eligible only when his parents are original/permanent residents of State of U.P. Certificate of ordinary residence will not do, enquiry will have to be made qua permanent residence. Competent Authority who had issued certificate, in the past, is directed to reexamine the issue of permanent resident, within three weeks from the date of receipt of certified copy of the order. At the point of time when competent authority proceeds to decide the matter entire documentary evidence be produced before him by petitioners: (i) from where husband of petitioner No.1 has pursued his further studies; (ii) permanent address mentioned by her husband in his service book; (iii) full details from where petitioner No.2 has pursued his study; (iv) point of time when house in question had been constructed, relevant records qua the same ; (v) who has been paying house tax, water tax and electricity dues up till date; (vi) in case name is there in the electoral college of the respective ward, the same be produced; (vii) affidavit to be filed that petitioners have no intention to return to the State of Bihar, and have not claimed any domicile qua State of Bihar. Reasoned decision be taken, and in prescribed format, if it is found that petitioner No.1 is permanent resident of State of U.P., then certificate be issued accordingly.

24. Consequently, writ petition stands disposed of. The candidature of the petitioner No.2, if certificate of being permanent resident of petitioner No.1 is issued, is directed to be considered for admission to B. Tech Course 2011, treating parents to be permanent residents of the State of U.P. and falling well within the zone of consideration. The respondents on fulfillment of such condition are directed to see and ensure that the petitioner No.2 is accorded admission to B. Tech course 2011 as per his merit status. In case no seat is available or vacant, then in that event supernumerary seat be created, as held by Hon'ble Apex Court in the case of Dolly Chandra v. Charima Jee and others, 2004 (23) A.I.C. 96 (S.C.).