

Yogesh Bhardwaj

Vs

State of U. P. and Others

Civil Appeal No. 62 of 1990

(L. M. Sharma, Dr. T. K. Thommen JJ)

24.04.1990

JUDGMENT

THOMMEN, J. -

1. This appeal by special leave is against the order of the Allahabad High Court, Lucknow Bench, in C.M. Application No. 17984(W) of 1989 in Writ Petition No. 5400 of 1989. The application for clarification and modification of the judgment in the writ petition was filed in the High Court by the appellant, though not a party to that proceeding, on the ground that he was adversely affected by it.

2. The appellant was nominated by the State of Himachal Pradesh to undergo the BDS course in the State of Uttar Pradesh. The appellant successfully completed his course of studies in Uttar Pradesh and secured the BDS degree. For that purpose he had stayed in that State for over a period of five years. He later applied for admission to the MDS course at King George Medical College, Lucknow. He secured admission to the course, but in a subject other than that of his choice. The subject of his choice was Oral Surgery, but what was offered to him was Periodontics. The reason for denying the appellant the subject of his choice was that he had to step down in favour of others who had come within the rule of preference as per the Notification dated August 19, 1983 issued under Section 26(5) of the U.P. State Universities Act, 1974 (U.P. Act 29 of 1974) providing for reservation of seats and prescribing a residence qualification for selection to the MDS course.

3. By the impugned order, the High Court rejected the appellant's prayer for clarification and modification of its judgment in Writ Petition No. 5400 of 1989 and held that the judgment was rendered in accordance with the principle laid down in its earlier decision in Writ Petition No. 5325 of 1988 where the residence qualification prescribed by the notification was so construed as to be applicable only to a person who was a resident in the State of Uttar Pradesh for reasons other than that of merely completing a course of studies. In other words, the High Court refused to accept the appellant's contention that the residence qualification should be so construed as to entitle to admission a person, like the appellant, who had come from outside the State strictly and solely for the purpose of undergoing a course of studies and returning to his own State upon completion of the course. The High Court held that residence strictly for studies without more did not bring a person within the ambit of the notification. This is what the High Court stated in its judgment in Writ Petition No. 5400 of 1989, clarification of which was sought by the appellant :

"In other words those candidates who joined BDS course on the basis of nominations made by the Central Government or their own State and were not bona fide residents of the State of Uttar Pradesh prior to joining the BDS course will not be treated to be bona fide residents of Uttar Pradesh merely because they have stayed in the State of

Uttar Pradesh for five years or more for completion of the BDS course or horsemanship."

4. The appellant does not challenge the validity of the notified provisions. The sole question which arises for consideration is as regards the construction of clause 4 of the said notification. Before reading that clause, it may be noticed that clause 1 of the notification provides for reservation of seats in favour of candidates belonging to the categories specified therein. Clause 2 then provides :

"2. The remaining seats shall be filled up on the basis of merit by the candidates who have passed the BDS Examination from the K.G. Medical College, Lucknow, obtaining minimum of 55 per cent marks in the aggregate and who are bona fide residents of Uttar Pradesh."

5. The High Court notice that clause 2 stipulates two conditions, namely, (i) institutional; and (ii) residential. The High Court observes that the appellant satisfies the first requirement - the institutional, but does not fulfil the second requirement, namely, bona fide residents. A bona fide resident is one who comes within the meaning of that expression in clause 4, which reads :

"4. For the purpose of this order the expression 'bona fide resident of Uttar Pradesh' shall mean -

(a) a citizen of India, the domicile of whose father is in Uttar Pradesh and who himself is domiciled in Uttar Pradesh; or

(b) a citizen of India, the domicile of whose father was not in Uttar Pradesh but who himself has resided in Uttar Pradesh for not less than five years at the time of making the application."

6. It is not disputed that the appellant is a citizen of India and is domiciled in India. The question is whether he is a 'bona fide resident of Uttar Pradesh'. The contention of the appellant before the High Court was that he had stayed in the State of Uttar Pradesh for more than five years for the purpose of completing his studies and was, therefore, fully qualified as a bona fide resident of that State. The High Court found that residence merely for the purpose of studies would not satisfy the requirement of clause 4.

7. The appellant was nominated by the State of Himachal Pradesh to undergo a course of studies in the State of Uttar Pradesh and he stayed in Uttar Pradesh for over five years solely for that purpose. There is no evidence that he had any other object for staying for that length of time, as he did, in Uttar Pradesh. There is no evidence that he had any intention of indefinitely residing in that State.

8. A person is treated as a 'bona fide resident of Uttar Pradesh' in terms of sub-clauses (a) and (b) of clause 4 by reason either of his 'domicile' or 'resident' in that State. While sub-clause (a) speaks of the domicile of the candidate and his father, sub-clause (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 sub-clause (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. 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*, 10th edn., Vol. I, 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 in abeyance, revives. The burden of proving a 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*, 192 N Y 238 : 84 NE 950 (1980)). See Dicey, *supra* note 1) 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 "testes, habits, conduct, actions, ambition, health, hopes, and projects" (*Casdagli v. Casdagli*, (1919) AC 145, 178 : 35 TIR 30) 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, 376 : 62 ER 141)

12. We must, in this connection, hasten to add that 'domicile', being a private international law concept, is inapposite to the relevant provisions, having no foreign element, i.e. having no contact with any system of law other than Indian, unless that expression is understood in a less technical sense (see observations to this effect in *Pradeep Jain v. Union of India* ((1984) 3 SCC 654, 666-69 : (1984) 3 SCR 942)). An expression which has acquired a special and technical connotation, and developed as a rule of choice or connecting factor amongst the competing diverse legal systems as to the choice of law or forum, is, when employed out of context, in situations having no contact with any foreign system of law, apt to cloud the intended import of the statutory instrument.

13. When a person is referred to as domiciled in a country, the expression 'country' is used in private international law as a term of art denoting, in the words of Dicey, "the whole of a territory subject under one sovereign to one body of law". (See Dicey and Morris, *supra* note 1, p.24) But in a federation like the United States, Australia, or Canada, or in a composite State like the United Kingdom, different systems of law may prevail in different regions in respect of certain matters. In such cases, each of the territories governed by a separate system of law is treated, for the purpose of private international law, as a 'country', though in public international law or constitutional law it is

not a separate sovereign State. As stated by Halsbury, "in federal states, some branches of law are within the competence of the federal authorities and for these purposes the whole federation will be subject to a single system of law, and an individual may be spoken of as domiciled in the federation as a whole; or other branches of law are within the competence of the states or provinces of the federation, and the individual will be domiciled in one state or province only". (Halsbury's Laws of England, Vol. 8, para 422; See D. P. Joshi v. State of Madhya Bharat, (1955) 1 SCR 1215 : AIR 1955 SC 334)

14. This is, however, not the position in India, Though a Union of States, and a federation in that sense, the whole country is governed by a single unified system of law, with a unified system of judicial administration, notwithstanding the constitutional distribution of legislative powers between the Centre and the States. There is no Statewise domicile within the territory of India. A man who is domiciled in India is domiciled in every State in India and is identified with a territorial system of legal rules pervading throughout the country. He is 'domiciled' in the whole of the country, even though his permanent home may be located in a particular spot within it. (Udny v. Udny, (1869) LR 1 SC & Div 441 (HL); Bell v. Kennedy, (1868) LR 1 Sc & Div 307 (HL)) The expression, as understood in private international law, makes no sense in the context of clause 4, for Indian domicile cannot be limited to any particular State within India. The full import of 'domicile' is, therefore, inapplicable to the construction of clause 4. We would in this connection recall the words of this Court in Pradeep Jain v. Union of India (Supra note. See also supra note 9). (SCC p. 668, para 8)

"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".

15. 'Domicile' for the purpose of clause 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 'resident' 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 clause 4 is much less in quality and contents than what is required in private international law. Sub-clause (a) of clause 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 clause 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 objects 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 clause 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. Intentions 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'. (For an interesting discussion on "The Meaning of Residence" see J. D. McClean, *International & Comparative Law Quarterly*, (1962) II 1153 et seq)

18. A person is ordinarily resident in a country if his residence there is to casual or uncertain, but is in the ordinary course of his life. (Per Viscount Cave, *Commissioners of Inland Revenue*, (1928) AC 217, 222) 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. (See Dicey and Morris, *supra* note 1 at 143-45 and 200-02. See also Cheshire and North, *Private International Law*, 11th edn., pp. 171-73; Halsbury's *Laws of England*, 4th edn., Vol.8, pp. 318-30)

19. In *Reg v. Barnet L. B. C., Ex p. Nilish Shah* ((1983) 2 AC 309 : (1983) 2 WLR 16) the House of Lords held that a person was ordinarily resident in the United Kingdom, if he normally resided lawfully in that country from choice and for a settled purpose. If a person resided there for the specific and limited purpose of education, he was ordinarily resident in that country, even if his permanent residence or real home was outside that country or his future intention or expectation was to live outside that country.

20. Residence must be voluntary. "Enforced presence by reason of kidnaping or imprisonment or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is." (Per Lord Scarman, *ibid.* at 344) Education, business, profession, employment, health, family, or merely love of the place are, some of the reasons commonly regarded as sufficient for a choice of regular abode. It is only lawful residence that can be taken into account. If a man stays in a country in breach of immigration laws, his presence there does not constitute ordinary residence.

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.

22. Clause 2, which we have set out above, refers to a 'bona fide resident' and such a person is defined under clause 4 to include a person who has resided in Uttar Pradesh for not less than five years at the time of making his application. These two clauses indicate that a person should have

resided in Uttar Pradesh for the requisite period lawfully and bona fide. The converse of bona fide being mala fide, meaning lack of good faith, in the absence of any allegation that the appellant's residence in that State was in any manner opposed to the law of the land, or tainted by lack of good faith, and in the light of the undisputed fact that his residence was neither casual nor fleeting, but in excess of the minimum period of five years, and for the definite purpose of education, he satisfies the definition of a 'bona fide resident'. Any other construction of the clauses would, in our view, be unreasonably restrictive and thus conflict with the appellant's constitutional rights.

23. Viewed in this light, we have no doubt that the construction placed by the High Court upon sub-clause (b) of clause 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.

24. In the circumstances, we set aside the impugned order of the High Court, and allow the appeal with the costs of the appellant here and in the High Court.

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