

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**INTERIM APPLICATION (L) NO. 30500 OF 2022
IN
WRIT PETITION NO. 2164 OF 2022**

The Nest India Foundation ... **Applicant**

In the Matter Between :

The Nest India Foundation ... **Applicant**

Versus

The State of Maharashtra & Ors. ... **Respondents**

Dr. Abhinav Chandrachud a/w. Adv. Akansha Agarwal and
Adv. Pranit Kulkarni i/b. Ismail Shaikh, Advocate for the
Applicant.

Smt. P. H. Kantharia, AGP for the Respondents/State.

**CORAM: S.V. GANGAPURWALA &
 R. N. LADDHA, JJ.**

DATED : OCTOBER 21, 2022

P.C.

1. The writ petition is filed by a Foundation running a Child Care Home. The writ petition is filed challenging the show cause notice and the directions issued to it by the Authority to shift the children with the petitioners' institution to the another Child Care Home. The interim protection is granted so far as shifting of the children is concerned by this Court. Interim application is filed by the Foundation/Child Care Home seeking directions to consider the application dated 13th September 2022 for issuing orphan certificate to Upasana Sharma and Varsha Gaikwad

in an expedited manner. The interim application seeks further prayer to issue and grant an Orphan Certificate to Upasana Sharma and Varsha Gaikwad in an expedited manner, so also seeking directions against respondent No.3 to consider Upasana Sharma and Varsha Gaikwad in the 1% horizontal reservation quota in the counselling and admission process of the Under Graduate courses and colleges pending the issuance of Orphan Certificate by respondent Nos.2 and 3.

2. We have heard Dr. Chandrachud, learned Advocate for the petitioner and Mr. Kantharia, learned Government Pleader.

3. The learned Advocate for the petitioner submits that the mothers of the petitioners are alive, still the petitioners can be termed as 'orphan' within the meaning of Section 2(42) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "**the Act, 2015**"). The learned Advocate further submits that even if it is assumed that these girls cannot be declared as 'orphan', still they can be declared as 'abandoned child' within the meaning of Section 2(1) of the Act, 2015. Since the age of 4 and 5 years, these girls are staying in the petitioner's Child Care Home. Their mothers have hardly visited during all these years. They will have to be construed as 'abandon child'. The learned Advocate further submits that reservation is provided for courses under the University of Health Sciences to Orphan. If technically the petitioner cannot be considered as 'orphan', however, they could be termed as 'abandoned child'. The law would not make a

distinction between 'abandoned child' and 'orphan' inasmuch as both are governed by the same Act. There would not be any reason for not applying the reservation of 'orphan' to 'abandoned child'. It is submitted that the phrase 'orphan' will have to be given a broader meaning and not a restricted meaning. The classification between orphan and abandoned child in the horizontal reservation does not bear a rational nexus with the object to be achieved. Reliance is placed by the learned Advocate upon the judgment of the Apex Court in *State of Rajasthan v. Mukan Chand*¹ and *Leelabai Gajanan Pansar v. Oriental Insurance Co. Ltd.*². It is further submitted that the social welfare legislation and human rights legislation must be interpreted liberally and not literally. Reliance is placed upon the judgment of Apex Court in *Workmen of American Express International Bankikng Corporation v. Management*³ and *Allahabad Bank v. All India Allahabad Bank Retired Employees' Association*.⁴ The learned Advocate submits that the Statute has to be read down in the manner to save it from unconstitutionality. The Court must avoid literal interpretation of the Statute if a literal interpretation will render the Statute unconstitutional. Reliance is placed on *Indra Das v. Statre of Assam*.⁵

4. Ms. Kantharia, learned Government Pleader submits that the petitioner institution is not a registered institution. It is illegally running a Child Care Home. Many times, the notices were issued to the petitioner for the same. First

1 AIR 1964 SC 1633.

2 (2008) 9 SCC 720.

3 (1985) 4 SCC 71.

4 (2010) 2 SCC 44.

5 (2011) 3 SCC 380.

time show cause notice was issued on 19th January 2019. The petitioner filed reply. Thereafter, the impugned show cause notice was issued on 1st July 2021. At the first instance, the petitioner cannot run the Child Care Home and as such, the girls namely Upasana Sharma and Varsha Gaikwad cannot be considered as 'abandoned child'. The said girls cannot be described as 'orphan' as their biological mothers are alive. The petitioner also does not possess a declaration that these girls are abandoned.

5. We have considered the submissions.

6. Yesterday i.e. on 20th October 2022, the learned Advocate for the petitioner submitted a draft amendment challenging the validity of the Rule providing 1% reservation for orphan. We allowed said amendment.

7. The immediate concern of the applicant is to participate in the admission process of the Under Graduate courses under the Health Science. It is stated that the girls are in the petitioner's Child Care Home since the year 2008. Today, we do not find anything on record as to the application filed by the petitioner Foundation for running the Child Care Home since 2008. However, it is stated that the application is filed on or about 14th February 2011 seeking permission for child care home and repeated reminders and follow up application were filed, but decision is not taken by the respondents on the application of the petitioner for grant of permission and instead the impugned show cause notice is issued. Ms.Upasana Sharma and Varsha Gaikwad would not be termed as 'orphan' as defined under Section 2(42) of the Act, 2015 in as much as their

biological mothers are alive. Much emphasis is laid that the reservation meant for 'orphan' should also include 'abandoned child'. For a child to be an 'abandoned child' within the meaning of Act, 2015, the Child should be deserted by his/her biological or adoptive parents or guardian and is required to be declared as 'abandoned child' by the Committee after inquiry. Today, we do not have any declaration of a Competent Committee declaring these two girls as 'abandoned child'. Admittedly, the mother of these girls are alive and some times visit them. Unless the declaration from the Competent Committee comes forth, these girls cannot be declared as 'abandoned child'. Enquiry would be contemplated to declare the child as an 'abandoned child'.

8. In light of the above, at present, we cannot grant any relief to the petitioner, however, the application may be made to the Competent Authority under the Act, 2015 for declaration of Upasana Sharma and Varsha Gaikwad as \ abandon child'.

9. The petitioner may make an application by 28th October 2022 with the Competent Committee as provided under the Act, 2015. The Committee may make due enquiry and take decision on the application of the petitioner for declaration as 'abandoned child' on its own merits preferably on or before 14th November 2022.

10. Place the matter on **15th November 2022**.

(R. N. LADDHA, J.)

(S.V. GANGAPURWALA, J.)