

Reserved

IN THE HIGH COURT OF UTTARAKHAND AT

NAINITAL

WRIT PETITION NO. 146 OF 2009 (MS)

Neha Saini

.....Petitioner.

Versus

State of Uttarakhand and another.Respondents.

Mr. Parikshit Saini, Advocate for petitioner.

Mr. K.P. Upadhyay, Additional Chief Standing Counsel for State of Uttarakhand.

30th October, 2009

Hon'ble Sudhanshu Dhulia, J.

Heard Mr. Parikshit Saini, Advocate for petitioner and Mr. K.P. Upadhyay, Additional Chief Standing Counsel for State of Uttarakhand.

The petitioner is a member of an Other Backward Class, community, (from hereinafter referred to as OBC), namely "Saini". This community is notified as an OBC in the State of Uttarakhand, and there is no dispute regarding this fact. However, petitioner has now married a person outside her Caste, who is of a high caste who is also a permanent resident of a different State i.e. of Purnia, which is in the State of Bihar. The two, presently resides in Delhi. Petitioner has a diploma in Russian Language from Jawahar Lal Nehru University, Delhi and in pursuance to an advertisement issued by the Union Public Service Commission has applied for a job, which requires proficiency in Russian Language. Some of the posts on which the appointment has to be made are reserved for OBC candidates. Now, the husband of the petitioner is not an OBC, moreover, the State in which

the husband of the petitioner claims a “permanent residence” has also not notified “Saini” as an OBC caste. The petitioner, therefore applied for this OBC certificate in the State of Uttarakhand, where she was born, brought up and had done most of her education. This was denied to the petitioner as the Tehsildar Roorkee (district Haridwar, Uttarakhand) has given a “noting” in the application of the petitioner that the petitioner has now married and resides in a different State and therefore, he (i.e. Tehsildar Roorkee) cannot give such a certificate to the petitioner. Aggrieved, the petitioner has filed present writ petition with the following prayer:

“I. Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 1 & 2 to issue caste certificate to the petitioner treating the petitioner as other backward class person as prescribed under Govt. of India, Ministry of Welfare resolution No. 12011/44/96-BCC dated 6th December 1996 published in Gazette of India extra ordinary-Part I Section I no. 210 dated 11-12-1996 which such time which this Hon’ble Court deem fit.

II. Issue any other writ, order or direction which this Hon’ble Court deem fit and proper under the facts and circumstances of the case in favour of the petitioner.

III. Award the cost of the present writ petition to the petitioner.”

The State in its counter affidavit has admitted all the factual details averred by the petitioner, such as her

being born and brought up in Uttarakhand, as well as her being educated in the State of Uttarakhand and her parents being permanent resident of State of Uttarakhand having their permanent address at Village Mehwar Kalan, Pargana and Tehsil Roorkee, District Haridwar, Uttarakhand, and also most importantly the fact that the parents of the petitioner being of caste “Saini”, which is notified as an OBC in the State of Uttarakhand. The primary objection of the State, however, is that now the petitioner has not only married outside her caste i.e. to a person, who is of higher caste, who is not an OBC, but also since the petitioner’s husband belongs to another State i.e. the State of Bihar, the OBC certificate cannot be now granted to the petitioner from Roorkee in the State of Uttarakhand. The respondents rely upon Sections 15 and 16 of [the Indian] Succession Act, 1925 (**From hereinafter referred to as the Succession Act**), which read as follows:

“15. Domicile acquired by woman on marriage.— By marriage a woman acquires the domicile of her husband if she had not the same domicile before.

16. Wife’s domicile during marriage.—A wife’s domicile during her marriage follows the domicile her husband.”

The State counsel submits that “domicile” is the main issue in the present controversy and since the petitioner has acquired the domicile of her husband by law, the present domicile of petitioner is not in the State of Uttarakhand, but in the State of Bihar and therefore, the only State, which can grant OBC certificate to the

petitioner, is the State of Bihar. This in a nutshell is the argument of the State counsel. This court has already been apprised by the counsel for the petitioner that “Saini” caste is not notified as an OBC in Bihar, and therefore, the petitioner cannot be granted an OBC certificate by the authorities in Bihar.

The State also relies upon a Division Bench judgment of this Court, which is **Jyotibala Vs. State of Uttarakhand** reported in **2009 (1) U.D.1**, where the petitioner though hailed from Moradabad (U.P.), married a man in the State of Uttarakhand, was given the benefit of Sections 15 and 16 of the Succession Act and it was directed by this Court that since the domicile of the petitioner changes with the marriage, her caste certificate is liable to be given by the State Authorities in State of Uttarakhand. By the same logic, the respondents state that in the present case it is not the State of Uttarakhand, but State of Bihar, which is only authorised to issue such a certificate in case of the petitioner and the authorities in Uttarakhand cannot issue such a certificate to the petitioner.

What goes to the root of the present dispute is the concept of “domicile” and the misconception prevalent in the State and particularly with those, who are authorised to deal with the issues related to domicile. Therefore, first and foremost this concept has to be defined and its legal position clearly stated. However, before we come to the core issue, which is ‘domicile’, it must be clearly understood first that the merely because the petitioner is married into a higher caste, she will not cease to be a member of an OBC. She has married into a “family”, and not into a ‘community’, and therefore she will not lose her claim on ‘reservations, which are available to a

member of an OBC community. Learned counsel for the petitioner Sri Parikshit Saini has placed before this Court a ruling of the Apex Court in **Valsamma Paul Vs. Cochin University & others AIR 1996 SC 1011**, where the Hon'ble Apex Court has held that once a high caste woman marries a Schedule Caste she will not be entitled for the benefits of "reservation" which exists for such a Scheduled Caste. As according to the Apex Court, the disadvantages of the Caste would mean being born into that caste and since the petitioner was not born into a Scheduled Caste she will not be entitled to the benefit of reservation. This ratio was arrived at by the Apex Court after discussing the entire law on the subject its previous decisions. Now logically the converse must also be true! Meaning thereby that the benefits, which are legally admissible to a Schedule Caste or an Other Back Ward Class are not washed out merely because such an OBC or SC (or the case might be) has now married into a higher caste! Since the determining factor is the birth in a socially disadvantageous community, a person born into a socially disadvantageous community, such as the petitioner, must carry with her the benefit of reservation. 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. 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 Vs. The Kerala Public Service Commission and Others** reported in **1996 LAB. I.C. 874**.

However, what actually goes against her, says the State authorities, is that her 'domicile' has now changed? Therefore no certificate from Uttarakhand!

Now to the core issue of domicile.

What is domicile? Domicile as a concept is of immense importance, both in municipal law as well as in Private International Law or the conflicts of laws, as it is called. The concept denotes "the place of living", or more precisely a permanent residence. Domicile as pointed in Halsbury's Laws of England (Fourth Edition) Volume 8, Paragraph 421 "is the legal relationship between an individual and a territory with a distinctive legal system which invokes that system as his personal law." Although the notion which lies behind the concept of domicile is of "permanent residence" or a "permanent home", yet domicile is primarily a legal concept for the purposes of determining what is the "personal law" applicable to an individual and therefore, even if an individual has no permanent residence or permanent home, even then he is invested with a "domicile" albeit by law or implication of law. There are three main categories or classes of domicile, A) Domicile of Origin, B) Domicile of Choice, and C) Domicile by law. "Domicile of origin" is the domicile which each person has at birth i.e. the domicile of his father or his mother. "Domicile of choice" is the domicile which a person of full age is free to acquire in substitution for that which he presently possesses. In other words, the "domicile of origin" is what is attached to person by birth whereas the domicile of choice is what is acquired by residence in a territory subject to a distinctive legal system with the intention to reside there permanently or indefinitely. What should be always remembered is that a domicile denotes an area with a

separate and distinctive legal system and not just a particular place in a country. This aspect is elaborated in paragraph 442 of Halsbury's Laws of England (Fourth Edition) Volume 8, which states as under:

“Even person who has, or whom the law deems to have, his permanent home within the territorial limit of a single system of law is domiciled in the country over, which is the whole of that country even though his home may be fixed at a particular spot within it.”

Halsbury's Law of England further states as under:

“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: other branches of law are within the competence of the State or provinces of the federation and the individual will be domiciled in one State or province only.”

The third category of domicile would be “Domicile by operation of law”.

All the same, the concept of domicile, as discussed above, acquires importance only when within a country there are different laws or more precisely, different systems of laws are operating. Let us for the sake of argument imagine that in India there is one matrimonial law operating in Tamilnadu and quite another in U.P., or one law of inheritance in State of Maharashtra and quite

another in West Bengal. In such a situation the “domicile” of a person would matter: for he would then be punished or rewarded in law, depending upon his domicile! But then this is not the case in India! 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, which is being followed. Therefore, there has to be only one “domicile” in India. 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. The difference in personal laws in India is not regional based but religion or community based and a “muslim” or a “Hindu” will be governed by a single system of personal laws whether he resides in Tamilnadu or in Uttar Pradesh.

The seminal decision on this is the judgment of Supreme Court passed in the case of **Pradeep Jain Vs. Union of India** reported in **AIR 1984 SC 1420**. In fact in the present case the above judgment is being heavily relied upon not only because it is seminal but because in the understanding of this Court, it states the undiminished and settled position of law. The aspect of domicile is defined and elaborated in the said judgment and needs to be referred here. Paragraph 8 of the said judgment would firstly be relevant, which reads as follows:

“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.

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 other manner except what the word actually conveys or means.

In the above case, the argument that domiciliary requirement for admission to medical colleges and other 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:

“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 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.”

The judgment at another place speaks as under:

“....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 other 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 others 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-à-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."

Much before the Pradeep Jain's case (supra), a full bench of Bombay High Court had an occasion to examine the concept of domicile. In this judgment, delivered by Chief Justice M.C. Chagla in **The State Vs. Narayandas Mangilal Dayame** reported in **AIR 1958 Bombay 68 (V 45. C 23) FB** the Full Bench 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 maybe 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 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.”

It is true that prior to Pradeep Jain’s case (supra), the majority Judges of the Apex Court in a constitution bench decision (4:1) had declared that there can be something like a “regional domicile” in India though in the same judgment the dissenting opinion of Justice Jagannadhadas held that “there is no place for regional domicile in existing Indian Law”. The Judges in Pradeep Jain’s case were also conscious of the earlier constitution bench decision, however, the applicability of the said decision on the concept of domicile was explained in Pradeep Jain’s case as follows:

“..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 case 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 N. Vasundara 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.”

It is common place in our country to use the nomenclature ‘domicile’ when what we actually mean to convey is residence or rather permanent residence. This was also noted by the Apex Court in D.P. Joshi’s case and it accepted the contention of the State Counsel on this plea that the word ‘domicile’ is being used in a ‘popular’ rather in a strictly legal or technical sense.

Hence, according to **Pradeep Jain’s**, earlier decision of **D.P. Joshi Vs. State of Madhya Bharat** reported in **AIR 1955 SC 334** did not actually dwell on the fundamental concepts of ‘domicile’ as the core issue there was residence or permanent residence.

It is also true that the earlier decision is of four Judge, and Pradeep Jain’s case is of three Judges. All the same, the fact of the matter is that it is the Pradeep Jain’s case, which has been continuously followed later. Reference would be necessary here of the two subsequent judgments of the Supreme Court in which the ratio, as laid down in Pradeep Jain’s case has been followed. These are:

“A) Dinesh Kumar v. Motilal Nehru College, Allahabad AIR 1985 S.C. 1059.”

B) Nidamarti Maheshkumar Vs. State of Maharashtra and others (1986) 2 SCC 534”

It must be stated here that in D.P. Joshi’s case, the matter which was challenged before the Supreme Court was the validity of an order passed by the Madhya Bharat Govt., whereby a lesser fee was being charged from those students who were permanent resident of Madhya Bharat and higher fee from such students who were coming from outside the Madhya Bharat. This action of the State authorities was justified in D.P. Joshi’s case and it was held not to be violative of Article 14 of the Constitution of India. In Pradeep Jain’s case as well such reservation based on residential requirement within a State or even the institutional preference for students was justified to some extent. This law, whereby on certain given contingencies, a preferential treatment given to those who reside in a given State, is being followed right from D.P. Joshi’s as well as in Pradeep Jain’s case and in many later decisions of the Apex Court. Therefore, on certain justifiable grounds, special treatment can be given by the State authorities on grounds of residence, even institutional preference may be granted. What kind of preference has been given and to what extent will depend upon from case to case. However, what is anathema to our Constitution is the assertion of a concept of regional domicile, which is alien to our legal system.

While following Pradeep Jain’s judgment, this Court is also conscious of the impact of a Court’s decision on a society. The fears and apprehensions raised in Pradeep Jain’s case about there being a threat to the unity and integrity of the country are not empty lectures but more

than 25 years since, the decision of the case is even more relevant in present times, where fissiparous and divisive tendencies are raising their voices in different States. There is more in this Country which unites us and very little that divides us. Domicile is one concept, which is inclusive of a single concept throughout the country and it is a unifying rather than a dividing factor. Apart from this, if we do not have one single domicile in the country, then there are various provisions in the Constitution of India, which would lose their relevance. Reference would be necessary here of Article 5, which speaks about “domicile in the territory of India”. It does not talk about domicile in the territory of a particular State. Apart from this, Article 15 prohibits any kind of discrimination, inter alia, on the ground of place of birth. Similarly, Article 16 mandates that there shall be an equality of opportunity for all citizens in matters relating to public employment and there shall be no discrimination, inter alia, on the ground of descent, place of birth or residence.

Therefore, it is the ratio of Pradeep Jain’s case which would be presently applicable. The Court is also conscious that on this issue there are also differences among the jurists. Whereas Mr. Seervai was of the view that the Supreme Court has laid down the correct law in D.P. Joshi’s case and not in Pradeep Jain’s case, there are others such as Dr. Durga Dass Basu, who are quite critical of the majority view in D.P. Joshi’s case, and agree with the minority view of Justice Jagannadhadas (in D.P. Joshi’s case) that the concept of regional state domicile is unnecessary and irrelevant. Dr. Basu states that **“the introduction of such a concept would be pernicious and encourage the separatist forces which are at work in the different States in India and as**

against which the Constitution-makers provides for one citizenship, one judiciary and one integrated public services”. (as referred to by Justice A.M. Bhattacharjee in his Article - Regional Domicile- Joshi and Jain Journal SCC 1985 Volume -III Page 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.

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, U.P. or Bihar, or for that matter of any one province. She was, and continues to be a domicile of India, as there is nothing like a “domicile of Uttarakhand” or a “domicile of Bihar” or of any other 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 Bihar 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”.

Reliance upon Sections 15 and 16 of the Succession Act in the present context is also misplaced. Firstly, the two sections i.e. Section 15 and Section 16 form a part of “Part II” of the Indian Succession Act. Part II of the Act which consists of Section 4 to Section 19 and the title of this part is “Domicile”. Now the first section of this part i.e. Section 4 excludes Hindus, Mohammedans, Buddhist, Sikh and Jain from the operation of this Part. Section 4 of the Act reads as follows:

“Application of Part.—This Part shall not apply if the deceased was a Hindu, Mohammadan, Sikh or Jaina.”

Very fact that Hindus, Muslims, etc. have been put outside the purview of the Chapter, which is on ‘domicile’ and of which Sections 15 and 16 are a part, shows that inter alia in the case of Hindus and Muslims, it is not the “domicile” of a person, which would be determining factor in a matter relating to succession of property of the deceased, but the determining factor would be the personal laws applicable to Hindus and Muslims, therefore, the reliance of the State Counsel on Section 15 and 16 of the Act is not well placed. Both the present petitioner as well as the petitioner in writ petition in the case of Jyotibala (supra), a decision of the Division Bench of this Court relied upon by the State are ‘Hindus’.

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 as such 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 by the State counsel, would not be correct.

The State Counsel has also relied upon the decision of the Division Bench of this Court in **Jyotibala Vs. State of Uttarakhand** reported in **2009 (1) U.D.1**. The facts of this case are as follows: The petitioner appeared in the Uttarakhand Judicial Service examination conducted by the Uttarakhand Public Service Commission in the year, 2008. The petitioner’s candidature was considered along with other eligible candidates. She qualified in the preliminary examination and accordingly was allowed to appear in the main written examination which also she qualified. She was later called for viva-voce. It was at this stage that a dispute arose about her eligibility, which was linked with her “domicile”, which ultimately led to the cancellation of her candidature. In the said case reliance was being

placed by both sides upon a Govt. Order dated 20th November, 2001, whereby all the administrative authorities of the district were directed that “a permanent resident certificate” shall be issued to only such persons, who are citizens of India and are bonafide resident of Uttarakhand. It was clarified in that Govt. Order that a person shall be considered as a bonafide resident of Uttarakhand, whose permanent home is in the State of Uttarakhand and further it laid down that permanent resident certificate can also be issued to such persons, who are residing in Uttarakhand for at least 15 years in the past. It was the interpretation of this Govt. Order which was made by a division bench of this Court. What was crucial in the Govt. Order was expression “bonafide resident”. In other words, a person who is a citizen of India and bonafide resident of Uttarakhand shall be issued such a certificate and further qualification of 15 years was only in addition to this qualification. The reference of Sections 15 and 16 of the Indian Succession Act and the emphasis on “domicile” in the said judgment is in fact emphasis of this Court on “bonafide resident” alone. From the perusal of the entire judgment, it is clear that what the Court has actually examined in the said case is the “bonafide residence” of the petitioner and has not discussed the issue of domicile. In fact in the said

judgment the issue of domicile has not been discussed at all. It is true that the benefit of permanent residence has been granted to the petitioner inasmuch as in view of the Court once the husband of the petitioner was a bonafide resident of Uttarakhand, it was presumed that she is also the bonafide resident of Uttarakhand, therefore, she was liable to be issued a permanent residence certificate by the State Authorities in Uttarakhand. It was not so much the provisions of Sections 15 and 16 of Succession Act that weighed upon the Court but the fact that the petitioner is now a bonafide resident of the State of Uttarakhand and not the concept of domicile. Moreover, the applicability of Sections 15 and 16 of the Indian Succession Act to 'Hindus' has already been referred above, where it has been pointed out that Sections 15 and 16 are not applicable to 'Hindus' and the petitioner in the case of Jyotibala was a Hindu.

Now since the petitioner is a domicile of India, it matters little whether she presently stays in Bihar, Uttarakhand or Delhi. What is important and what should be examined by the State authorities is that the petitioner was born in an Other Backward Class i.e. "Saini" which is notified as Other Backward Class 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.

The petitioner was born in 'Saini' community, which is notified as an OBC in Uttarakhand. Although she has now married into a higher caste yet she is entitled to her caste certificate, which is determined by birth and the community she is born into. 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 into a higher caste or that her husband permanently resides in Bihar i.e. in another State.

The State authorities including Tehsildar Roorkee are hereby directed to issue a caste certificate pertaining to "Saini" community to the petitioner. The certificate which has to be given to the petitioner is as prescribed under G.O. of Government of India dated 6.12.1996, which also requires a satisfaction of the authorities that the person to whom this certificate is being given does not come under the "creamy layer". Therefore, the authorities are free to examine other aspects. But on the ground of 'domicile' such a certificate cannot be denied.

The Writ Petition is accordingly allowed. No order as to costs.

(Sudhanshu Dhulia, J.)

30.10.2009

Rathour