2023 INSC 99

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (C) NO.891 OF 2021

Anushka Rengunthwar & Ors. .... Petitioner(s)

Versus

Union of India & Ors. .... Respondent(s)

WITH

Writ Petition (C) No.503/2022,

Writ Petition (C) No.35/2022,

Writ Petition (C) No.246/2022,

Writ Petition (C) No.155/2022,

Writ Petition (C) No.347/2022,

Writ Petition (C) No.380/2022,

Writ Petition (C) No.322/2022,

Writ Petition (C) No.629/2022,

Writ Petition (C) No.740/2022,

Writ Petition (C) No.706/2022,

Writ Petition (C) No.741/2022,

Civil Appeal No. 812/2023
(arising out of SLP(C) No. 16306/2022)

Writ Petition (C) No.22/2022,

Writ Petition (C) No.1070/2022,

Writ Petition (C) No.1230/2021,

Writ Petition (C) No.1186/2021,

Writ Petition (C) No.838/2022,

Writ Petition (C) No.1032/2021,

Writ Petition (C) No.961/2022,

Writ Petition (C) No.1123/2021,

Writ Petition (C) No.1128/2021,

Writ Petition (C) No.1125/2021,

Writ Petition (C) No.1150/2021,

Writ Petition (C) No.1129/2021,

Writ Petition (C) No.1141/2021,

Writ Petition (C) No.1143/2021,

Writ Petition (C) No.1149/2021,

Civil Appeal No. 811/2023
(arising out of SLP(C) No. 17153/2021)

Civil Appeal No. 810/2023
(arising out of SLP(C) No. 17158/2021)

Writ Petition (C) No.1174/2021 and

Writ Petition (C) No.34/2023

J U D G M E N T

1. The petitioners in all these petitions are the Overseas Citizens of India card holders. They are all students who have just reached the full age or are below this age**.** All the petitioners are aspiring to become Doctors by pursuing the MBBS course by securing admission through NEET selection

process and thereafter the post-graduation as also the super specialty in the field of medicine. Some of them are also seeking to pursue post-graduation and also a super specialty. For the purpose of narration of facts, the averments as put forth in W.P.(C) No.891 of 2021 which was taken as the lead case is noted. The petitioners contend that they have been putting in all efforts and were preparing to appear for the NEET-UG examinations based on the right which was available to them under the notifications dated 11.04.2005 and 05.01.2009. Through the said notifications, the Overseas Citizens of India ('OCI' for short) cardholders were given the right of parity with Non-Resident Indians ('NRIs' for short) in respect of the facilities as notified, including in the field of education, who in turn had the parity with Indian Citizens. Through the notification dated 05.01.2009, the said right to education in India was also extended further, to appear for the All India Pre-Medical Test or such other tests to make them eligible for admission in pursuance to the provisions contained in the relevant acts. In view of such right being extended to the OCI Cardholders by respondent No.1 in exercise of the powers under Section 7B(1) of the Citizenship

Act, 1955 ("Act 1955" for short), the petitioners were also assured of appearing for the NEET-UG exam so as to compete to secure a seat to pursue the medical course.

2. Such right was available to the petitioners from a point almost immediately after their birth, since the petitioners in these petitions were born in the year 2003 onwards. Except for the fact that they were born in a foreign country, they had lived in this country for periods ranging from 10 to 15/17 years. In that view, the entire educational career was pursued in India, including the 12th standard so as to qualify for the NEET-UG examinations and MBBS Course. In fact, in most of the cases, both parents of the petitioners herein are Indian nationals and in any case, one of them is an Indian national. Even in cases where both the parents are OCI Cardholders, the children have lived most of their life in India since their roots remain to be in India where grandparents and family are here.

3. When this was the position the respondent No.1 issued the notification dated 04.03.2021 in exercise of the power under Section 7B(1) of Act, 1955 whereunder the existing right of appearing for the Entrance Exams to compete with Indian Citizens for the seat was taken away and restricted

the admission only as against the seats reserved for the Non-Resident Indians or for supernumerary seats. The proviso to clause 4(ii) of the impugned notification dated 04.03.2021 in fact clarifies that the OCI cardholders shall not be eligible for admission against any seat reserved exclusively for Indian Citizens. This is done so, by providing an explanation that the OCI Cardholder is a foreign national holding passport from a foreign country and is not a citizen of India.

4. The petitioners, therefore, contend that such notification falls foul of the Doctrine of Non -Retrogression since the right which was being bestowed from the year 2005, instead of progressing and maturing to be a better right was being curtailed and reversed. The petitioners also contend that the right guaranteed under Articles 14 and 21 of the Constitution of India is violated since such right is available to "any person", even if one is not a citizen of India. In the instant facts, the petitioners have no quarrel with the validity of Sections 7B(1), 7D, 8(1) and 9(1) of Act, 1955. The petitioners while accepting the sovereign power of the respondents, are only aggrieved by the manner in which

the impugned notification dated 04.03.2021 is issued, by which an existing right has been taken away. The petitioners thus contend that they are not only OCI Cardholders, but are resident OCI Cardholders and therefore they should be treated like any other Citizen of India. Since respondent No.1 through the impugned notification has disentitled the OCI Cardholders from the process of admission to the seats to which the Indian citizens are entitled to participate in the selection process, they have approached this court assailing the impugned notification dated 04.03.2021, in these petitions under Article 32 of the Constitution of India.

5. The petitioners have accordingly sought for issue of an appropriate writ to quash clause 4(ii), its proviso and Explanation (1) as contained in the impugned notification dated 04.03.2021 bearing F No.2611/CC/05/2018-OCI.

6. The respondent No.1 has filed its objection statement seeking to justify the notification. It is necessary to take note herein that though in the instant batch of the petitions, the validity of the provisions in the Citizenship Act has not been assailed, in an another petition bearing W.P.(C) No.1397 of 2020 since there is a challenge to the said

provisions and was earlier tagged with these petitions, the respondents in the common counter affidavit have also referred to the provisions of the Act and the Constitution of India in order to justify its validity. Since those aspects do not require consideration in this batch of cases, the objections by respondent No.1 insofar as seeking to justify the issue of the impugned notification dated 04.03.2021 alone is taken note. In that regard, it is contended that as per the notification dated 11.04.2005, the OCI Cardholders were given parity with NRIs in the educational field. Under the notification dated 05.01.2009, the OCI Cardholder students were entitled to appear for All India Pre Medical Test and such other tests to make them eligible for admission. It is averred that a harmonious reading of 2005 and 2009 notifications leads to the conclusion that the OCI Cardholder students have parity to the NRIs and therefore can lay claim only to NRI quota seats. The educational right of OCI Cardholder students were discussed in a meeting of the Committee of Secretaries held on 19.07.2018 wherein it was agreed that the OCI Cardholders may be treated at par with NRI, in the quota of NRI and they ought not to be

eligible against seats meant for Indian citizens. Hence, it was felt that relevant notifications be issued by the Ministry of Home Affairs. In that view, the consolidated notification dated 04.03.2021 was issued in exercise of the power under Section 7B(1) of Act, 1955 whereby the earlier notifications of 2005, 2007 and 2009 were incorporated so as to bring clarity with regard to the various provisions. It is contended that the rationale is to protect the rights of the Indian Citizens and in such matters, State may give preference to its citizens vis-à-vis foreigners holding OCI Cards. In that regard it is stated that the number of seats available for medical and engineering courses in India are very limited and does not fully cater to the requirement of the Indian citizens. Hence the right to admission to such seats should be primarily available to Indian citizens instead of foreigners including OCI Cardholders. It is contended that the right to claim the protection under Article 14, 19 and 21 of the Constitution are not available to a person who is not a citizen, more particularly in matters of education and is limited to the privilege bestowed through a notification issued under the Act. The respondent No.1 therefore seeks

to justify and sustain the notification dated 04.03.2021, a portion of which is under challenge.

7. In the light of the above we have heard Mr. P. Chidambaram and Mr. K.V. Viswanathan learned senior counsels for the respective petitioners as also Mr. Kunal Cheema and the other learned counsels appearing for the respective petitioners. We have also heard Ms. Aishwarya Bhati, learned Additional Solicitor General for the respondents. In that light, we have perused the petition papers and all the documents made available to us.

8. The summary of the arguments on behalf of the petitioners is as hereunder;

> This Court vide order dated 8.11.2021 in WP 1397 of 2020 passed a general order applicable to all eligible candidates who are similarly situated to appear for counselling in General at par with Indian citizens and same was made applicable to a variety of courses stated therein.
>
> Many of the Petitioners in WP No.891 of 2021, who were all NEET-2021 aspirants, appeared for NEET 2021 and also qualified and have secured admissions and are pursuing their academic courses. They would be in their 2nd year of studies. There would be other OCIs also who are not part of the writ petitions, but would have taken the benefit of the order dated 08.11.2021 passed by this Hon'ble Court, which was a general order applicable to all.
>
> The OCIs have been equated with NRIs all along since 2005 as regards various rights conferred under

Section 7B(1) of the Citizenship Act and more particularly rights regarding education. That vide notification dated 05.01.2009, OCIs were permitted to carry out various professions in India as enumerated therein.

That in view of the various rights having been given and more particularly education rights and right to work in India and also because many OCIs have their grandparents/families/roots in India, they came back to India long back and have been residing and working here and contributing to the nation like any other citizen in the form of taxes etc. The span of living here ranges as long as about 16 to 17 years.

That till up to 04.03.2021 (*impugned notification*), OCIs were entitled to seek admission to all seats like NRIs were (who are still entitled to) and not restricted to only NRI seats or supernumerary seats, but pursuant to the said portion of the impugned notification, OCIs are now entitled to only seats reserved for NRI i.e. NRI seats or supernumerary seats, which is discriminatory and violative of Article 14 and 21 of the Constitution of India.

Article 14 prohibits class legislation, but permits reasonable classification. However, for reasonable classification to be valid, there are twin tests i.e. (i) classification must be founded on intelligible differentia and (ii) that the differentia must have a rational relation to the object sought to be achieved. The seats have remained, unfilled. Hence Indian Citizens are not prejudiced.

That Article 14 and 21 are available to “persons” and not only citizens and hence the OCIs who are “persons” and who have been residing in India for years together, in view of the rights of living (since life long visa is granted) and undertaking various professions in India granted under section 7B vide 05.01.2009 notification, have a right not to be discriminated against, which is guaranteed under Article 14 and also have a right of meaningful existence, which is a facet of Article 21 of the Constitution of India. Moreover, there is no valid rationale for having withdrawn the said rights of being

entitled to various seats other than seats reserved for NRIs, which they have been enjoying for considerable amount of time at par with NRIs, who today (notification dated 12.10.2022) also are entitled to all seats including seats reserved for Non-Residents.
It is further contended that the only object as can be culled out from the Counter Affidavit of the Respondent no.1 appears to be to protect rights of Indian citizens as seats are limited. However, if the statistics of past few years i.e 2018-2019 onwards are seen, even when the OCIs were entitled to all seats and they took admissions then, few hundred seats were remaining vacant at the end of final counselling. In fact the data also shows that seats have been significantly increased year on year, yet at the end of final counseling seats have remained vacant. Hence, it is clear that the said objective is a misnomer and the said portion of the impugned notification smacks of arbitrariness and non-application of mind.

The said portion of the impugned notification falls foul of the doctrine of "non-retrogression" as discussed in the matter of *Navtej Singh Johar* [2018 (10) SCC 1], as it is resulting in withdrawal of the rights which the OCIs have enjoyed for the past several years.

OCIs have taken up particular stream of education, passing 10th and 12th from schools in same state, meeting domicile/residence requirements, keeping in mind the rights which were available to them and hence their such acts would be saved as "things done" as per the words "except as respect things done or omitted to be done before such supersession" appearing in impugned notification dtd 04.03.2021. In support of this submission, reliance was placed on *Universal Import Agency and Anr. v. The Chief Controller of Imports and Exports and Ors*. [1961 (1) SCR 305]

The OCIs were entitled to have "legitimate expectation" as enshrined in the case of *Navjyoti* [1992 (4) SCC 477] that the said rights will continue to be available to them and not retrograded. That only a limited number of OCIs take the exam and out of them only a minuscule number clear the same and become eligible for admission. Hence no grave prejudice was being

caused if the OCIs were allowed to seek admission to all seats based on merit and withdrawal of the same is therefore arbitrary and unreasonable.

9. The summary of the contention on behalf of the respondents as put forth by the learned Additional Solicitor General is as follows;

The present case essentially raises a singular issue with regard to the classification made between Indian citizens and Overseas Citizens of India cardholders and the same being statutory, whether it is sustainable. It is contended that the classification made by the impugned notification is supported by statutory provisions which legitimizes the State's interest and ensures that the limited number of seats in educational institutions are available to Indian citizens and not taken away by foreigners. It is contended that for any sovereign country, the rights and privileges that are extended to the non-citizens are in exercise of inviolable sovereign powers and are essentially unfettered and unqualified. The courts have consistently declined to interfere in visa, immigration or such issues relating to foreigners. The power of exclusion of foreigners being an incident of sovereignty is that of the Government to be exercised. The OCI regime is a privilege extended by the

Parliament and the Executive, falling squarely in the domain of the sovereign policy of the country. The Citizenship is regulated in Part II (Articles 5 to 11) of the Constitution of India pursuant to which the Citizenship Act is enacted to regulate the same. Section 2(ee) of the Citizenship Act defines OCI cardholders to mean a person registered as an Overseas Citizens of India cardholder by the Central Government under Section 7A of the Act. The learned Additional Solicitor General on referring to the said constitutional provisions and the Citizenship Act would point out that the privilege of securing education in India was pursuant to the conferment of the same in terms of Section 7(B) of the Act by the issue of notification.

10. The Notification dated 04.03.2021 which is impugned in these petitions is issued by the Ministry in continuation of the policy of the Union of India in conformity with the constitutional principles. With reference to the Notification, it is contended that it is very evident and clear that the intention was not to give the OCI cardholders parity with Indian citizens at any stage with regard to admission but the parity was always with NRIs. The policy was consistent

from 2004 when the OCI cardholders' mechanism was started, to treat them at par with the NRIs. However, there was some dichotomy in the interpretation of the earlier Notifications and the benefit which was available to the NRIs for the seats along with Indian citizen students was also being extended. Therefore, after comprehensive consultation on the educational rights of the OCI cardholders in the meeting held on 19.07.2018 it was decided that the OCI cardholders may be treated at par with NRIs in the quota for NRI seats and they would not be eligible against the seats meant for Indian citizens.

11. Hence the issue of the consolidated Notification of 04.03.2021 was in supersession of earlier Notifications of 2005, 2007, and 2009 to bring clarity with regard to various provisions which were under consideration of the Ministry of Home Affairs for quite some time. In this context, consultations were held with all stakeholders and the Notification was issued.

12. Reference to the judgments cited by the learned Additional Solicitor General to substantiate her contention that the consideration with regard to the validity of the

Notification cannot be of a similar purport when it is assailed by the citizens of India and other decisions referred to would be considered at the appropriate stage. The sum and substance of the contention is that the decision is with the object of legitimate public interest and in the interest of the Indian citizens. Hence, it is contended that the impugned Notification does not call for interference and the petitioners are not entitled to seek any relief from this Court.

13. In the light of rival contentions, at the threshold it is necessary to take note that though the arguments were elaborately addressed and the learned Additional Solicitor General referred in detail to the provisions of the constitution relating to citizenship and also the sovereign power of the respondent No.1 under the Act, 1955, we do not find it necessary to dwell into much detail in this batch of petitions. This is for the reason that from the very case put forth by the petitioners they are not questioning the power of respondent No.1 to issue notifications prescribing the right in respect of OCI Cardholders. However, the grievance is only that a right which existed in their favour

has been altered to their detriment without application of mind to the fact that most of the petitioners have spent their entire lifetime in India and also pursued their educational careers in India including appearing for the qualifying exam. As such the only grievance of the petitioners herein is with regard to the proviso to clause 4(ii) and Explanation contained in the impugned notification dated 04.03.2021 whereunder a limitation has been prescribed wherein they have been made entitled only to the seats available to NRIs and they have been specifically excluded from seeking admission to the seats which are exclusively available to the Indian citizens.

14. In that regard, the provisions of Act, 1955 which are to be noted read as hereunder:-

> **"7A. Registration of overseas citizens of India Cardholder.-(1)** The Central Government may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf, register as an Overseas Citizen of India Cardholder-
>
> (a)any person of full age and capacity,-
>
> (i) who is citizen of another country, but was a citizen of India at the time of, or at any time after, the commencement of the Constitution; or
>
> (ii) who is citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the

Constitution; or

(iii) who is citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947; or

(iv) who is a child or a grandchild or a great grandchild of such a citizen; or

(b) a person, who is a minor child of a person mentioned in clause (a); or

(c) a person, who is a minor child, and whose both parents are citizens of India or one of the parents is a citizen of India; or

(d) spouse of foreign origin of citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section:

Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India:

Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section.

2. The Central Government may, by notification in the Official Gazette, specify the date from which the existing Persons of Indian Origin Cardholders shall be deemed to be Overseas Citizens of Indian Cardholders.

Explanation.- For the purposes of this sub-section, "Persons of Indian Origin Cardholders" means the persons registered as such under notification number 26011/4/98 F.I., dated the 19th August, 2002, issued by the Central Government in this regard.

3. Notwithstanding anything contained in sub-section (1), the Central Government may, if it is

satisfied that special circumstances exist, after recording the circumstances in writing, register a person as an Overseas Citizen of India Cardholder."

"7B. Conferment of rights on Overseas Citizen of India Cardholder (1) **Notwithstanding anything contained in any other law for the time being in force, an Overseas Citizen of India Cardholder shall be entitled to such rights [other than the rights specified under sub-section (2)] as the Central Government may, by notification in the Official Gazette, specify in this behalf.**

(2) An Overseas Citizen of India Cardholder shall not be entitled to the rights conferred on a citizen of India-

(a) under article 16 of the Constitution with regard to equality of opportunity in matters of public employment;

(b) under article 58 of the Constitution for election as President:

(c) under article 66 of the Constitution for election of Vice-President;

(d) under article 124 of the Constitution for appointment as a Judge of the Supreme Court;

(e) under article 217 of the Constitution for appointment as a Judge of the High Court;

(f) under section 16 of the Representation of the People Act, 1950 (43 of 1950) in regard to registration as a voter;

(g) under sections 3 and 4 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the House of the People or of the Council of States, as the case may be;

(h) under sections 5, 5A and 6 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the Legislative Assembly or the Legislative Council, as the case may be, of a State;

(i) for appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may, by special order in that behalf specify.

(3) Every notification issued under sub-section (1)

shall be laid before each House of Parliament."

(emphasis supplied)

15. The above-noted provisions were inserted initially during the year 2004 and were thereafter substituted on the introduction of the provisions in the year 2005 and substituted time to time thereafter. On foreign citizens of such category being given the status of OCI Cardholders, it also provided for conferment of rights on OCI Cardholders as contemplated under Section 7B of Act, 1955 (supra).

16. In exercise of the said power under Section 7B(1) of Act, 1955 the notification dated 11.04.2005 was issued which provides as hereunder:-

"**MINISTRY OF HOME AFFAIRS**
NOTIFICATION
New Delhi, the 11th April, 2005

S.O. 542(E)- In exercise of the powers conferred by Sub-section (1) of Section 7B of the Citizenship Act, 1955 (57 of 1955), the Central Government hereby specifies the following rights to which the persons registered as Overseas Citizens of India under Section 7A of the said Act shall be entitled, namely:-

(a) grant of multiple entry lifelong visa for visiting India for any purpose;

(b) exemption from registration with Foreign Regional Officer or Foreign Registration Officer for any length of stay in India; and

(c) parity with Non-Resident Indians in respect of all facilities available to them in economic,

financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties.

[F.No. 26011/2/2005-IC]

DURGA SHANKER MISHRA, Jt. Secy."

(emphasis supplied)

17. Through the said notification, apart from granting multiple entry life-long visa for visiting India for any purpose, insofar as economic, financial and educational fields, parity with Non-Resident Indians was provided, except for acquisition of agricultural or plantation properties. By a subsequent notification dated 05.01.2007 issued under Section 7B(1) of Act, 1955, though no right relating to the field of education was referred to, the OCI Cardholders were given similar treatment with Non-Resident Indians in the matter of inter-country adoption of Indian children **and also to be treated at par with the Indian Nationals in the matter of tariffs in air fares and also for same entry fee being charged to domestic Indian visitors to visit National Parks and Wildlife Sanctuaries.**

18. Further, a notification dated 05.01.2009 relating to pursuing professions and admission to professional course was issued, which reads as hereunder:

"MINISTRY OF OVERSEAS INDIAN AFFAIRS
NOTIFICATION

New Delhi, the 5th January 2009

S.O.36(E) - In exercise of the powers conferred by sub-section (1) of Section 7B of the Citizenship Act, 1955 (57 of 1955), and in continuation of the notifications of the Government of India in the Ministry of Home Affairs number S.O.542(E), dated the 11th April, 2005 and in the Ministry of Overseas Affairs S.O.12(E), dated the 6th January, 2007, the Central Government hereby specifies the following rights to which the persons registered as the overseas citizen of India under Section 7A of the said Act, shall be entitled, namely :-

(a) **Parity with non-resident Indian in respect of,**-

(i) Entry fees to be charged for visiting the national monuments, historical sites and museums in India;

(ii) Pursuing the following professions in India, in pursuance of the provisions contained in the relevant act, namely:-

(i) Doctors, dentists, nurses and pharmacists;
(ii) Advocates;
(iii) Architects;
(iv) Chartered accountants;

(b) To appear for the All India Pre-Medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.

[F.No.OI-15013/13/2008-DS]

D.N. SRIVASTAVA, Jt. Secy."

(emphasis supplied)

19. Through the said notification dated 05.01.2009 the OCI Cardholders **were given the right to pursue the professions indicated therein, in India and also to appear for the All-Indian Pre-Medical Test or such other**

tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts. Since NRIs had parity with the Indian Citizens in that regard, the same benefit became extended to the OCI Cardholders including the petitioners herein.

20. A cumulative perusal of the three notifications of 2005, 2007 and 2009 heavily relied on by the learned senior counsel for the petitioners would certainly indicate that from the stage of amendment to Act, 1955 through Section 7A to 7D thereof and the notifications issued pursuant thereto, conferring rights under Section 7B(1) and such right being expanded from stage to stage, it would indicate that based on the need, progression was made in conferring better right to the Overseas Citizens of India who, except for the incident of their birth in a foreign country were in all other respects similarly placed as that of Indian citizens and the limited foreign affiliation of NRI and OCI Cardholders made them to be compared with each other for parity. **In fact, for the purpose of air fares and entry fee to places of interest, they were given parity with Indian nationals**. It is in that view contended that taking away such a right that was

available in the changing social scenario would amount to retrogression when in fact better right should have been conferred.

21. In that background, it would be necessary to refer to the impugned notification dated 04.03.2021 which reads as hereunder:

"MINISTRY OF HOME AFFAIRS
NOTIFICATION
New Delhi, the 4th March, 2021

S.O. 1050(E) – In exercise of the powers conferred by sub-section (1) of section 7B of the Citizenship Act, 1955 (57 of 1955) and in supersession of the notification of the Government of India in the Ministry of Home Affairs published in the Official Gazette vide number S.O. 542(E), dated the 11th April, 2005 and the notifications of the Government of India in the erstwhile Ministry of Overseas Indian Affairs published in the Official Gazette vide numbers S.O. 12(E), dated the 5th January, 2007 and S.O. 36(E), dated the 5th January, 2009, except as respect things done or omitted to be done before such supersession, the Central Government hereby specifies the following rights to which an Overseas Citizen of India Cardholder (hereinafter referred to as the OCI cardholder) shall be entitled, with effect from the date of publication of this notification in the Official Gazette, namely:-

(1) grant of multiple entry lifelong visa for visiting India for any purpose

Provided that for undertaking the following activities, the OCI cardholder shall be required to obtain a special permission or a Special Permit, as the case may be, from the competent authority or the Foreigners Regional Registration Officer or the Indian Mission concerned, namely:-

(i) to undertake research;

(ii) to undertake any Missionary or Tabligh or Mountaineering or Journalistic activities;

(iii) to undertake internship in any foreign Diplomatic Missions or foreign Government organisations in India or to take up employment in any foreign Diplomatic Missions in India;

(iv) to visit any place which falls within the Protected or Restricted or prohibited areas as notified by the Central Government or competent authority;

(2) exemption from registration with the Foreigners Regional Registration Officer or Foreigners Registration Officer for any length of stay in India:

Provided that the OCI cardholders who are normally resident in India shall intimate the jurisdictional Foreigners Regional Registration Officer or the Foreigners Registration Officer by email whenever there is a change in permanent residential address and in their occupation;

(3) parity with Indian nationals in the matter of,-

(i) tariffs in air fares in domestic sectors in India; and

(ii) entry fees to be charged for visiting national parks, wildlife sanctuaries, the national monuments, historical sites and museums in India;

(4) parity with Non-Resident Indians in the Matter of,-

(i) inter-country adoption of Indian children subject to the compliance of the procedure as laid down by the competent authority for such adoption;

(ii) appearing for the all India entrance tests such as National Eligibility cum Entrance Test, Joint Entrance Examination

(Mains), Joint Entrance Examination (Advanced) or such other tests to make them eligible for admission only against any Non-Resident Indian seat or any supernumerary seat;

Provided that the OCI cardholder shall not be eligible for admission against any seat reserved exclusively for Indian citizens.

(iii) Purchase or sale of immovable properties other than agricultural land or farm house or plantation property; and

(iv) Pursuing the following professions in India as per the provisions contained in the applicable relevant statutes or Acts as the case may be, namely:-

(a) doctors, dentists, nurses and pharmacists;

(b) advocates;

(c) architects;

(d) chartered accountants;

(5) in respect of all other economic, financial and educational fields not specified in this notification or the rights and privileges not covered by the notifications made by the Reserve Bank of India under the Foreign Exchange Management Act, 1999 (42 of 1999), the OCI cardholder shall have the same rights and privileges as a foreigner.

Explanation – For the purposes of this notification,-

(1) **The OCI Cardholder (including a PIO cardholder) is a foreign national holding passport of a foreign country and is not a citizen of India.**

(2) "Non-resident Indian" shall have the same meaning as assigned to it in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 made by the Reserve Bank of India under the Foreign Exchange Management Act, 1999 (42 of

1999) and who fulfills the "Non-Resident Indian" status as per the Income Tax Act, 1961 (43 of 1961).

[F.No.26011/CC/05/2018-OCI]
PRAMOD KUMAR,
Director"

(emphasis supplied)

22. A perusal of the notification dated 04.03.2021 would *ex facie* indicate that the rights bestowed thereunder on the OCI Cardholders are in fact a consolidation of the rights which had been bestowed through the notification dated 11.04.2005, 05.01.2007 and 05.01.2009. However, the impugned portion of the notification is the portion which has been emphasised i.e. the proviso to clause 4(ii) and Explanation (1) thereto and limiting the parity only to NRI seats and supernumerary seats. Through the impugned portion of the notification, the parity which existed with Non-Resident Indians including in the field of education has been modified to indicate their eligibility for admission only against any "Non-Resident Indian seat" or any supernumerary seat. It is relevant to take note herein that the Non-Resident Indians apart from the seats reserved only for Non-Resident Indians, are also entitled to participate in

the selection process for allotment of seats along with the Indian citizens for the remaining seats as well, which benefit was hitherto available to OCI Cardholders by virtue of their parity with NRIs. However, by presently specifying that the OCI Cardholders would be eligible for only the Non-Resident Indian seat or any supernumerary seat, the right available to the OCI Cardholders is only for the seats which are reserved as NRI quota seats, for which they would have to compete with the NRI candidates for the limited number of seats, for which higher fee structure is also fixed. The proviso thereto makes it clear that the OCI Cardholders shall not be eligible for admission against any seat reserved exclusively for Indian citizens. The provision contained in the impugned portion of the notification dated 04.03.2021 would indicate that the OCI Cardholders even if they have settled down in India and have undergone their entire educational course in India but not having renounced the citizenship of a foreign country and not having acquired the citizenship of India will now be denied the opportunity of securing a medical seat in the general pool of Indian citizens including NRIs and will have to compete only for the limited

seats available under the NRI quota, which would be a denial of an opportunity of education to such OCI Cardholders which was hitherto available. It is in that view contended that a legitimate expectation of the petitioners herein is being defeated and they are also being discriminated upon due to which there is a violation of Article 14 of the Constitution.

23. In the above backdrop it would be appropriate to refer to the precedents cited and relied upon by the learned counsel for all the parties including the respondents.

24. In support of the case of the petitioners, Shri P. Chidambaram, learned Senior Counsel placed reliance on the decision in (1978) 1 SCC 248 ***Maneka Gandhi vs. Union of India,*** to contend that unreasonable classification is not permissible, wherein, *inter alia*, it is held as hereunder;

> "7. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was

> pointed out by the majority in *E.P. Royappa* v. *State of Tamil Nadu* namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

25. On the contention relating to the *doctrine of non-retrogression* the decision in ***Navtej Singh Johar & Ors. vs. Union of India Thr. Secretary Ministry of Law and Justice*** (2018) 10 SCC 1 is relied upon, wherein it is observed as hereunder:

> **"199.** What the words of Lord Roskill suggest is that it is not only the interpretation of the Constitution which needs to be pragmatic, due to the dynamic nature of a Constitution, but also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply.
>
> **200.** This also gives birth to an equally important role of the State to implement the constitutional rights effectively. And of course, when we say State, it includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in

concrete action. The State has an obligation to take appropriate measures for the progressive realisation of economic, social and cultural rights.

201. The doctrine of progressive realisation of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.

202. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise."

26. The decision in (1995) 5 SCC 482 ***LIC Vs. Consumer Education and Research Centre*** was relied on to contend that every activity of public authority must be informed by reasons and guided by public interest and the exercise of discretion or power by public authority must be judged by that standard. Para 24 and 30 of the decision relied upon is as hereunder:

"24. In *Dwarkadas Marfatia & Sons* v. *Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293 : (1989) 2 SCR 751] it was held that the Corporation must act in accordance with certain constitutional conscience and whether they have so acted must be discernible from the conduct of such Corporations. Every activity of public authority must be informed by reasons and guided by the public interest. All exercises of discretion or power by public authority must be judged by that standard. In that case when the building owned by the port trust was exempted from the Rent Act, on terminating the tenancy for development when possession was sought to be taken, it was challenged under Article 226 that the action of the port trust was arbitrary and no public interest

would be served by terminating the tenancy. In that context, this Court held that even in contractual relations the Court cannot ignore that the public authority must have constitutional conscience so that any interpretation put up must be to avoid arbitrary action, lest the authority would be permitted to flourish as imperium in imperio. Whatever be the activity of the public authority, it must meet the test of Article 14 and judicial review strikes an arbitrary action.

30. The contention of the appellants is that the offending clause is a valid classification. The salaried group of lives from the Government, semi-Government or reputed commercial institutions form a class. With a view to identify the health conditions, the policy was applied to that class of lives. No mandamus would be issued to declare the classification as unconstitutional when it bears reasonable nexus to the object and there is intelligible differentia between the salaried lives and the rest. The High Court, therefore, was wrong in declaring the offending clause as arbitrary violating Article 14. It is true that the appellant is entitled to issue the policy applicable to a particular group or class of lives entitled to avail contract of insurance with the appellant but a class or a group does mean that the classification meets the demand of equality, fairness and justness. The doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, overemphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. The overemphasis on classification would inevitably result in substitution of the doctrine of classification to the doctrine of equality and the Preamble of the Constitution which is an integral part and scheme of the Constitution. *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] ratio extricated it from this moribund and put its elasticity for egalitarian path finder lest the classification would deny equality to the larger segments of the society. The classification based on employment in Government, semi-Government and reputed commercial firms has the insidious and inevitable effect of excluding lives in vast rural and urban areas engaged in unorganised or

self-employed sectors to have life insurance offending Article 14 of the Constitution and socio-economic justice."

27. Shri K.V. Viswanathan, learned senior counsel while contending that the right which had accrued cannot be taken away and the 'things done' or 'omitted to be done' before such supersession is to be kept in view, has relied on the decision in ***(1961) 1 SCR 305 Universal Imports Agency & Ans. Vs. Chief Controller of Imports and Exports and Ors.*** wherein it is held as hereunder:

> **"16.** What were the "things done" by the petitioners under the Pondicherry law? The petitioners in the course of their import trade, having obtained authorization for the foreign exchange through their bankers, entered into firm contracts with foreign dealers on C.I.F. terms. In some cases irrevocable Letters of Credit were opened and in others bank drafts were sent towards the contracts. Under the terms of the contracts the sellers had to ship the goods from various foreign ports and the buyers were to have physical delivery of the goods after they had crossed the customs barrier in India. Pursuant to the terms of the contracts, the sellers placed the goods on board the various ships, some before and others after the merger, and the goods arrived at Pondicherry port after its merger with India. The prices for the goods were paid in full to the foreign sellers and the goods were taken delivery of by the buyers after examining them on arrival. Before the merger if the Customs Authorities had imposed any restrictions not authorised by law, the affected parties could have enforced the free entry of the goods in a court of law. On the said facts a short question arises whether para 6 of the Order protects the petitioners. While learned counsel for the petitioners contends that "things done" take in not only things done but also their legal consequences, learned counsel for the State contends that, as the goods were not brought into India before

the merger, it was not a thing done before the merger and, therefore, would be governed by the enactments specified in the Schedule. It is not necessary to consider in this case whether the concept of import not only takes in the factual bringing of goods into India, but also the entire process of import commencing from the date of the application for permission to import and ending with the crossing of the customs barrier in India. The words "things done" in para 6 must be reasonably interpreted and, if so interpreted, they can mean not only things done but also the legal consequences flowing therefrom. If the interpretation suggested by the learned counsel for the respondents be accepted, the saving clause would become unnecessary. If what it saves is only the executed contracts i.e. the contracts whereunder the goods have been imported and received by the buyer before the merger, no further protection is necessary as ordinarily no question of enforcement of the contracts under the pre-existing law would arise. The phraseology used is not an innovation but is copied from other statutory clauses. Section 6 of the General clauses Act (10 of 1897) says that unless a different intention appears, the repeal of an Act shall not affect anything duly done or suffered thereunder. So too, the Public Health Act of 1858 (38 & 39 Vict. c. 55) which repealed the Public Health Act of 1848 contained a proviso to Section 343 to the effect that the repeal "shall not affect anything duly done or suffered under the enactment hereby repealed", This proviso came under judicial scrutiny in *Queen* v. *Justices of the West Riding of Yorkshire* [(1876) 1 QBD 220] . There notice was given by a local board of health of intention to make a rate under the Public Health Act, 1848, and amending Acts. Before the notice had expired these Acts were repealed by the Public Health Act, 1875, which contained a saving of "anything duly done" under the repealed enactments, and gave power to make a similar rate upon giving a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed Acts. It was contended that as the rate was made after the repealing Act, the notice given under the repealed Act was not valid. The learned Judges held that as the notice was given before the Act, the making of the rate was also saved by the words "anything duly done" under the repealed enactments. This case illustrates the point that it is not necessary that an impugned

thing in itself should have been done before the Act was repealed, but it would be enough if it was integrally connected with and was a legal consequence of a thing done before the said repeal. Under similar circumstances Lindley, L.J., in *Heston and Isleworth Urban District Council* v. *Grout* [(1897) 2 Ch 306] confirmed the validity of the rate made pursuant to a notice issued prior to the repeal. Adverting to the saving clause, the learned Judge tersely states the principle thus at p. 313:"That to my mind preserves that notice and the effect of it". On that principle the court of appeal held that the rate which was the effect of the notice was good."

28. The learned senior counsel, further on the principle of legitimate expectation, relied on the decision in (1992) 4 SCC 477 ***Navjyoti Coop.Group Housing Society and Ors. Vs. Union of India & Ors***. wherein it is observed as hereunder:

"15. It also appears to us that in any event the new policy decision as contained in the impugned memorandum of January 20, 1990 should not have been implemented without making such change in the existing criterion for allotment known to the Group Housing Societies if necessary by way of a public notice so that they might make proper representation to the concerned authorities for consideration of their viewpoints. Even assuming that in the absence of any explanation of the expression "first come first served" in Rule 6(*vi*) of Nazul Rules there was no statutory requirement to make allotment with reference to date of registration, it has been rightly held, as a matter of fact, by the High Court that prior to the new guideline contained in the memo of January 20, 1990 the principle for allotment had always been on the basis of date of registration and not the date of approval of the list of members. In the brochure issued in 1982 by the DDA even after Gazette notification of Nazul Rules on September 26, 1981 the policy of allotment on the basis of seniority in registration was clearly indicated. In the aforesaid facts, the Group Housing Societies were entitled to 'legitimate expectation' of following

consistent past practice in the matter of allotment, even though they may not have any legal right in private law to receive such treatment. The existence of 'legitimate expectation' may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the 'legitimate expectation' without some overriding reason of public policy to justify its doing so. In a case of 'legitimate expectation' if the authority proposes to defeat a person's 'legitimate expectation' it should afford him an opportunity to make representations in the matter. In this connection reference may be made to the discussions on 'legitimate expectation' at page 151 of Volume 1(1) of *Halsbury's Laws of England*, 4th edn. (re-issue). We may also refer to a decision of the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service* [(1984) 3 All ER 935] . It has been held in the said decision that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment on such reasons.

16. It may be indicated here that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of 'legitimate expectation', the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent past policy, come in. We, have not been shown any compelling reasons taken into consideration by the Central Government to make a departure from the existing policy of allotment with reference to seniority in registration by introducing a new guideline. On the contrary, Mr Jaitley the learned counsel has submitted that the DDA and/or Central Government do not intend to challenge the decision of the High Court and the impugned memorandum of January 20, 1990 has since been withdrawn. We therefore feel that in the facts of the case it was only desirable that before introducing or implementing any change in the guideline for allotment, an opportunity to make representations against the proposed change

in the guideline should have been given to the registered Group Housing Societies, if necessary, by way of a public notice."

29. On behalf of the petitioners the decision to explain the *Doctrine of Ultra Vires* was also relied in (2007) 13 SCC 673 ***J.K. Industry Ltd. vs. Union of India*** wherein it is held as hereunder:

> "**127.** At the outset, we may state that on account of globalisation and socio-economic problems (including income disparities in our economy) the power of delegation has become a constituent element of legislative power as a whole. However, as held in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, SCC at p. 689, subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. *It may further be questioned on the ground that it is inconsistent with the provisions of the Act* or that it is contrary to some other statute applicable on the same subject-matter. Therefore, it has to yield to plenary legislation. It can also be questioned on the ground that it is manifestly arbitrary and unjust. That, any inquiry into its vires must be confined to the grounds on which plenary legislation may be questioned, to the grounds that it is contrary to the statute under which it is made, to the grounds that it is contrary to other statutory provisions or on the ground that it is so patently arbitrary that it cannot be said to be in conformity with the statute. It can also be challenged on the ground that it violates Article 14 of the Constitution.
>
> **128.** Subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned. A distinction must, however, be made

> between delegation of a legislative function in which case the question of reasonableness cannot be gone into and the investment by the statute to exercise a particular discretionary power. In the latter case, the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. A subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account vital facts which expressly or by necessary implication are required to be taken into account by the statute or the Constitution. This can be done on the ground that the subordinate legislation does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19 of the Constitution. However, it may be noted that, a notification issued under a section of the statute which requires it to be laid before Parliament does not make any substantial difference as regards the jurisdiction of the court to pronounce on its validity."

30. Ms. Aishwarya Bhati, learned Additional Solicitor General, in seeking to distinguish the above-referred decisions contended that the cases referred to by the learned senior counsel for the petitioner are all in the context of the issues which had arisen in matters relating to Citizens of India against the State/Authorities or when the dispute arose for consideration *inter se* between the Citizens of India. In that view, it is contended that the petitioner cannot claim protection under Article 14, 19 or 21 of the Constitution of India. Even for claiming any right under

Article 14, the same will emerge from Article 19 of the Constitution and as such protection cannot be accorded to foreigners.

31. In addition, the learned Additional Solicitor General, to emphasize that a policy decision in public interest cannot be interfered, referred to the decision in (1998) 4 SCC 117 ***State of Punjab and Ors. Vs. Ram Lubhaya Bagga & Ors.:***

> "25. Now we revert to the last submission, whether the new State policy is justified in not reimbursing an employee, his full medical expenses incurred on such treatment, if incurred in any hospital in India not being a government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive. It is within

this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints."

32. On the contention relating to the reasonable classification test and a foreigner not having right, the following decisions are relied upon by the learned Additional Solicitor General. They are;

(i) AIR 1962 SC 1052 ***Izhar Ahmed Khan & Ors. vs. Union of India.***

"38. The next point to consider is about the validity of Section 9(2) itself. It is argued that this rule is ultra vires because it affects the status of citizenship conferred on the petitioners and recognised by the relevant articles of the Constitution, and it is urged that by depriving the petitioners of the status of citizenship, their fundamental rights under Article 19 generally and particularly the right guaranteed by Article 19(1)(*e*) are affected. It is not easy to appreciate this argument. As we have already observed, the scheme of the relevant articles of Part II which deals with citizenship clearly suggests that the status of citizenship can be adversely affected by a statute made by the Parliament in exercise of its legislative powers. It may prima facie sound somewhat surprising, but it is nevertheless true, that though the citizens of India are guaranteed the fundamental rights specified in Article 19 of the Constitution, the status of citizenship on which the existence or continuance of the said rights rests is itself not one of the fundamental rights guaranteed to anyone. If a law is properly passed by the Parliament affecting the status of citizenship of any citizens in the country, it can be no challenge to the validity of the said law that it affects the fundamental rights of those whose citizenship is thereby terminated. Article 19 proceeds on the assumption that the person who claims the rights guaranteed by it is a

citizen of India. If the basic status of citizenship is validly terminated by a Parliamentary statute, the person whose citizenship is terminated has no right to claim the fundamental rights under Article 19. Therefore, in our opinion, the challenge to Section 9(2) on the ground that it enables the rule-making authority to make a rule to deprive the citizenship rights of the petitioners cannot be sustained."

(ii) AIR 1964 SC 1140 ***Indo-China Steam Navigation Co.Ltd. vs. Jasjit Singh & Ors.***

35. There is one more point which must be mentioned before we part with this appeal. Mr Choudhary attempted to argue that if mens rea was not regarded as an essential element of Section 52-A, the said section would be ultra vires Articles 14, 19 and 31(1) and as such, unconstitutional and invalid. We do not propose to consider the merits of this argument, because the appellant is not only a company, but also a foreign company, and as such, is not entitled to claim the benefits of Article 19. It is only citizens of India who have been guaranteed the right to freedom enshrined in the said article. If that is so, the plea under Article 31(1) as well as under Article 14 cannot be sustained for the simple reason that in supporting the said two pleas, inevitably the appellant has for fall back upon the fundamental right guaranteed by Article 19(1)(*f*). The whole argument is that the appellant is deprived of its property by operation of the relevant provisions of the Act and these provisions are invalid. All that Article 31(1) provides is that no person shall be deprived of his property save by authority of law. As soon as this plea is raised, it is met by the obvious answer that the appellant has been deprived of its property by authority of the provisions of the Act and that would be the end of the plea under Article 31(1) unless the appellant is able to take the further step of challenging the validity of the act, and that necessarily imports Article 19(1)(*f*). Similarly, when a plea is raised under Article 14, we face the same position. It may be that if

Section 52-A contravenes Article 19(1)(*f*), a citizen of India may contend that his vessel cannot be confiscated even if it has contravened Section 52-A, and in that sense, there would be inequality between the citizen and the foreigner, but that inequality is the necessary consequence of the basic fact that Article 19 is confined to citizens of India, and so, the plea that Article 14 is contravened also must take in Article 19 if it has to succeed. The plain truth is that certain rights guaranteed to the citizens of India under Article 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners. That being so, we see no substance in the argument that if Section 52-A is construed against the appellant, it would be invalid, and so, the appellant would be able to resist the confiscation of its vessel under Article 31(1). We ought to make it clear that we are expressing no opinion on the validity of Section 52-A under Article 19(1)(*f*). If the said question were to arise for our decision in any case, we would have to consider whether the provisions of Section 52-A are not justified by Article 19(5). That is a matter which is foreign to the enquiry in the present appeal.

(iii) (1994) Supple 1 SCC 615 **State of A.P. vs. Khudiram Chakma**

"75. It is true that fundamental right is available to a foreigner as held in *Louis De Raedt* v. *Union of India* [(1991) 3 SCC 554: 1991 SCC (Cri) 886] : (SCC p. 562, para 13)

"The next point taken on behalf of the petitioners, that the foreigners also enjoy some fundamental rights under the Constitution of this country, is also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in Article 19(1)(*e*), which is applicable only to the citizens of this country."

As such Articles 19(1)(*d*) and (*e*) are unavailable to foreigners because those rights are conferred only on the citizens. Certainly, the machinery of Article 14 cannot be invoked to obtain that fundamental right. Rights under Articles 19(1)(*d*) and (*e*) are expressly withheld to foreigners."

(iv) AIR 1955 SC 367 ***Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta & Ors.***

"19. We do not agree and will first examine the position where an order of expulsion is made before any steps to enforce it are taken. The right to expel is conferred by Section 3(2)(*c*) of the Foreigners Act, 1946 on the Central Government and the right to enforce an order of expulsion and also to prevent any breach of it, and the right to use such force as may be reasonably necessary "for the effective exercise of such power" is conferred by Section 11(1), also on the Central Government. There is, therefore, implicit in the right of expulsion a number of ancillary rights, among them, the right to prevent any breach of the order and the right to use force and to take effective measures to carry out those purposes. Now the most effective method of preventing a breach of the order and ensuring that it is duly obeyed is by arresting and detaining the person ordered to be expelled until proper arrangements for the expulsion can be made. Therefore, the right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order, and the Preventive Detention Act confers the power to use the means of preventive detention as one of the methods of achieving this end. How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the Government concerned, but, in any event, when criminal charges for offences said to have been committed in this country and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention in such circumstances is rightly termed preventive and falls within the

ambit of the Preventive Detention Act and is reasonably related to the purpose of the Act.

35. The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.

42. Our conclusion is that the Foreigners Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a requisition and a good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse. Section 3(1) of the Extradition Act says—"the Central Government may, if it thinks fit".

Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure of the Foreigners Act when a foreigner is concerned, provided always, that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different but as Government is given the right to choose, no question of want of good faith can arise merely because it exercises the right of choice which the law confers. This line of attack on the good faith of Government falls to the ground."

33. In order to contend that the classification made is valid, the learned Additional Solicitor General has referred to the decision in;

(i) AIR 1952 SC 75 ***State of W.B. Vs. Anwar Ali Sarkar*** as hereunder:

"63. In order to appreciate this contention, it is necessary to state shortly the scope of Article 14 of the Constitution. It is designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and

hostile legislation. Democracy implies respect for the elementary rights of man, however suspect or unworthy. Equality of right is a principle of republicanism and Article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings the Article assures to everyone the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances. This principle, however, does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position.

64. By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. "Such a classification for such a purpose would be arbitrary and a piece of legislative despotism".

(ii) (1955) 1 SCR 1045 ***Budhan Choudhary Vs. State of Bihar***

"5. The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal Chowdhuri* v. *Union of India* [(1950) 1 SCR 869] , *State of Bombay* v. *F.N. Balsara* [(1951) 2 SCR 682] , *State of West Bengal* v. *Anwar Ali Sarkar* [(1952) 3 SCR 284] , *Kathi Raning Rawat* v. *State of Saurashtra* [(1952) 3 SCR 435] , *Lachmandas Kewalram Ahuja* v. *State of Bombay* [(1952) 3 SCR 710] and *Qasim Razvi* v. *State of Hyderabad* [AIR 1953 SC 156 : (1953) 4 SCR 581] and *Habeeb Mohamad* v. *State of Hyderabad* [(1953) 4 SCR 661] . It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (*ii*) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court.

(iii) (1976) 2 SCC 310 ***State of Kerala Vs. N.M. Thomas***

> **"31.** The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

34. The learned Additional Solicitor General has also referred to the decision in (2001) 2 SCC 259 ***K. Thimmappa Vs. Chairman, Central Board of Directors***

to contend that when a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some differentia which bears a just and reasonable relation to the object of Legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause.

35. Having noted the above, at the outset, insofar as the decision relied on by the learned senior counsel for the petitioner in the case of ***Navtej Singh Johar & Ors.*** (supra), though the *Doctrine of Progressive Realisation of Rights* is referred and has been stated that there must not be any regression of rights and in a progressive and an ever-improving society there is no place for retreat, the society has to march ahead that the state should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the constitution or otherwise, we are of the opinion that the said observation would depend on the nature of the rights regarding which a consideration is made in appropriate cases. In the instant

facts, the said observation cannot be of any assistance to the petitioners since the right though had been conferred earlier, such rights, insofar as the petitioners are concerned only a statutory right as they are admittedly not citizens of this country. Though certain rights under the statute were given, the state has a duty to balance the interests of its citizens and the non-citizens when a change is required to be made. However as to whether such consideration has been made in a just and proper manner with reference to all aspects is another aspect which we will advert to in the course of this judgment, but to contend that it amounts to retrogression may not arise in the present context.

36. Insofar as the remaining decisions relied on by the petitioners as also the learned Additional Solicitor General, a cumulative perusal of the same would indicate that though this court has asserted with regard to the legitimate expectation, right not to be discriminated keeping in view Article 14 of the Constitution etc., they are all essentially in the context while dealing with the rights of a citizen against the State or in a situation where a dispute was between a citizen against another citizen of this country and in that

regard when the constitutional principles were invoked. Further, the decisions relied on by the learned Additional Solicitor General would indicate that this Court while considering the right claimed by a foreigner or who is not a citizen of this country has dealt with the matter differently and declined to interfere and grant any relief. If in that light, the matter is looked into, when there is no dispute to the fact that the petitioners answer the definition of "foreigners" as defined under the Foreigners Act, the said decisions relied upon by the learned senior counsel for the petitioner would not apply on all fours. But keeping in view the nature of right claimed by the petitioners as OCI Cardholders which is a status accorded despite being foreigners and the background circumstance which led to the situation the spirit of the principles laid will have to be borne in mind while making further consideration since the principles laid down therein disapproving non-application of mind, arbitrariness etc. will hold good in the present circumstance as well. In the instant facts the statutory as OCI Cardholder subsists and it is in that light the validity of notification is to

be tested which certainly can be raised by the petitioner and be addressed by this Court.

37. Therefore, with the said understanding on the aspect of the applicability of the said decisions concluded as above, in the facts and circumstances arising in the instant case and the issue which is to be taken note and answered by us, the matter requires further consideration. No doubt, as pointed out by the learned Additional Solicitor General, Section 2(a) of the Foreigners Act, 1946 defines a 'foreigner' to mean a person who is not a citizen of India. If the matter had rested at that, there was no difficulty. In the instant case, there is a different dimension which arises for consideration. The circumstance in which the petitioners have come to be classified as 'foreigners' and the right which was conferred on them is to be kept in view.

38. To put the matter in perspective and understand the concept based on which the rights are being claimed by the petitioners, it is necessary to advert to the fact situation and the law governing them despite being classified as 'foreigner'. Most of the petitioners are all persons who are either of full age or are yet to reach the full age but are all children, whose both parents or one of them are Indian citizens. In

the changing world and in an era where the concept of multinationals providing employment to Indian citizens had increased, the incident of birth of the children taking place in a country outside India had also increased. In that circumstance, successive governments had to bestow their attention to this aspect of the matter to provide better rights to such persons, who, though in the technical sense where 'foreigners', not being citizens of this country, yet had a 'connect' with this country. These were cases where though the umbilical cord with the biological mother had snapped in a foreign country, the umbilical connections with the country continue to remain intact as the entire family including the grandparents would be in India and the parents were Indian citizens in most cases. In that view, having considered all these aspects of the matter, despite such persons not having the benefit of citizenship as provided under Part II of the Constitution through Articles 5 to 8 thereof and there being no scope for dual citizenship, certain rights were created under Act, 1955 which had come into force based on the provision in Article 11 of the Constitution of India.

39. In that regard, in a concept where the 'dual citizenship' was not recognised, such persons as like that of the petitioners were considered as Overseas Citizens of India card holders as defined under Section 2(ee) of Act, 1955. The Act, 1955 through the amendment Act 6 of 2004 brought certain rights and through substitution of Section 7A to 7D the manner of registration of Overseas Citizen of India card holder; renunciation of citizenship and cancellation of registration were provided for. In the cases, on hand, the fact that all the petitioners are registered as Overseas Citizens of India cardholders is not in dispute. The right to which they are making a claim is conferred under Section 7B(1) to Act, 1955 which has been extracted and noted above. The right to education which was conferred under the notification dated 11.04.2005, in parity with the Non-Resident Indians is due to the fact that the Non-Resident Indians which is a separate class, had such right similar to that of the Indian citizens in matters relating to education. It is based on such right being conferred as far back as in the year 2005, the OCI Cardholders were taking part in the process of selections conducted for undertaking

educational courses in India. Such benefit was extended to appear for the All India Pre-Medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant acts, through the notification dated 05.01.2009. The said benefit is being enjoyed by all the OCI Cardholders in the same manner as the Non-Resident Indians were enjoying along with the Indian citizens. In that circumstance, most of such OCI Cardholders have been pursuing their entire educational career in India.

40. In the said background it is necessary to note that as per the information furnished relating to the status of the petitioners in W.P.(C) No.891 of 2021 which is taken as an instance for demonstrating the situation of their affinity with India and the number of years they have been in India. The details are as provided in Annexure P/2 which is as hereunder: -

P.No.	**Name**	**Date of Birth**	**Place of Birth**	**OCI Card Holder**	**Nationality of Parents**	**Studying in India since which year**	**Years living in India**	**Presently in which standard last standard passed**	**Current city of residence and state**

1	Anushka Rengunthwar	31.12.2003	USA, California	Yes	Indian (both)	2006	15	12th	Pune, Maharashtra
2	Ria Sameer Munje	15.01.2003	New Jersey, USA	Yes	Indian (both)	2008	13	12th	Pune, Maharashtra
3	Ved Milind Mulay	21.02.2004	Michigan, USA	Yes	Indian (both)	2006	15	12th	Pune, Maharashtra
4	Samriddhi Narayan Patil	27.10.2002	USA, Illinois	Yes	Indian (both)	2004	17	12th	Pune, Maharashtra
5	Joana Banerjee	26.08.2003	USA, Lowa	Yes	Indian (both)	2008	13	12th	Pune, Maharashtra
6	Amulya Kalidindi	04.03.2003	California, USA	Yes (PIO-deemed OCI	Indian (Mother)	2009	12	12th	Hyderabad, Telangana
7	Yash Manish Mehta	15.06.2003	California, USA	Yes	USA (both)	2007	14	12th	Pune, Maharashtra
8	Viswa Kantamneni	03.02.2004	USA, New Jersey	Yes	USA (both)	2008	13	12th	Bengaluru, Karnataka
9	Dhanush Gajula	05.09.2003	USA, North Carolina	Yes	USA (both)	2012	9	12th	Chennai, Tamil Nadu
10	Netra Ashish Athawale	17.12.2002	Pune, India [nationality changed to UK in 2010]	Yes	UK (both)	2011	10	12th	Pune, Maharashtra
11	Shreya Repala	11.03.2003	USA, New Hampshire	Yes	USA (both)	2010	11	12th	Hyderabad, Telangana
12	Richa Shirole	26.12.2002	Canada, Ontario	Yes	Canada (both)	2010	11	12th	Pune, Maharashtra
13	Harini Padmanaban	31.03.2003	Tamilnadu, India [nationality changed	Yes	UK (both)	2014	7	12th	Chennai, Tamil Nadu

			to UK in 2009]						
14	Prithvi Thennavan	13.06.2003	UK, Scotland	Yes	UK-Father India- Mother	2008	13	12th	Coimbatore, Tamil Nadu
15	Sricharan Kosygan	19.07.2003	York, England	Yes	UK (Father) Indian (Mother)	2009	12	12th	Chennai, Tamil Nadu
16	Anushree Rammoorthi	03.01.2003	USA, Texas	Yes	USA (both)	2015	6	12th	Coimbatore, Tamil Nadu
17	Neya Kavya Chander	04.06.2004	USA, Illinois	Yes	India (father) USA (Mother)	2009	12	12th	Chennai, Tamil Nadu
18	Harini Manikumar	23.09.2003	New Jersey, USA	Yes	USA (both)	2013	8	12th	Chennai, Tamil Nadu
19	Amita Bacchu	10.04.2002	USA, California	Yes	Indian (both)	2008	13	12th	Bengaluru, Karnataka
20	Srisneha Mettu	08.03.2004	India, Tamil Nadu [nationality changed to UK in 2011]	Yes	UK (both)	2012	9	12th	Chennai, Tamil Nadu
21	Aashish Varma Kalidindi	10.12.2002	USA, Texas	Yes	USA (father) Mother (Indian)	2013	8	12th	Hyderabad, Telangana
22	Chetana Thotakura	02.04.2003	USA, New Jersey	Yes	USA (both)	2012	9	12th	Hyderabad, Telangana
23	Radha Garikipati	18.04.2003	USA, New Jersey	Yes	USA (both)	2009	12	12th	Chennai, Tamil Nadu
24	Sejal Marri	13.09.2003	USA, UTAH	Yes	Indian (both)	2007	17	12th	Hyderabad, Telangana
25	Neha Neetha Gonuguntla	29.08.2003	USA, Texas	Yes	USA (both)	2012	9	12th	Chennai, Tamil Nadu
26	Bhuvan Reddy Jonnala	27.10.2002	USA, Illinois	Yes	USA (both)	2011	10	12th	Hyderabad, Telangana
27	Nandhini Saravanan	22.10.2003	USA, Michigan	Yes	USA (both)	2009	11	12th	Chennai, Tamil Nadu
28	Dhruv Dhuria	31.07.2003	US, MA	Yes	Indian (both)	2009	11	12th	Delhi

41. The above extracted details would indicate that in all the cases the petitioners have studied for more than six years in India and in most of the cases, almost the entire educational career up to the stage of the qualifying examination for the Pre-Medical Test has been undertaken in India. Apart from the specific cases noted herein, there are also petitioners/persons who had become citizens of a foreign country for compelling reasons, but hold benefit of OCI card. This would demonstrate that though in terms of law, the petitioners were 'foreigners' due to the incident of birth in a foreign country or such other compelling circumstances, they continue to remain in India and to pursue their education and had fully justified the mid-path benefit given to them based on the OCI card. The manner in which they have conducted themselves by being students in India would indicate that in addition to having the umbilical connection with the country, they being aware of the right conferred through the notifications dated 11.04.2005 and 05.01.2009 had positioned themselves to further their professional career by making a choice of their profession

and undertaking the preparation for the same. This was based on what was held out to that class of Overseas Citizens. In fact, their entire educational career has been of the same standard, with the same 'advantages' and 'disadvantages' as has been the case with the students who are Indian citizens. In such situation, though in the strict term of the word 'legitimate expectation', it may not fall, a statutory right conferred had sown the seed of hope recognising the affiliation to this country, though they were not citizens in the strict sense.

42. Hence keeping this situation in the backdrop, the manner in which the impugned notification would affect the petitioners and the similarly placed citizens will have to be taken note to examine whether the withdrawal of the conferred right will be justified. It is no doubt true as contended by the learned Additional Solicitor General, the right available to the OCI Cardholders is only the statutory right based on the right that is conferred through a notification in terms of Section 7B(1) of Act, 1955. Sub-section (2) thereto specifically indicates the right that cannot be conferred even under sub-section (1) through a

notification. Though a notification issued under the sub-delegated power can be withdrawn, modified or altered, the effect of the impugned notification dated 04.03.2021 needs to be noted to consider as to whether the same is wholly justified or as to whether any portion of it falls foul of the object for which it is made and the manner in which it has been modified.

43. To the extent as noticed, the right being conferred under Section 7B(1) of Act 1955 through the impugned notification dated 04.03.2021 if it was for the first time conferring such right, the petitioners could not have made any grievance. In fact, a perusal of the notification at first blush gives an impression that merely the earlier notifications dated 11.04.2005, 05.01.2007 and 05.01.2009 have been consolidated to crystallize all the rights to be provided under one notification. However, a closer perusal of the said notification which has been extracted above in the course of this judgment would indicate that clause 4(ii) of the notification though provides the right to appear for the All India Entrance Test, which was hitherto available to make them eligible for admission in parity with Non-

Resident Indians has now restricted the eligibility for admission only against the seats which are reserved for Non-Resident Indians. In a situation where there is a certain marked economic difference between OCI Cardholders and Non-Resident Indians to acquire such seats, the OCI Cardholders claim to be at a disadvantage and the right which was available to them earlier has stood altered to their detriment. Even if that be so, if the said right which is conferred in modification of the right which had been bestowed earlier was made with prospective effect, certainly the petitioners and the similarly placed persons based on the contentions which are at present urged herein could not have been heard to complain in a proceeding of this nature and would have been a matter to be considered by the executive based on the claim of the Indian diaspora.

44. However, what is necessary to be taken note is that the right which was bestowed through the notification dated 11.04.2005 and 05.01.2009 insofar as the educational parity, including in the matter of appearing for the All India Pre-Medical Test or such other tests to make them eligible for admission has been completely altered. Though the

notification ex facie may not specify retrospective application, the effect of superseding the earlier notifications and the proviso introduced to clause 4(ii) would make the impugned notification dated 04.03.2021 'retroactive' insofar as taking away the assured right based on which the petitioners and similarly placed persons have altered their position and have adjusted the life's trajectory with the hope of furthering their career in professional education.

45. The learned senior counsel for the petitioners would in that context contend that since sub-section (2) to Section 7B of Act, 1955 does not exclude the right under Article 14 of the Constitution, it is available to be invoked and such discrimination contemplated in the notification to exclude the OCI Cardholders should be struck down. Article 14 of the Constitution can be invoked and contend discrimination only when persons similarly placed are treated differently and in that view the OCI Cardholders being a class by themselves cannot claim parity with the Indian citizens, except for making an attempt to save the limited statutory right bestowed. To that extent certainly the fairness in the procedure adopted has a nexus with the object for which

change is made and the application of mind by the Respondent No.1, before issuing the impugned notification requires examination.

46. As noted, the right of the OCI Cardholders is a mid-way right in the absence of dual citizenship. When a statutory right was conferred and such right is being withdrawn through a notification, the process for withdrawal is required to demonstrate that the action taken is reasonable and has nexus to the purpose. It should not be arbitrary, without basis and exercise of such power cannot be exercised unmindful of consequences merely because it is a sovereign power. To examine this aspect, in addition to the contentions urged by the learned Additional Solicitor General we have also taken note of the objection statement filed with the writ petition. Though detailed contentions are urged with regard to the status of a citizen and the sovereign power of the State, as already noted, in these petitions the sovereign power has not been questioned but the manner in which it is exercised in the present circumstance is objected. The contention of learned Additional Solicitor General is that the intention from the

beginning was to grant parity to OCI Cardholders only with NRIs. On that aspect as already noted above we have seen the nature of the benefit that had been extended to the petitioners and the similarly placed petitioners under the notifications of the year 2005, 2007 and 2009. The further contention insofar as equating the OCI Cardholders to compete only for the seats which are reserved for NRIs and to exclude the OCI Cardholders for admission against any seat reserved exclusively for the Indian citizens, across the board, even to the persons who were bestowed the right earlier, it is stated that the rationale is to protect the rights of the Indian citizens in such matters where State may give preference to its citizens vis-à-vis foreigners holding OCI Cards. It is further averred in the counter that number of seats available for medical and engineering courses in India are very limited and that it does not fully cater to the requirement of even the Indian citizens. It is therefore contended that the right to admission to such seats should primarily be available to the Indian citizens instead of foreigners, including OCI Cardholders.

47. Except for the bare statement in the objection statement, there is no material with regard to the actual exercise undertaken to arrive at a conclusion that the participation of OCI Cardholders in the selection process has denied the opportunity of professional education to the Indian citizens. There are no details made available about the consideration made as to, over the years how many OCI cardholders have succeeded in getting a seat after competing in the selection process by which there was denial of seats to Indian Citizens though they were similar merit-wise. Per contra, the learned senior counsel for the petitioners has placed reliance on the statement made by the Hon'ble Minister in reply to the question raised in the Rajya Sabha as recent as on 13.12.2022, and an extract to indicate the details is produced along with I.A. No.4763 of 2023 for additional documents in W.P.(C) No.246 of 2022. The details shown are as follows:-

> **"STATEMENT REFERRED TO IN REPLY TO RAJYA SABHA STARRED QUESTION NO.64* FOR 13TH DECEMBER, 2022**
>
> (a) to (c) As per information received from National Testing Agency (NTA), the details of number of students who appeared

for the NEET-UG examination in the last three years are as under:-

Year	2022	2021	2020
Number of students registered	18,72,343	16,14,777	15,97,435
Number of students appeared	17,64,571	15,44,273	13,66,945

The details of number of Undergraduate (UG)/Postgraduate (PG) seats available during the admission process of last three years are as under:-

Year	UG	PG
2020-2021	83275	55495
2021-2022	92065	60202
2022-2023	96077	64059

According to National Medical Commission (NMC), the number of MBBS & PG seats vacant from 2018-19 to 2021-22, year wise is as under:-

SI.No.	**Academic Year**	**Total number of seats left vacant for MBBS in UG Counselling**
1.	**2021-22**	**197**
2.	**2019-20**	**273**
3.	**2018-19**	**274**

SI.No.	**Academic Year**	**Total number of PG seats left vacant in Counselling (Year wise)**
1.	**2021-22**	**3744**

2.	**2020-21**	**1425**
3.	**2019-20**	**4614**

(Emphasis Supplied)

48. Hence, it is sought to be pointed out on behalf of the petitioners that the explanation put forth does not indicate the true State of Affairs in as much as, seats have still remained vacant in the previous years. It is no doubt true that as contended by the learned Additional Solicitor General, the vacancies will remain due to several factors such as reservation of seats, other permutations and combinations as also the preferred and non-preferred colleges. Be that as it may, the dire need to take away the bestowed right by applying the impugned notification even to young students who technically though are not citizens of this country but were provided certain rights in such manner would not be justified as it does not demonstrate nexus to the object sought to be achieved. Policy decision for the future, certainly is within the domain of Respondent No.1 based on the sovereign powers of the State. Even on that aspect all that has been stated is that the decision to issue the notification was taken in the meeting of

Secretaries held on 19.07.2018 without indicating the nature of deliberations. Therefore, in that perspective, keeping in view the present position, the decision to supersede the earlier notifications and take away the right of OCI Cardholders in whose favour such right had accrued and they have acted in a manner to take benefit of such right should not have been nullified without reference to the consequences. Having undertaken the entire educational career in India or at least the High School onwards, they cannot at this stage turn back to the country in which they were born to secure the professional education as they would not be in a position to compete with the students there either, keeping in view the study pattern and the monetary implication.

49. To put the matter in its context for better appreciation of the mischief caused by the impugned notification and the manner in which it would irreversibly alter the situation, to which aspect there is non-application of mind by respondent No.1, it would be appropriate to refer to the existing facts of an individual petitioner. To demonstrate this aspect we shall take the details of the first petitioner in W.P.(C) No.891 of

2021 as an instance to demonstrate the case in point. From the tabular statement supra, it is noted,

(a) She was born on 31.12.2003 in California, USA.
(b) Both her parents are Indian Nationals.
(c) She has come to India in the year 2006
(d) Has lived thereafter in India for 15 years."
(e) Presently she is at Pune, Maharashtra,
(f) pursued her entire educational career in India
(g) Passed the 12th standard which is the qualifying examination to appear for the Medical Entrance also in India.

As on the year of birth in 2003 the Citizenship Amendment Act, 2003 was brought in to introduce Section 7A of Act, 1955 w.e.f. 06.12.2004. The said amendment was based on the recommendations of a High-Level Committee on Indian diaspora. The Government of India decided to register the Persons of Indian Origin (PIO) of a certain category as specified in Section 7A of Act, 1955 as Overseas Citizens of India. The OCI scheme was introduced with the issue of notification of 2005 which is in the background of the demands for dual citizenship by the Indian diaspora and the concept of dual citizenship is not recognized.

50. Therefore it is evident that the object of providing the right in the year 2005 for issue of OCI cards was in response to the demand for dual citizenship and as such, as an alternative to dual citizenship which was not recognised, the OCI card benefit was extended. If in that light, the

details of the first petitioner taken note hereinabove is analysed in that context, though the option of getting the petitioner No.1 registered as a citizen under Section 4 of Act, 1955 by seeking citizenship by descent soon after her birth or even by registration of the citizenship as provided under Section 5 of Act, 1955, was available in the instant facts to her parents, when immediately after the birth of petitioner No.1 the provision for issue of OCI cards was statutorily recognised and under the notification the right to education was also provided, the need for parents of petitioner No.1 to make a choice to acquire the citizenship by descent or to renounce the citizenship of the foreign country and seek registration of the Citizenship of India did not arise to be made, since as an alternative to dual citizenship the benefit had been granted and was available to petitioner No.1 and the entire future was planned on that basis and that situation continued till the year 2021.

51. Further, as on the year 2021 when the impugned notification was issued the petitioner No.1 was just about 18 years i.e., full age and even if at that stage, the petitioner was to renounce and seek for citizenship of India as

provided under Section 5(1)(f)(g), the duration for such process would disentitle her the benefit of the entire education course from pre-school stage pursued by her in India and the benefit for appearing for the Pre-Medical Test which was available to her will be erased in one stroke. Neither would she get any special benefit in the country where she was born. Therefore in that circumstance when there was an assurance from a sovereign State to persons like that of the petitioner No.1 in view of the right provided through the notification issued under Section 7B(1) of Act, 1955 and all 'things were done' by such Overseas Citizens of India to take benefit of it and when it was the stage of maturing into the benefit of competing for the seat, all 'such things done' should not have been undone and nullified with the issue of the impugned notification by superseding the earlier notifications so as to take away even the benefit that was held out to them.

52. Therefore, on the face of it the impugned notification not saving such accrued rights would indicate non application of mind and arbitrariness in the action. Further in such circumstance when the stated object was to make

available more seats for the Indian Citizens and it is demonstrated that seats have remained vacant, the object for which such notification was issued even without saving the rights and excluding the petitioners and similarly placed OCI Cardholders with the other students is to be classified as one without nexus to the object. As taken note earlier during the course this order, the right which was granted to the OCI cardholders in parity with the NRIs was to appear for the Pre-Medical Entrance Test along with all other similar candidates i.e. the Indian citizens. In a situation where it has been demonstrated that the petitioner No.1 being born in the year 2003, has been residing in India since 2006 and has received her education in India, such student who has pursued her education by having the same 'advantages' and 'disadvantages' like that of any other students who is a citizen of India, the participation in the Pre-Medical Entrance Test or such other Entrance Examination would be on an even keel and there is no greater advantage to the petitioner No.1 merely because she was born in California, USA. Therefore, the right which had been conferred and existed had not affected Indian citizens

so as to abruptly deny all such rights. The right was only to compete. It could have been regulated for the future, if it is the policy of the Sovereign State. No thought having gone into all these aspects is crystal clear from the manner in which it has been done.

53. In the above circumstance, keeping in view, the object with which the Act, 1955 was amended so as to provide the benefit to Overseas Citizen of India and in that context when rights were given to the OCI cardholders through the notifications issued from time to time, based on which the OCI cardholders had adopted to the same and had done things so as to position themselves for the future, the right which had accrued in such process could not have been taken away in the present manner, which would act as a 'retroactive' notification. Therefore, though the notification *ex-facie* does not specify retrospective operation, since it retroactively destroys the rights which were available, it is to be ensured that such of those beneficiaries of the right should not be affected by such notification. Though the rule against retrospective construction is not applicable to statutes merely because a part of the requisite for its action

is drawn from a time antecedent to its passing, in the instant case the rights were conferred under the notification and such rights are being affected by subsequent notification, which is detrimental and the same should be avoided to that extent and be allowed to operate without such retroactivity.

54. We note that it is not retrospective inasmuch as it does not affect the OCI Cardholders who have participated in the selection process, have secured a seat and are either undergoing or completed the MBBS course or such other professional course. However, it will act as retroactive action to deny the right to persons who had such right which is not sustainable to that extent. The goal post is shifted when the game is about to be over. Hence we are of the view that the retroactive operation resulting in retrospective consequences should be set aside and such adverse consequences is to be avoided.

55. Therefore in the factual background of the issue involved, to sum up, it will have to be held that though the impugned notification dated 04.03.2021 is based on a policy and in the exercise of the statutory power of a Sovereign

State, the provisions as contained therein shall apply prospectively only to persons who are born in a foreign country subsequent to 04.03.2021 i.e. the date of the notification and who seek for a registration as OCI cardholder from that date since at that juncture the parents would have a choice to either seek for citizenship by descent or to continue as a foreigner in the background of the subsisting policy of the Sovereign State.

56. In light of the above, it is held that the respondent No.1 in furtherance of the policy of the Sovereign State has the power to pass appropriate notifications as contemplated under Section 7B(1) of the Citizenship Act, 1955, to confer or alter the rights as provided for therein. However, when a conferred right is withdrawn, modified or altered, the process leading thereto should demonstrate application of mind, nexus to the object of such withdrawal or modification and any such decision should be free of arbitrariness. In that background, the impugned notification dated 04.03.2021 though competent under Section 7B(1) of Act, 1955 suffers from the vice of non-application of mind and despite being prospective, is in fact 'retroactive' taking

away the rights which were conferred also as a matter of policy of the Sovereign State.

57. Hence, the notification being sustainable prospectively, we hereby declare that the impugned portion of the notification which provides for supersession of the notifications dated 11.04.2005, 05.01.2007 and 05.01.2009 and the clause 4(ii), its proviso and Explanation (1) thereto shall operate prospectively in respect of OCI cardholders who have secured the same subsequent to 04.03.2021.

58. We further hold that the petitioners in all these cases and all other similarly placed OCI cardholders will be entitled to the rights and privileges which had been conferred on them earlier to the notification dated 04.03.2021 and could be availed by them notwithstanding the exclusion carved out in the notification dated 04.03.2021. The participation of the petitioners and similarly placed OCI cardholders in the selection process and the subsequent action based on

the interim orders passed herein or elsewhere shall stand regularised.

59. Notwithstanding the fact that we have held the impugned notification dated 04.03.2021 to be valid with specific prospective effect in view of the power available to respondent No.1 under Section 7B(1) of Act, 1955, keeping in perspective the wide ramification it may have in future also on the Indian diaspora and since it is claimed to be based on the policy decision of the Sovereign State, we expect that the same would be examined in the higher echelons of the Executive with reference to the rights already created.

60. In terms of the above, all these petitions/ appeals are allowed in part to the above extent with no order as to costs.

61. Pending application, if any, stands disposed of.

.....J.
(A.S. BOPANNA)

.....J
(C.T. RAVIKUMAR)

NEW DELHI;
FEBRUARY 03, 2023