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January 27

v.

THE STATE OF MADHYA BHARAT AND ANOTHER.

[MUKHERJEA C. J., VIVIAN BOSE, JAGANNADHADAS, VENKATARAMA AYYAR and SINHA JJ.]

Constitution of India, Arts. 14 and 15—Rule laying down that no capitation fee should be charged from students—Bona fides residents of Madhya Bharat—But capitation fee should be charged from non-Madhya Bharat students—Whether infringes the Constitution.

The Government of the State of Madhya Bharat substituted the following new rule for the old rule for admission to the Mahatma Gandhi Memorial Medical College Indore, when it took over the administration of the College from a private committee.

"For all students who are '*bona fide* residents' of Madhya Bharat no capitation fee should be charged. But for other non-Madhya Bharat students the capitation fee should be retained as at present at Rs. 1,300 for nominees and at Rs. 1,500 for others".

'*Bona fide* resident' for the purpose of this rule was defined as: "one who is—

(a) a citizen of India whose original domicile is in Madhya Bharat, provided he has not acquired a domicile elsewhere, or

(b) a citizen of India, whose original domicile is not in Madhya Bharat but who has acquired a domicile in Madhya Bharat and has resided there for not less than 5 years at the date, on which he applies for admission, or

(c) a person who migrated from Pakistan before September 30, 1948 and intends to reside in Madhya Bharat permanently, or

(d) a person or class of persons or citizens of an area or territory adjacent to Madhya Bharat or to India in respect of whom or which a Declaration of Eligibility has been made by the Madhya Bharat Government".

The question for determination was whether the rule infringed the fundamental rights guaranteed by Arts. 14 and 15(1) of the Constitution.

Held, per VENKATARAMA AYYAR J. (MUKHERJEA C.J., VIVIAN BOSE and SINHA JJ. *concurring*, JAGANNADHADAS J. *dissenting*) that the rule did not infringe the fundamental rights guaranteed by Art. 15(1) because residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when Art. 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence.

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Domicile of a person means his permanent home and is sometimes used in the sense of residence.

Held further, that the imposition of capitation fee on some of the students and not on others was not discriminatory as being in contravention of Art. 14 of the Constitution, because the classification was based on a ground which had a reasonable relation to the subject matter of the legislation as the object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies and it was quite a laudable object for a State to encourage education within its borders. A classification made on a geographical basis would be eminently just and reasonable when it relates to education which is the concern primarily of the State.

Per JAGANNADHADAS J.—There is no place for regional domicile in the existing Indian Law. In the circumstances the phrase "original domicile in Madhya Bharat" is meant to convey the "place of birth (of the applicant) in Madhya Bharat". It is true that "domicile of origin" and "place of birth" are two different matters. But that is so only where the use of the phrase "domicile of origin" conveys a definite legal meaning. In the present case however, the phrase "domicile of origin in Madhya Bharat" conveys no legal meaning, and if any meaning has to be attached to it, then it could only have reference to the "place of birth".

Therefore, the rule in question has reference to place of birth in Madhya Bharat primarily, and offends Art. 15 of the Constitution. Even in the view that the rule has reference to the juristic concept of regional domicile and for that reason does not fall within the scope of the inhibition of Art. 15, a distinction based on such domicile cannot, in any way, be considered reasonable with reference to Art. 14 of the Constitution.

Rustam Mody v. *State*: *Sumitra Devi* v. *State* (I.L.R. 1953 Madhya Bharat 87), *Whicker* v. *Hume* ([1859] 28 L. J. Ch. 396), *Somerville* v. *Somerville* ([1801] 5 Ves. 750), *Winans* v. *Attorney-General* (1904 A.C. 287), *Udny* v. *Udny* ([1869] L.R. 1 Sc. & Div. 441), *Mcmullen* v. *Wadsworth* ([1889] 14 A.C. 631), *The State of Punjab* v. *Ajaib Singh and another* ([1953] S.C.R. 254) and *Om Prakash* v. *The State* (A.I.R. 1953 Punjab 93), referred to.

ORIGINAL JURISDICTION: Petition No. 367 of 1954.

Under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

N. C. Chatterjee and *Veda Vyas,* (*S. K. Kapur* and *Ganpat Rai,* with them), for the petitioner.

M. C. Setalvad, Attorney-General of India (*Shiv Dyal* and *P. G. Gokhale,* with him), for respondent No. 1.

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1955. January 27. The judgment of Mukherjea C. J., Vivian Bose, Venkatarama Ayyar and Sinha JJ. was delivered by Venkatarama Ayyar J. Jagannadhadas J. delivered a separate judgment.

VENKATARAMA AYYAR J.—This is a petition under article 32 of the Constitution. There is at Indore a Medical College known as the Mahatma Gandhi Memorial Medical College run by the State of Madhya Bharat. The petitioner who is a resident of Delhi was admitted as a student of this College in July 1952, and is now studying in the third year class, M.B.B.S. Course. His complaint is that the rules in force in this institution discriminate in the matter of fees between students who are residents of Madhya Bharat and those who are not, and that the latter have to pay in addition to the tuition fees and charges payable by all the students a sum of Rs. 1,500 per annum as capitation fee, and that this is in contravention of articles 14 and 15(1) of the Constitution. The petitioner accordingly prays that an appropriate writ might be issued prohibiting the respondent from collecting from him capitation fee for the current year, and directing a refund of Rs. 3,000 collected from him as capitation fee for the first two years.

The respondent contests the petition. In the affidavit filed on its behalf, it is stated that the institution in question had its origin in private enterprise, and was under the management of a Committee; that it was the Committee that had made the rule imposing capitation fee on students who did not belong to Madhya Bharat, that the State took over the College subject to the conditions relating to reservation of seats under which it was being run, and that the requirement of a capitation fee from non-residents did not offend either article 14 or article 15(1) of the Constitution.

A brief narration of the history of the institution will be useful for a correct appreciation of the contentions on either side. The beginnings of the institution go back to the year 1878, when a Dr. Beaumont started a Medical School at Indore under the name of

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Indore Medical School, as an adjunct to a hospital called the Indore Charity Dispensary. It received considerable financial assistance from the rulers of Gwalior and other Indian States, and became well established; and it is claimed on its behalf that the medical practitioners of Central India, Rajasthan and neighbouring States were largely recruited from its alumni. In 1910 the name of the school was changed to King Edward Memorial School, Indore, and it was thereafter under the management of a Committee. In 1940 the Committee decided to improve the status of the School, and started collecting funds for equipping it as a first-class Medical College. The arrangements were completed in 1947, and in 1948 the institution was affiliated to the University of Agra. It then came to be known as the Mahatma Gandhi Memorial Medical College. In 1950 the College Council resolved to request the Madhya Bharat Government to take over the running of the institution, subject to the arrangements entered into between the institution and certain States and donors for reservation of seats for their nominees. The proposal was accepted by the respondent, and by resolution dated 17-3-1951 it took over the administration of the College.

According to the rules relating to admission to the College which were in force at that time, the maximum number of students who could be admitted in any year was 50, and they were classed into two groups, nominees and ordinary students. The Committee had arranged to raise funds for the institution on a promise that those who contributed Rs. 7,000 would be entitled to nominate one student each for admission into the College, and that those students called nominees should pay, in addition to the usual fees and charges, a capitation fee of Rs. 1,300 per annum. Excluding the seats which have thus to be reserved for the nominees, the remaining seats were thrown open to all eligible applicants who came to be called self-nominees, and the requisite number was selected from among them on the basis of merit. Then came the rule which is at the root of the present controversy. It provided that "Madhya Bharat students are

exempted from capitation fees". (Vide 1952 Calendar, page 5 and Exhibit G). After the State took over the management, it introduced certain modifications in the rules, and it is with these new rules that the present petition is concerned, the petitioner having been admitted under them. In place of the rule that "Madhya Bharat students are exempted from capitation fees" a new rule was substituted, which runs as follows :

"For all students who are '*bona fide* residents' of Madhya Bharat no capitation fee should be charged. But for other non-Madhya Bharat students the capitation fee should be retained as at present at Rs. 1,300 for nominees and at Rs. 1,500 for others". [Vide Exhibit 6/1 quoted in *Rustam Mody* v. *State* : *Sumitra* Devi v. State(1)].

'*Bona fide* resident' for the purpose of this rule was defined as :

"one who is—

(a) a citizen of India whose original domicile is in Madhya Bharat, provided he has not acquired a domicile elsewhere, or

(b) a citizen of India, whose original domicile is not in Madhya Bharat but who has acquired a domicile in Madhya Bharat and has resided there for not less than 5 years at the date, on which he applies for admission, or

(c) a person who migrated from Pakistan before September 30, 1948 and intends to reside in Madhya Bharat permanently, or

(d) a person or class of persons or citizens of an area or territory adjacent to Madhya Bharat or to India in respect of whom or which a Declaration of Eligibility has been made by the Madhya Bharat Government".

In brief, the change effected by the new rule was that whereas previously exemption from capitation fee was granted in favour of all Madhya Bharat students whatever that might mean, under the revised rule it was limited to *bona fide* residents of Madhya Bharat.

Now the contention of Mr. N. C. Chatterjee for the

(1)I.L.R. 1953 Madhya Bharat 87, 99

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petitioner is that this rule is in contravention of articles 14 and 15(1), and must therefore be struck down as unconstitutional and void. Article 15(1) enacts:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

The argument of the petitioner is that the rule under challenge in so far as it imposes a capitation fee on students who do not belong to Madhya Bharat while providing an exemption therefrom to students of Madhya Bharat, makes a discrimination based on the place of birth, and that it offends article 15(1). Whatever force there might have been in this contention if the question had arisen with reference to the rule as it stood when the State took over the administration, the rule was modified in 1952, and that is what we are concerned with in this petition. The rule as modified is clearly not open to attack as infringing article 15(1). The ground for exemption from payment of capitation fee as laid down therein is *bona fide* residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when article 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence. This is not seriously disputed. The argument that is pressed on us is that though the rule purports to grant exemption based on residence within the State, the definition of *bona fide* residence under the rule shows that the exemption is really based on the place of birth. Considerable emphasis was laid on clauses (a) and (b) of the rule wherein 'residence' is defined in terms of domicile; and it was argued that the original domicile, as it is termed in the rules, could in substance mean only place of birth, and that therefore the exemption based on domicile was, in effect, an exemption based on place of birth under an *alias*. That, however, is not the true legal position. Domicile of a person means his permanent home. "Domicile meant permanent home, and if that was not understood by itself no illustration could help to make it

intelligible" observed Lord Cranworth in *Whicker* v. *Hume*(1). Domicile of origin of a person means "the domicile received by him at his birth". (Vide Dicey on Conflict of Laws, 6th Edition, page 87). The learned author then proceeds to observe at page 88:

"The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance, or the country of the infant's nationality". In *Somerville* v. *Somerville*(2), Arden, Master of the Rolls, observed:

"I speak of the domicile of origin rather than of birth. I find no authority which gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father".

Mr. N. C. Chatterjee argued that domicile of origin was often called domicile of birth, and invited our attention to certain observations of Lord Macnaghten in *Winans* v. *Attorney-General*(3). But then, the noble Lord went on to add that the use of the words "domicile of birth" was perhaps not accurate. But that apart, what has to be noted is that whether the expression used is "domicile of origin" or "domicile of birth", the concept involved in it is something different from what the words "place of birth" singnify. And if "domicile of birth" and "place of birth" cannot be taken as synonymous, then the prohibition enacted in article 15(1) against discrimination based on place of birth cannot apply to a discrimination based on domicile.

It was argued that under the Constitution there can be only a single citizenship for the whole of India, and that it would run counter to that notion to hold that the State could make laws based on domicile within their territory. But citizenship and domicile represent two different conceptions. Citizenship has reference to the political status of a person, and

(1) [1859] 28 L.J. Ch. 396, 400.
(2) [1801] 5 Ves. 750 at 786, 787, 31 E.R. 839, 858.
(3) 1904 A.C. 287, 290.

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domicile to his civil rights. A classic statement of the law on this subject is that of Lord Westbury in *Udny* v. *Udny*(1). He observes:

"The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal statuses or conditions: one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political statuts. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend".

Dealing with this question Dicey says at page 94:

"It was, indeed, at one time held by a confusion of the ideas of domicile and nationality that a man could not change his domicile, for example, from England to California, without doing at any rate as much as he could to become an American citizen. He must, as it was said, 'intend *quatenus in illo exuere patriam*'. But this doctrine has now been pronounced erroneous by the highest authority".

Vide also the observations of Lord Lindley in *Winans* v. *Attorney-General*(2). In Halsbury's Laws of England, Vol. VI the law is thus stated at page 198, para 242:

"English law determines all questions in which it admits the operation of a personal law by the test of domicil. For this purpose it regards the organisa-

(1) [1869] L.R. 1 Sc. & Div. 441, 457.
(2) 1904 A.C. 287, 299.

tion of the civilised world in civil societies, each of which consists of all those persons who live in any territorial area which is subject to one system of law, and not its organisation in political societies or States, each of which may either be co-extensive with a single legal system or may unite several systems under its own sovereignty".

Under the Constitution, article 5, which defines citizenship, itself proceeds on the basis that it is different from domicile, because under that article, domicile is not by itself sufficient to confer on a person the status of a citizen of this country.

A more serious question is that as the law knows only of domicile of a country as a whole and not of any particular place therein, whether there can be such a thing as Madhya Bharat domicile apart from Indian domicile. To answer this question we must examine what the word "domicile" in law imports. When we speak of a person as having a domicile of a particular country, we mean that in certain matters such as succession, minority and marriage he is governed by the law of that country. Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country, and that different areas in the State might have different laws in respect of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. The position is thus stated by Dicey at page 83:

"The area contemplated throughout the Rules relating to domicile is a 'country' or 'territory subject to one system of law'. The reason for this is that the object of this treaties, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, i.e. within a given country, rather than within

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another. If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, e.g. California in the United States; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these Rules".

The following statement of the law in Halsbury's Laws of England, Volume VI, page 246, para 249 may also be quoted :

.....where that State comprises more than one system of law, a domicil is acquired in that part of the State where the individual resides".

An instructive decision bearing on this point is *Somerville* v. *Somerville*(1). There, the dispute related to the personal estate of Lord Somerville, who had died intestate in London, his domicile of origin being Scotch. The contest was between those who were entitled to inherit if his domicile was Scotch, and those who were entitled to inherit if his domicile was English. It was urged in support of the claim of the latter that by reason of the death of Lord Somerville at London, succession was governed by English domicile. In discussing this question the learned Master of the Rolls referred to the fact that the law of succession in the Province of York was different from that prevailing in other parts of England, and was akin to Scotch law, and posed the question whether if a Yorkshire man died intestate in London, succession to his personal estate would be governed by the Law of the Province of York or of England. He observes :

"It is surprising that questions of this sort have not arisen in this country when we consider that till a very late period and even now for some purposes a different succession prevails in the Province of York. The custom is very analogous to the law of Scotland. Till a very late period the inhabitants of York were restrained from disposing of their property by testament.....And the question then would have been

(1) [1801] 31 E.R. 839.

whether during the time the custom and the restraint of disposing by testament were in full force, a gentleman of the county of York coming to London for the winter and dying there intestate, the disposition of his personal estate should be according to the custom or the general law".

The principle that was laid down was that "succession to the personal estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or the death or the situation of the property at that time". On the facts, the decision was that the domicile of origin which was Scotch, governed the succession. What is of interest in this decision is that it recognises that for purposes of succession there can be within one political unit, as many domiciles as there are systems of law, and that there can be a Scotch domicile, an English domicile and even a York domicile within Great Britain.

Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is therefore quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution.

It was also urged on behalf of the respondent that the word "domicile" in the rule might be construed not in its technical legal sense, but in a popular sense as meaning "residence", and the following passage in Wharton's Law Lexicon, 14th Edition, page 344 was quoted as supporting such a construction:

"By the term 'domicile', in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicile",

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In *Mcmullen* v. *Wadsworth*(1), it was observed by the Judicial Committee that "the word 'domicil' in article 63 (of the Civil Code of Lower Canada) was used in the sense of residence, and did not refer to international domicile". What has to be considered is whether in the present context "domicile" was used in the sense of residence. The rule requiring the payment of a capitation fee and providing for exemption therefrom refers only to *bona fide* residents within the State. There is no reference to domicile in the rule itself, but in the Explanation which follows, clauses (a) and (b) refer to domicile, and they occur as part of the definition of "*bona fide* resident". In Corpus Juris Secundum, Volume 28, page 5, it is stated:

"The term '*bona fide* residence' means the residence with domiciliary intent".

There is therefore considerable force in the contention of the respondent that when the rule-making authorities referred to domicile in clauses (a) and (b) they were thinking really of residence. In this view also, the contention that the rule is repugnant to article 15(1) must fail.

There was a good deal of argument before us on the validity of clause (d) of the rule. It was contended by the petitioner that that clause introduced a new element unconnected with domicile or residence which formed the basis of the previous clause, that it put foreign nationals on a more advantageous footing than Indian citizens, and that the entire rule must be discarded as based on no rational or intelligible principle. No doubt, clause (d) strikes a new note. And it may be that as a matter of policy the management of the institution decided that it would be an advantage to associate citizens of other countries with Indian citizens in educational institutions, and therefore reserved a few seats for them on the most-favoured nation treatment basis. The validity of this reservation, however, does not arise for decision in this petition, and as clauses (a) to (c) rest on a classification based on domicile and residence, and are

(1) [1889] 14 A.C. 631.

distinct and severable from clause (d), they would be valid even if clause (d) were to be held bad.

It must be mentioned that the rule relating to the payment of capitation fee discussed above was again modified by the management as a result of the decision of the High Court of Madhya Bharat in *Rustam Mody* v. *State: Sumitra Devi* v. *State*(1). The rule as amended—and that is what is now in force—runs as follows:

"Only those students, who are *bona fide* residents of Madhya Bharat and have been selected for being admitted in accordance with the allocation scheme and the rules of admission to the seats specifically reserved for the residents of Madhya Bharat are exempted from the payment of Capitation Fees. All other students admitted to seats other than those reserved for the residents of Madhya Bharat shall be liable to pay Capitation Fees as prescribed".

Under this rule also, the exemption is in favour of *bona fide* residents of Madhya Bharat", and therefore with reference to the points now under consideration, the position under the present rule would appear to be the same as under the previous one. It is unnecessary to consider this matter further, as learned counsel on either side were agreed that the rights of the petitioner must be determined in accordance with the rule which was in force when he was admitted.

It is next contended for the petitioner that the imposition of capitation fee on some of the students and not on others is discriminatory, and is in contravention of Article 14 of the Constitution, and therefore void. The impugned rule divides, as already stated, self-nominees into two groups, those who are *bona fide* residents of Madhya Bharat and those who are not, and while it imposes a capitation fee on the latter, it exempts the former from the payment thereof. It thus proceeds on a classification based on residence within the State, and the only point for decision is whether the ground of classification has a fair and substantial relation to the purpose of the law, or whether it is purely arbitrary and fanciful.

(1) I.L.R. 1953 Madhya Bharat 87.

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The object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies, and it cannot be disputed that it is quite a legitimate and laudable objective for a State to encourage education within its borders. Education is a State subject, and one of the directive principles declared in Part IV of the Constitution is that the State should make effective provisions for education within the limits of its economy. (Vide article 41). The State has to contribute for the upkeep and the running of its educational institutions. We are in this petition concerned with a Medical College, and it is well-known that it requires considerable finance to maintain such an institution. If the State has to spend money on it, is it unreasonable that it should so order the educational system that the advantage of it would to some extent at least enure for the benefit of the State? A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality. The classification is thus based on a ground which has a reasonable relation to the subject-matter of the legislation, and is in consequence not open to attack. It has been held in *The State of Punjab* v. *Ajaib Singh and another*(1) that a classification might validly be made on a geographical basis. Such a classification would be eminently just and reasonable, where it relates to education which is the concern primarily of the State. The contention, therefore, that the rule imposing capitation fee is in contravention of article 14 must be rejected.

We have proceeded so far on the assumption that the impugned rule is a "law" as defined in article 13. If it is not that, article 14 would have no application. It was indeed contended by the learned Attorney-General on behalf of the respondent that the rule in question is a mere administrative or executive order, and that however liberally the word "law" might be

(1) [1953] S.C.R. 254.

construed, it should be limited to what is an expression of the legislative power and cannot comprehend what is an executive order. In support of this contention he relied on the decision in *Om Prakash* v. *The State*(1). In the view which we have taken that even on the footing that it is a law, the rule does not offend article 14, we do not consider it necessary to express any opinion on this question.

One other contention put forward by the respondent remains to be noticed. It was urged that as the institution was originally under private management and the State took it over subject to the conditions under which it was run, it was bound to enforce the rule relating to the payment of capitation fee which was previously in operation. But the terms under which the State took over expressly reserve only the agreement for reserving seats for the nominees of participating States and donors, and do not contain any undertaking to maintain the rule relating to imposition of capitation fee. Whether if such an undertaking had been given it could have been set up in answer to a fundamental right, does not therefore arise for decision.

In the result, the petition fails and is dismissed; but in the circumstances there will be no order as to costs.

JAGANNADHADAS J.—I regret that I feel obliged to differ.

The question that arises is whether the petitioner who is a resident of Delhi and has been admitted in July, 1952, by the State of Madhya Bharat as a student in the Mahatma Gandhi Memorial Medical College at Indore and who has been called upon to pay a sum of Rs. 1,500 per annum as capitation fee, in addition to the tuition fees and other charges payable by all the students of the college in general, is entitled to a writ restraining the authorities concerned from levying that capitation fee on the ground that the rule under which he is asked to pay is repugnant to the Constitution. The history of the

(1) A.I.R. 1953 Punjab 93.

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institution and the relevant rules have been set out in the judgment of the majority just delivered and it is unnecessary to repeat them. It is desirable, however, to mention, at the outset two matters. The exact authority for these rules, that is to say, the question whether they are rules made under a rule-making power having a legislative basis, or whether they are merely executive orders, which it is open to the State Government to change as they please, has not been clearly elucidated. Though the learned Attorney-General suggested, in the course of his arguments, that these were merely executive orders and that as such they did not come within the scope of article 14 of the Constitution, the material placed before us throws no light thereon. Nor has the question as to whether these executive orders which are issued by the State and are general in their application within the ambit of their subject matter constitute laws falling within the scope of article 14, been sufficiently canvassed before us. The discussion has proceeded on the assumption that the validity of these rules may be judged with reference both to the article 14 and article 15, no other article obviously having any direct bearing.

Now, as has been pointed out in the majority judgment, the relevant original rule by the date when the College was taken over by the State from private management was that "Madhya Bharat students are exempted from capitation fees". On the State taking over the College, this rule was substituted by the following new rule:

"For all students who are '*bona fide* residents' of Madhya Bharat no capitation fee should be charged. But for other non-Madhya Bharat students the capitation fee should be retained as at present at Rs. 1,300 for nominees and at Rs. 1,500 for others".

"*Bona fide* resident" for the purposes of the above rule was defined as

"(a) a citizen of India, whose original domicile is in Madhya Bharat, provided he has not acquired a domicile elsewhere, or

(b) a citizen of India, whose original domicile is

not in Madhya Bharat but who has acquired a domicile in Madhya Bharat and has resided there for not less than 5 years, at the date on which he applies for admission, or

(c) a person who migrated from Pakistan before September 30, 1948 and intends to reside in Madhya Bharat permanently, or

(d) a person or class of persons or citizens of an area or territory adjacent to Madhya Bharat or to India in respect of whom or which a Declaration of Eligibility has been made by the Madhya Bharat Government".

This, it is said, was the rule in force when the applicant was admitted into the College. This rule is again said to have been modified recently and the same is as follows:

"Only those students, who are *bona fide* residents of Madhya Bharat and have been selected for being admitted in accordance with the allocation scheme and the rules of admission to the seats specifically reserved for the residents of Madhya Bharat are exempted from the payment of capitation fees. All other students admitted to seats other than those reserved for the residents of Madhya Bharat shall be liable to pay capitation fees as prescribed".

In the affidavit filed in this Court by Shri H. L. Gupta, Assistant Secretary to the Government of Madhya Bharat, it is stated that this was meant to be only a restatement by the Government of their real intention in order to clarify what the prior rule was meant to convey. Now, with reference to these rules, it is necessary to notice the suggestion made in the course of the argument that the rules by the use of the word "exemption" indicate that some students get the benefit of not paying what would otherwise have been payable and that therefore others cannot complain of any hostile action constituting discrimination. But a copy of the rules for admission to the regular M.B.B.S. courses (copied from Mahatma Gandhi Memorial Medical College, Indore, Calendar of 1954) with which we have been furnished as one of the

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enclosures to the affidavit of the petitioner, and which is at pages 34 to 38 of the paper-book, on a perusal thereof, clearly shows at page 37 that the capitation fee is *in addition to the normal fees* and that this is payable only in respect of some students, while all the students in general pay certain prescribed fees. But whether the rule is in the nature of an exemption for some students or is by way of an addition for the others, there is clearly discrimination between the two groups which affects the one adversely. The very use of the phrase "capitation fees" for this additional amount levied from some, is indicative of its discriminatory character. The only question accordingly is whether this discrimination falls within the mischief of either article 14 or article 15. It is desirable for this purpose to have a clear understanding of what exactly the relevant rule at the date of the admission of the applicant into the College signifies.

It has been stated that this rule has to be understood with reference to the allocation scheme for admission of students which is said to be as follows in the affidavit of Shri H. L. Gupta, Assistant Secretary to the Government of Madhya Bharat.

"The basis of allocation of seats at the time of admission each year is that out of the total number of candidates to be newly admitted a certain number of seats is reserved for 'nominees' of such States as also of such individuals with whom there is a contract of reservation of seats, and a certain number of seats is reserved for Madhya Bharat. The rest go to what are called 'self-nominees'. All candidates (except Central Government nominees) are, however, admitted by a competitive examination and are selected in order of merit for each category".

It has been stated by the applicant in his reply affidavit that, while the competitive examination is the same for all, it is only the marks of the candidates in each separate group that are taken into consideration *inter se*. However this may be, there appear to be, as stated by the Assistant Secretary to the Madhya Bharat Government, three broad categories: (1) A

certain number of seats reserved for "*bona fide* students of Madhya Bharat". (2) A certain number of seats reserved for some specified States and the original donors, who in respect of their nominees have to pay capitation fees, somewhat lower in amount, and (3) The rest of the students who have to pay the higher capitation fees. The second category above mentioned may be left out of consideration for the present case, since that depends on certain pre-existing contractual obligations and different considerations may arise and the present petitioner does not fall wihin this category. The question of discrimination in this case arises really with reference to categories 1 and 3 above and turns upon the exact meaning of the phrase "*bona fide* residents" as defined in the rules. If this definition was meant to convey fairly and substantially, the qualification of residence in Madhya Bharat and nothing else, it may be, that this is not hit by article 15 and that it may also be a reasonable classification, on the facts and circumstances of a particular State, for purposes of article 14. The learned Attorney-General himself based his arguments, at one stage, on this view of the definition of "*bona fide* resident" in the rules. But the difficulty is that the learned Attorney-General has not committed himself, on behalf of the State, as to this being the only reasonable meaning of the definition. He put it as a kind of alternative. The Assistant Secretary to the Madhya Bharat Government, Shri H. L. Gupta, in his affidavit clearly and categorically says that the charging of capitation fee, truly speaking, is *not* on the basis of residence. The restatement of the rule by the Government is not also definite or clear about it inasmuch as it uses again the phrase "*bona fide* residents of Madhya Bharat". *Bona fide* residents of Madhya Bharat, as defined, is clearly something quite different from the class which can be designated ordinarily as "residents of Madhya Bharat". Now out of the four categories comprised in the definition, obviously (c) and (d) have absolutely nothing to do with actual residence. It is also difficult to discover any principle with reference to which discrimination can be justified in favour of (1) a Pakistan migrant

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with the mere intention to make Madhya Bharat his permanent residence, and (2) a person, belonging to the contiguous areas of Madhya Bharat, or the contiguous areas of India (and excluding citizens of India from the non-contiguous areas of Madhya Bharat, like the applicant). The main categories, however, are those which fall within (a) and (b) of the definition. But it is difficult to say even of these categories that they are based merely on residence, as such, of the person concerned. Category (b) has reference to "Domicile in Madhya Bharat" plus residence in Madhya Bharat for the preceding five years. Category (a) has reference only to "original domicile in Madhya Bharat" and by contrast with category (b) which requires precedent residence, is clearly intended not to insist on any precedent residence. Even if it be assumed that "domicile" means "permanent home" as stated by Lord Cranworth in *Whicker* v. *Hume*(1) this has no necessary reference to the applicant's actual residence at the relevant time. It is difficult to see why the fact of the applicant's father having had his permanent home in Madhya Bharat at the time of applicant's birth should be a ground of preference or why a person who has made Madhya Bharat his permanent home but left it for a time and returned only, say, an year previously should be denied it. Thus the definition of "*bona fide* resident" taken as a whole or even confining it to categories (a), (b) and (c) cannot be said to be based merely on residence in Madhya Bharat. Nor can any intelligible basis of grouping be gathered therefrom by imputing to the word "domicile" the meaning "residence" or "permanent home". It is interesting to notice, in this connection, that category (b) in requiring Madhya Bharat domicile and precedent residence for five years follows closely the pattern of Indian citizenship based on category (c) of article 5 of the Constitution with "domicile of Madhya Bharat" substituted for "domicile of India" and this raises the question of the concept of regional domicile (tending to the growth of the idea of regional citizenship) which will be discussed presently.

(1) [1859] 28 L. J. Ch. 396,398

Now confining our attention to the category (a) which has given rise to the main controversy in this case, it appears to me quite clear that the phrase "original domicile in Madhya Bharat" used therein could not have been meant to indicate either the residence or the permanent home of the applicant in Madhya Bharat. What then is the meaning intended to be conveyed thereby. Is the word "domicile" in this phrase to be understood in the legalistic sense or as the likely framer of the relevant rule—possibly a lay man like the Director of Public Instruction of the State—would have understood it to mean. It is necessary for this purpose to have a clear idea of the concept of "domicile" and its applicability in relation to any particular region within a country like India. Now the juristic concept of domicile is one which can be best gathered from the following passage in the classic judgment of Lord Westbury in *Udny* v. *Udny*(1).

"The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal statuses or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend".

Thus domicile is that attribute of a person's status which according to International Law determines

(1) [1869] L.R. 1 Sc. & Div. 441, 457.

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the personal laws by which he is governed and on which his personal laws depend. The question for consideration is whether this concept of domicile can apply to the word "domicile" in the phrase "domicile in Madhya Bharat". Dicey in his Conflict of Laws (6th Edn.), at pages 43 and 78 says as follows:

"A person's domicile (meaning thereby the place of domicile) is the country which is considered by law to be his permanent home"

and at page 82 he says

"the area contemplated relating to domicile is a 'country' or 'territory subject to one system of law'".

Farnsworth in his book on the Residence and Domicil of Corporations (1939 Edition) says as follows at page 1:

"In any consideration of domicil, the area contemplated has always been taken to be a 'country' or 'a territory subject to one system of law'".

It is no doubt true that there are countries which though politically one unit have different personal laws, in different areas thereof. In such a case the sub-unit which is governed by one system of law is the area of domicile. Thus for instance, as has been pointed out, though Great Britain is one single political unit, the personal laws in Scotland are different and therefore Scotch domicile is recognised. But this is a matter of historical growth. Now, so far as India is concerned it appears to me that there has so far been no such concept of domicile of sub-units known or recognised by law, for the only purpose for which it is normally relevant and which attracts it, *viz.* personal laws of the citizens of India. The personal laws in India, as is well known, depend mostly on religious affiliations. This has been so from pre-British period. The earliest British regulations have recognised this and the same has been continued by a specific provision being incorporated in the Civil Courts Act or analogous Acts of the various Provinces or States to the effect that the Courts are to decide matters relating to Hindus and Muhammadans, etc. with reference to their personal laws. These Acts

have invariably a provision by way of a direction to the Courts concerned, more or less in the following terms:

"To decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution or the like by the Muhammadan law in cases where the parties are Muhammadans and by Hindu law in cases where the parties are Hindus".

In respect of some of these matters as well as in respect of other matters which properly fall within the category of personal laws such as for instance minority, succession, etc., there have been legislative modifications. But it is noteworthy that those modifications are almost entirely of an all-India character and not on any regional basis (*viz.* Indian Majority Act, Indian Succession Act). So far as I am aware there are only a few instances of Provincial or State legislation on any matters relating to personal laws and that too, to an extremely small and limited extent. Thus it will be seen the the Province or the State of India to which a Hindu or Muslim belongs has no relevance or relation to his personal laws. Indeed, the contrary is emphasised by the fact that, a Hindu at any rate, carries with him even his own school of Hindu law in spite of migration to a different Province or State. Now, so far as Indian citizens who are neither Hindus nor Muslims are concerned, such as, Indian Christians or Anglo-Indians, they are governed by personal laws which are all-India in character and not regional, as for instance the Indian Succession Act. (It may be mentioned that even in Europe until the middle ages, personal laws depended on race and not on domicile. See Phillimore on International Law, page 36). In this state of the factual situation as regards the personal laws of the various categories of persons who comprise the bulk of the population of India, it appears to me to be clear that there has been in India up to the present moment no scope for growth of any concept of State or Provincial domicile as distinct from Indian domicile. There is thus no place for regional domicile, in the existing Indian law. Nor is there any reason

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to think that such a situation will arise in the future under the present Constitution. For this purpose, it may be noticed that the exclusive legislative power of the State does not extend to personal laws. Personal laws are the subject matter of item No. 5 of the Concurrent Legislative List. It is relevant in this connection also to notice that article 44 of the Constitution enjoins that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". It is extremely unlikely therefore that regional personal laws will be allowed to become operative in any substantial measure. It may be also mentioned that there is single citizenship under the Constitution for the whole of India and that "citizenship and naturalisation" have been listed within the exclusive competence of the Union Legislature. Of course citizenship is different from domicile. But I mention this here only to emphasize the view, that consistently with the Constitution, the concept of regional domicile which does not exist at the present day and which if recognised would tend to the growth of claims of regional citizenship (as for instance in the United States of America) would be entirely foreign to the intendment of the Constitution. It is with reference to the above considerations that the phrase "domicile in Madhya Bharat" in the relevant rule defining the phrase "*bona fide* resident of Madhya Bharat" has to be considered and understood. Since the concept of domicile in Madhya Bharat, is, in my view, unknown to the existing Indian law, I do not think it permissible to construe the phrase "domicile in Madhya Bharat" used in the relevant rule as having any thing to do with the regional domicile of the kind known to the English system of law. The recognition of such a concept of regional domicile in English or American law does not necessitate that we should import the same idea into our country contrary to the intendment of the Constitution. We have got to consider the meaning of the phrase "original domicile in Madhya Bharat" used in the relevant rule with reference to the existing state of law in India, which, I conceive, does not recognise such a regional domicile.

I have already given my reasons for thinking that the meaning of "residence" or "permanent home" of the applicant cannot be read into the phrase "domicile in Madhya Bharat" used in clause (a). In the circumstances it appears to me to be reasonably clear that the phrase "original domicile in Madhya Bharat" is meant to convey the "place of birth (of the applicant) in Madhya Bharat". It it perfectly true that "domicile of origin" and "place of birth" are two different matters. But that is so only where the use of the phrase "domicile of origin" conveys a definite legal meaning. But where, as in the present case, the phrase "domicile of origin in Madhya Bharat" conveys no legal meaning, as I have pointed out above, and if any meaning has to be attached to it, then it could only have reference to the "place of birth". This would accord with what was likely to have been contemplated by the framer of the rule. Normally a person's domicile of origin is the place of his birth except in a few and exceptional cases. In this context the following passage from Corpus Juris Secundum, Vol. 28 at page 1095 may be noticed:

"A person's domicile of origin is the domicile of his birth. It is generally but not necessarily the place of birth".

In this connection it is to be remembered that the relevant rule is a substitute for the pre-existing rule which was as follows:

"Madhya Bharat students are exempted from capitation fees".

The phrase "Madhya Bharat students" has no reference either to residence or domicile, and there can be no doubt that it normally connoted students who were born in Madhya Bharat.

In my opinion when the State authorities took over the management of the institution from private hands and made a change in the rule by coining a hybrid definition of the phrase *"bona fide* residents of Madhya Bharat" placing the category of citizens whose original domicile is in Madhya Bharat in the forefront of that definition, they only attempted to camouflage the

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implication thereof so as to accord with the pre-existing rule, viz. that the benefits of the exemption from capitation fees should be available only to persons born in Madhya Bharat and the burden of the capitation fees should be borne by persons not born in Madhya Bharat. In the view I take of the real meaning and effect of the rule, which is under discussion, neither an attempt at subsequent clarification nor the actual manner in which it is said to be administered or intended to be administered, as stated by the Assistant Secretary to the Madhya Bharat Government, Shri H. L. Gupta, in his affidavit, even if accepted as correct, can have any bearing. The fact that some of the admitted students of the Medical College who are residents of Madhya Bharat may not be entitled to exemption from capitation fee under the rule as now sought to be interpreted is not relevant so long as a student in the position of the applicant cannot have the benefit of the exemption, even if he got the highest marks in the competition. In my view, therefore, the rule in question has reference to place of birth in Madhya Bharat primarily, though a number of other miscellaneous categories might also come in under other and different heads. Hence the rule offends article 15 of the Constitution. Even in the view that the rule has reference to the juristic concept of regional domicil and for that reason does not fall within the scope of the inhibition of article 15, I am unable to see how, with reference to article 14, the distinction based on such domicile can be considered reasonable. No suggestion has been put forward how "original domicile in Madhya Bharat" is a reasonable ground for classification. In my opinion, therefore, the primary content of the rule relating to capitation fees which is contained in clause (a) of the definition of "*bona fide* resident of Madhya Bharat" does operate to the disadvantage of the petitioner by way of unconstitutional discrimination. Hence the State Government cannot validly seek to levy capitation fees on the petitioner with reference to that rule.

I would, therefore, allow this application.

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I think it right to add that the question as to the existence or admissibility of the concept of regional domicile as distinguished from Indian domicile and as to the bearing of this on the meaning of the concerned rule were not canvassed or suggested at the hearing before us and that the Court has not had the benefit of arguments on these and the connected matters. If, therefore, I have ventured to differ, notwithstanding my respect for the views of the majority and notwithstanding the absence of assistance from the Bar, it is out of the conviction that the recognition, express or implied, of regional domicile by a decision of this Court would be contrary to the intendment of the Constitution.

BY COURT.—In accordance with the opinion of the majority, the Petition is dismissed without costs.

Petition dismissed.

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February 3

THE AUTOMOBILE PRODUCTS OF INDIA LTD.

v.

RUKMAJI BALA AND OTHERS

(And connected Appeal)

[S. R. DAS, BHAGWATI and SYED JAFER IMAM JJ.]

Industrial Disputes (Appellate Tribunal) Act, 1950 (XLVIII of 1950), s. 22—Whether Labour Appellate Tribunal has jurisdiction to impose conditions when granting permission—Industrial Disputes Act, 1947 (XIV of 1947), s. 33 and Industrial Disputes (Appellate Tribunal) Act, 1950—S. 23—Jurisdiction of authority not only to decide whether there has been failure to obtain permission but also to give decision on the merits of an industrial dispute—Industrial Disputes Act, 1947 (as amended), s. 33 and s. 33-A—Industrial Disputes (Appellate Tribunal) Act—Ss. 22 and 23—Meaning and scope of.

Held, (i) that the ordinary and primary jurisdiction of the Labour Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950 is appellate; (ii) that s. 22 of the Act confers on the appellate tribunal a special jurisdiction which is in the nature of original jurisdiction; (iii) that s. 23 also vests in the tribunal an additional jurisdiction to decide the complaint as if it were an appeal pending before it; and (iv) that s. 23 confers on the