

Union Of India And Ors vs Dudh Nath Prasad on 4 January, 2000

Equivalent citations: AIR 2000 SUPREME COURT 525, 2000 AIR SCW 56, 2000 LAB. I. C. 384, (2000) 1 JT 1 (SC), 2000 (1) UPLBEC 318, 2000 (2) BLJR 1006, (2000) 2 KER LT 82, 2000 (2) SRJ 99, 2000 (3) SERVLJ 37 SC, 2000 (1) SCALE 23, 2000 (1) LRI 54, 2000 (2) SCC 20, 2000 BLJR 2 1006, 2000 (1) JT 1, (2000) 1 ESC 413, 2000 SCC (L&S) 236, (2000) 1 LAB LN 332, (2000) 2 MAD LJ 57, (2000) 1 PAT LJR 71, (2000) 1 SCT 879, (2000) 3 SCJ 130, (2000) 1 SERVLR 1, (2000) 1 UPLBEC 318, (2000) 2 ANDHLD 4, (2000) 1 SUPREME 38, (2000) 1 SCALE 23, (2000) 1 BLJ 513, (2000) 3 CALLT 1, (2000) 1 CURLR 342

Author: S. Saghir Ahmad

Bench: S. Saghir Ahmad, S.P. Kurdukar

CASE NO.:

Appeal (civil) 1387 of 1991

PETITIONER:

UNION OF INDIA AND ORS.

RESPONDENT:

DUDH NATH PRASAD.

DATE OF JUDGMENT: 04/01/2000

BENCH:

S. SAGHIR AHMAD & S.P. KURDUKAR

JUDGMENT:

JUDGMENT 2000 (1) SCR 1 The Judgment of the Court was delivered by S. SAGHIR AHMAD, J. Respondent is a member of the Indian Administrative and Allied Services. He was appointed in 1968 against a reserved vacancy as he was treated to belong to "Nuniya" community which was declared to be a Scheduled Caste community in the State of West Bengal and not in the State of Bihar where the respondent was born and had his schooling throughout even upto Graduate level. It was for this reason that the Comptroller and Auditor General wrote to the respondent that he cannot be treated as a member of the Scheduled Caste community. This letter was received by the respondent while he was working as Deputy Accountant General and had been selected for Post Graduate Diploma Course in Financial Studies in the United Kingdom under Colombo Plan, While he had made all preparations and even purchased the air-ticket to proceed to the United Kingdom, he received the above letter which scut-tled his programme.

Respondent, at that stage, approached the Central Administrative Tribunal where he contended that

he belonged to "Nuniya" caste and the Caste Certificate produced by him at the time of his examination, which was only checked and verified by the Union Public Service Commission ('UPSC', for short), had been properly issued by the Sub-Divisional Officer, Howrah, as his parents have been residing in that State for over 30 years prior to the date on which the examination was held by the Union Public Service Commission. His contention was accepted by the Judicial Member of the Tribunal, but the Administrative Member did not agree and gave a dissenting judgment. Consequently, the matter was referred to the Chairman who, by his judgment and order dated 15.2.1987, which is impugned in this appeal, agreed with the judicial Member and found that the respondent did belong to the "Nuniya" caste, which was duly notified as a Scheduled Caste in the State of West Bengal. It was further found that the ordinary place of residence of the parents of the respondent was Howrah from where the Caste Certificate was produced by the respondent, which was a proper and valid certificate. The Claim Petition was allowed with these findings and it is against this judgment that the Union of India has come in appeal before us.

Shri P.P. Malhotra, learned Senior Counsel for the Union of India has contended that in allowing the Claim Petition the Tribunal committed a manifest error in not considering the true impact of the vital fact that the respondent was born in a village in Siwan District in the State of Bihar where he also received his early education. He also graduated from a University in Bihar and, therefore, for all intents and purposes, he was to be treated as a member of "Nuniya" community of Bihar, which, for that State, had not been declared to be a Scheduled Caste.

Learned counsel for the respondent, on the contrary, submitted that in view of the admitted position that the parents of the respondent were residing in District Howrah for over 30 years prior to the date on which the examination was held by UPSC, their place of ordinary residence was District Howrah and, therefore, the Caste Certificate issued by the Sub-Divisional Officer, Howrah, was proper and valid and on that basis he was rightly allowed to appear in the Examination and on being selected, was properly appointed to the Service.

The facts which have been found established by the Tribunal are :

(a) The respondent and his parents, ADMITTEDLY, belong to the "Nuniya"

Caste, which has been declared as a "Scheduled Caste" in the State of West Bengal but not so in Bihar.

(b) The parents of the respondent were living in District Howrah in West Bengal continuously for more than 30 years before the respondent joined the India Administrative and Allied Services.

(c) The parents of the respondent, before coming to West Bengal, were living in Village Chanchopali in Siwan District in the State of Bihar where they also owned some property.

(d) (i) The respondent, was born in that village on 3.2.1940.

(ii) Respondent had his schooling in Bihar and also Graduated from a College in Bihar.

(iii) Respondent joined service in Customs House, Calcutta.

(iv) While working in the Customs House, respondent applied for "Scheduled Caste" certificate which was issued to him by the Sub-Divisional Officer, Sadar. Howrah, on 16.7.1965.

(v) Respondent applied to the Union Public Service Commission as a candidate for the IAS Examination. He claimed that he belonged to "Nuniya" Caste which was a Scheduled Caste community declared as such in the State of West Bengal. He also indicated that his parents were ordinarily residing in District Howrah, West Bengal.

(vi) Union Public Service Commission made necessary inquiries and by its letter dated 6.2.1967 accepted the respondent as a candidate belonging to "Nuniya" Caste which was a Scheduled Caste in the Howrah District of West Bengal, and thus confirmed the respondent's candidature for the Indian Administrative Service etc. Examination, 1966.

(vii) Respondent qualified at the Examination and the Govt. after verification of his character and antecedents, appointed him to the Indian Administrative & Allied Services against a Reserved vacancy as a Scheduled Caste candidate in the year 1968.

On the basis of the above facts, it is contended by learned counsel for the appellants that since the parents of the respondent originally belonged to the State of Bihar where they also possessed property and where the respondent was born and brought up and also educated, he could not be treated to be a resident of West Bengal nor could his parents be treated to be ordinarily residing in West Bengal and, therefore, the benefit of reservation in favour of "Nuniya" community, which was a Scheduled Caste community in the state of West Bengal alone, would not be available to the respondent. Let us examine the merits of this contention.

Para 5 of the "Instructions to the Candidates" contained in the pamphlet issued for the Indian Administrative Service etc. Examination, 1966, published under the authority of the Govt. of India, recites as under :

"5. A candidate who claims to belong to one of the Scheduled Castes or Scheduled Tribes should submit in support of his claim a certificate, in original, in the form given below from the DISTRICT OFFICER OR THE SUB-DIVISIONAL OFFICER OR ANY OTHER OFFICER OF THE DISTRICT IN WHICH HIS PARENTS (OR SURVIVING PARENT) ORDINARILY RESIDE, who has been designated by the State Government concerned as competent to issue such certificate, if both his parents are dead, OF THE DISTRICT IN WHICH HE HIMSELF ORDINARILY RESIDES OTHERWISE THAN FOR THE PURPOSE OF HIS OWN EDUCATION.

A candidate, from the Delhi State may submit such a certificate also from the Additional District Magistrate of the First Class Stipendiary magistrate or the Revenue Assistant,"

The proforma of the Form on which the Schedule Caste Certificate is to be issued is set out in Para 5 referred to above. It is reproduced below:

"The form of the certificate to be produced by Scheduled Caste and Scheduled Tribe candidates applying for appointment to posts under the Government of India.

This is to certify that.....son of.....of village-District/Division.....in the State.....belongs to the community which is recognised as a Scheduled Castes/Tribes under the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956, read with Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956, the Constitution (Jammu & Kashmir) Schedule Castes Order, 1956 and the Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959. Shri.....

and/or his family ordinarily reside(s) in the District/Division of the.....State/Union Territory.

Signature.....

Dated :
Office

Designation with seal of

Seal

State/Union Territory.

NOTE : THE TERM 'ORDINARILY RESIDE' USED HERE WILL HAVE THE SAME MEANING AS IN SECTION 20 OF THE REPRESENTATION OF PEOPLE ACT, 1950"

According to Para 5 of the "Instructions", the Scheduled Caste Certificate has to be issued by the District Officer or the Sub-Divisional Officer etc. of the District in which the parents of the candidate "ordinarily reside". If the candidate himself is residing, for the purpose of his education, elsewhere, he is still required to produce the certificate of the District Officer etc. of the District in which his parents were "ordinarily residing". If, however, both the parents were dead, the candidate could submit the Certificate of the District Officer etc. of the District in which the candidate himself was "ordinarily residing" otherwise than for the purpose of education.

Applying the requirements set out in Paragraph 5 of the "Instructions" to the facts of this case, it will be found that since the parents of the respondent were, admittedly, living in District Howrah for more than 30 years before the Examination in question was held, the District Officer or, for that matter, the Sub-Divisional Officer in the instant case, could legally issue the Caste Certificate and also certify that his parents were "ordinarily residing" in District Howrah. The mere fact that the respondent, for purposes of education, stayed in the State of Bihar and graduated from a college in that state, would not affect the status of his parents who were already living in District Howrah for more than 30 years and consequently could be treated as

"ordinarily residing" in District Howrah. Their status would not be affected by the temporary residence of the respondent, for the purpose of his education, in the State of Bihar. In such a situation, the respondent had no option but to obtain the Certificate from the Sub-Divisional Officer, Howrah, as he could not have deviated from the "Instructions" already issued by the UPSC.

The Tribunal has found it as a fact that the parents of the respondent had settled down in District Howrah and were living there for about 30 years. They were, therefore, for all intents and purposes, "ordinarily residing"

at Howrah. The Examination in which the respondent had appeared was the 1966-Examination for recruitment to Indian Administrative and Allied Services which was held 30 years after the parents of the respondent had settled down in Howrah District. Learned counsel for the appellant has contended that in view of the "NOTE" appended to Paragraph 5 of the "Instructions", the term "ordinarily reside" has to be given the same meaning as in Section 20 of the Representation of People Act, 1950, and if that meaning is taken into consideration, the respondent cannot be said to belong to the State of West Bengal and consequently he could not take advantage of the Notification by which "Nuniya" community was declared as a Scheduled Caste community in that State. Section 20 of the Representation of People Act, 1950, provides as under :

"20. Meaning of 'ordinarily resident':

(1) A person shall not be deemed to be ordinarily resident in a constituency on the ground only that he owns, or is in possession of a dwelling house therein.

(1A) A person absenting himself temporarily from his place of ordinary residence shall not, by reason thereof, cease to be ordinarily resident therein.

(IB) A member of Parliament or the legislature of a State shall not during the term of his office cease to be ordinarily resident in the constituency in the electoral roll of which he is registered as an elector at the time of his election as such member, by reason of his absence from that constituency in connection with his duties as such member.

(2) A person who is a patient in any establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness, or who is detained in prison or other legal custody at any place, shall not by reason thereof be deemed to be ordinarily resident therein.

(3) Any person having a service qualification shall be deemed to be ordinarily resident on any date in the constituency in which, but for his having such service qualification, he would have been ordinarily resident on that date.

(4) Any person holding any office in India declared by the President in consultation with the Election Commission to be an office to which the provisions of this sub-section apply, shall be deemed to be ordinarily resident on any date in the constituency in which, but for the holding of any such office, he would have been ordinarily resident on that date.

(5) The statement of any such person as is referred to in sub-section (3) or sub-section (4) made in the prescribed form and verified in the prescribed manner, that but for his having the service qualification or but for his holding any such office as is referred to in sub-section (4) he would have been ordinarily resident in a specified place on any date, shall in the absence of evidence to the contrary, be accepted as correct.

(6) The wife of any such person as is referred to in sub-section (3) or sub-section (4) shall, if she be ordinarily residing with such person be deemed to be ordinarily resident in the constituency specified by such person under sub-section (5).

(7) If in any case a question arises as to whether a person is ordinarily resident at any relevant time, the question shall be determined with reference to all the facts of the case and to such rules as may be made in this behalf by the Central Government in consultation with the Election Commissioner.

(8) In sub-section (3) and (5) "service qualification" means -

(a) being a member of the armed forces of the Union; or

(b) being a member of a force to which the provisions of the Army Act, 1950 (46 of 1950) have made applicable whether with or without modifications; or

(c) being a member of an armed police force of a State, who is servicing outside that State; or

(d) being a person who is employed under the Government of India in a post outside India."

Section 20 which is part of the law enacted for purposes of election to Parliament or State Legislature contemplates many categories of persons including those who are in service. It lays down as to when they would be treated to be "ordinarily residing" in a particular constituency. Sub-section (1) and Sub-section (1A) of Section 20 are couched in a negative language. Sub-section (1) of Section 20 provides that if a person holds or is in possession of a dwelling house in a particular constituency, he would not, merely on that ground, be deemed to be "ordinarily resident" in that constituency. Sub-section (1A) provides that temporary absence of a person from the place of his "ordinary residence", would be ineffective and a person would not cease to be an "ordinary resident" in that constituency merely for that reason. Thus, in determining the question whether a person was

ordinarily residing in a particular constituency, the factors mentioned in sub-section (1) and Sub-section (1A) of Section 20 alone would not be determinative of the status and the question would have to be determined on a consideration of all other relevant factors. This is also clear from a reading of sub-section (7) of Section 20 which lays down that if a question arises as to whether a person was ordinarily residing in any constituency at the relevant time, it would be determined with reference to all the facts of the case as also with reference to the Rules that may have been made in that behalf by the Central Govt. in consultation with the Election Commissioner.

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

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

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

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

"Personal presence at some place of abode with HO present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently. Bodily presence and the intention of remaining in a place, to sit down to stay in a place, to settle, to remain, and is made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Residence implies something more than mere physical presence and something less than domicile." If the two meanings referred to above are to be read along with the word "ordinarily", it becomes clear that a person, before he can be said to be "ordinarily residing" at a particular place, has to have an intention to stay at that place for a considerably long time. It would not include a flying visit or a short or casual presence at that place.

The word "reside" came to be considered by this Court in *Jagir Kaur & Anr. v. Jaswant Singh*, [1964] 2 SCR 73, in the context of the jurisdiction of the Magistrate under Section 488 of the Code of Criminal Procedure, 1898, for entertaining the petition of a wife for maintenance. After considering the meaning of the word "reside" in the Oxford Dictionary, which we have already set up above, the Court observed as under :

"He said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including

domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to, a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense."

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

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

In Tomlin's Law Dictionary, "domicile" has been defined as "the place where a man has his home."

In Whicker v. Hume, 28 L.J. Ch. 396, it was held that a person's domicile means, generally speaking, the place where he has his permanent home.

In Me Mullen v. Wadsworth, 14 A.C. 631, it was observed that 'the Roman law still holds goods that 'it is not by naked assertion but by deeds and acts that a domicil is established'.

Lord Macnaghten in Wernans v. A.G., (1904) A.C. 290, observed that "Domicil of origin, or, as it is sometimes called, perhaps less accurately, domicil of birth, differs from domicil of choice mainly in this - that its character is more enduring, its hold stronger and less easily shaken off."

In Ross v. Ross, (1930) A.C. 1, Lord Buckmaster while dealing with a case relating to change of domicile observed that "Declarations of intention are rightly regarded as determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression".

In another case, namely, Ramsay v. Liverpool Royal Infirmary, (1930) A.C.

538. Lord Dunedin observed at page 594 that. "The animus of changing domicil may be inferred from the factum of residence."

Etymologically, "residence" and "domicile" carry the same meaning, inasmuch as both refer to the 'permanent home', but under Private International Law, "domicile" carries a little different sense and exhibits many facets. In spite of having a permanent home, a person may have a commercial, a political or forensic domicile. 'Domicile' may also take many colours; it may be the domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. In Private International Law, "domicile"

jurisprudentially has a different concept altogether. It plays an important role in the Conflict of Laws. The subject has been elaborately considered by Dicey in his book "Conflict of Laws" (6th Edition) as also in another book by Phillimore on Domicil, Equally valuable discussion is to be found in Private International jurisprudence by Foote and by Westlake on Private International Law.

To bring home the point we may quote a few words from the "New jurisprudence (The grammar of Modern Law) by Justice P.B. Mukharji (Tagore Law Lectures), as under :

Certain principles relating to domicile have taken firm root in common Law countries. The principles may be stated in the form of propositions in the light of the famous case of *Udny v. Udny*, (1869) L.R. 1SC. App. 441. Every person must all the time be said to possess a domicile. There can be one domicile at a time and no person can have plural domicile. Secondly, the basic question whether certain facts do or do not constitute domicile is ordinarily decided by the municipal law of the court of the country deciding. Naturally, *lex fori* plays a significant part in this question of Renvoi where domicile is the connecting factor. *Casdagli v. Casdagli*, (1919) AC 145, But the difficult point of private international jurisprudence is that the whole problem of the choice of law has remained excluded as yet in determining the question what law ought to govern a person's capacity to acquire a domicile. (*In Re : Wallach*, (1950) 1 All ER

199. Apparently this gap in private international jurisprudence is waiting long to be filled up. It is just possible that a single choice of law may not govern all types of cases in this field.

The classical division of domicile is well known. There are the domicile of origin, the domicile of choice and the domicile of dependence. There has been little change in the essential concept of these three domiciles. Domicile and residence are different and yet related concepts. Ordinarily domicile operates as the basis of jurisdiction, in such vital aspect of a person's private life like marriage, legitimacy and succession. But on the other hand residence operates as the basis of jurisdiction in cases like taxation, right to vote, in certain aspects of matrimonial question, and generally in cases where public rights are involved.

In view of the above, the concept of "domicile" as canvassed by learned counsel for the appellants with reference to change of nationality or change of domicile from one country to another, cannot be

imported in the present case. Moreover, "Domicile" and "Residence" are relative concepts and have to be understood in the context in which they are used, having regard to the nature and purpose of the statute in which these words are used. We are principally concerned with the expression "ordinarily reside"

as used in the Note to Paragraph 5 of the Instructions" and the expression "ordinarily resident" used in Section 20 of the Representation of People Act, 1950. This Act and the Representation of People Act, 1951 both deal with the election matters including delimitation of constituencies, right to contest the election as also right to vote in a constituency.

We have already explained the meanings of the words "ordinarily resident"

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

We do not find any infirmity in the judgment passed by the Tribunal which is hereby upheld. The appeal having no merit, is dismissed, but without any order as to costs.