



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(Org. Petitioner)

In the matter between

The Nest India Foundation & Ors. ...Petitioners

V/s.

The State of Maharashtra ...Respondents

Dr. Abhinav Chandrachud with Ms. Akanksha Agrawal and Mr. Pranit Kulkarni i/b. Ismail Shaikh, for the Applicant/ Petitioner.

Dr. Birendra Saraf, Advocate General with Smt. PH Kantharia, Government Pleader, for the Respondent/State of Maharashtra.

**CORAM : SUNIL B. SHUKRE, AND
FIRDOSH P. POONIWALLA, J.J.**

DATE : 14th SEPTEMBER 2023

PC.

1. In the present Interim Application, the Petitioners have sought interim reliefs in terms of prayer clauses (a), (b) and (c) of the Interim Application. However, the Petitioners have not pressed prayer clauses (a) and (b) of the Interim Application and have limited their arguments only to prayer clause (c) of the Interim Application. We have heard the parties only for considering whether to grant any reliefs in terms of prayer clause (c) of the Interim Application which reads as under:-

“(c) Direct Respondent No.5 to consider Upasana Sharma and Varsha Gaikwad in the 1% parallel reservation quota in the counselling and admission process of the undergraduate courses and colleges, pending the issuance of the Orphan Certificate by Respondent Nos.2 and 3.”

2. Dr. Chandrachud, the learned Counsel for the Petitioners, made submissions as to why the said interim relief ought to be granted to the Petitioners. Dr. Chandrachud pointed out that the main challenge in the Petition is to the Government Resolution dated 6th April 2023, by virtue of which the State (Respondent No.1) has introduced 1% horizontal reservation for Orphans (“the said Government Resolution”). Dr. Chandrachud submitted that the said Government Resolution violates Article 14 of the Constitution of India as it discriminates between Orphans and Abandoned Children. He submitted that there was no rational nexus between the object sought to be achieved by the horizontal reservation policy of Respondent No.1 and the distinction drawn between Orphans and Abandoned children. He submitted that both Orphans and Abandoned Children are in need of protection and to discriminate between the two in the context of horizontal reservation is therefore unconstitutional and ultra vires Article 14 of the Constitution of India.

3. For the sake of convenience, the relevant portion of the said Government Resolution is set out hereunder:-

This Government Resolution is being issued by superseding the Government Resolution at reference no. 5 and Government Corrigendum at reference no. 6 for making changes in orphan reservation policy.

It is being approved to apply 1% reservation in education and government (in semi government as well as government aided institutions) employment to orphans on the lines of reservation for Divyang persons. The eligibility criteria for this reservation, nature of the reservation, terms and conditions, guidelines for implementation of reservation, procedure for issuing orphan

certificate and format of orphan certificate are being prescribed as follows:

1. The eligibility criteria for this reservation

1) "Institutional" category will include the children whose parents have died before the child had attained the age of 18 years and who have been brought up in a government recognized institution. (Even if the information of his/her relative or caste is known or otherwise.)

(The orphans brought up in Child Care Institutions under the Women and Child Development Department working vide Juvenile Justice (Care and Protection of Children) Act, 2015 as well as in the institutions recognized by the departments other than Women and Child Development Department will be included in this category.)

2) "Non-Institutional" category will include the children whose parents have died before the child had attained the age of 18 years and who have been brought up outside a government recognized institution/by a relative.

4. In support of his submissions, Dr. Chandrachud referred to Sections 2(1) and 2(42) of the Juvenile Justice (Care and Protection of Children) Act, 2015 ("the Juvenile Justice Act") which defined an "Abandoned Child" and an "Orphan". Sections 2(1) and 2(42) of the Juvenile Justice Act read as under:-

2. Definitions-In this Act, unless the context otherwise requires,--

(1) "abandoned child" means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry;

(42)"orphan" means a child-

(i) who is without biological or adoptive parents or legal guardian; or
(ii) whose legal guardian is not willing to take, or capable of taking care of the child;

5. Dr. Chandrachud also referred to Section 2(14), Section 30(x) and (xi) and Section 36 of the Juvenile Justice Act. He submitted that if the Juvenile Justice Act, and, in particular, the aforesaid provisions are

examined, then the Juvenile Justice Act does not make any distinction between an Abandoned Child and an Orphan.

6. Dr. Chandrachud also referred to a Certificate dated 17th February 2023 issued by the Child Welfare Committee, Mumbai Suburban (II), under which Petitioner Nos.2 & 3, namely Varsha Gaikwad and Upasana Sharma, have been declared to be “Abandoned Child” under Section 2(1), read with Section 2(42), of the Juvenile Justice Act. He submitted that the same demonstrates that the said Child Welfare Committee has also considered the said two young ladies as Orphans.

7. Further, Dr. Chandrachud referred to the definition of Orphan in P Ramanatha Aiyar’s Advanced Law Lexicon, which reads as under:-

Orphan. “ORPHAN” means a person, none of whose parents is alive and is in receipt of monthly widow/widower pension. [Employee’s Pension Scheme, 1995, S.2(xi)]

“ORPHAN” means a child-

*(i) who is without biological or adoptive parents or legal guardian; or
(ii) whose legal guardian is not willing to take, or capable of taking care of the child. [Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016, S. 2(42)].*

“ORPHAN” means a child-

*(i) who is without parents or legal guardian; or
(ii) whose parents or legal guardian is not willing to take, or capable of taking care of child. [Guidelines Governing Adoption of Children, 2015, para 2(23)].*

A fatherless child, or an illegitimate child of a deceased mother. According to more general usage a minor who has lost both of his or her parents. (Bouvier.) Sometimes the term is applied to a person who has lost only one of his or her parents. [Powell v. Att. Gen., (1817) 3 Mer. 48 : 36 ER 19 : 17 RR 8; Luch’s Case, 1724, Hob.247] Though Johnson defines an orphan as ‘a child who has lost father, or mother, or both’; yet where there was a bequest to A until 21, “provided she be left an orphan, unprovided for, and lives with part of my family”, it was held by Wood V- C., that though A’s mother was

dead, yet as her father was alive and as on him lay the obligation of providing for A, she was not an "orphan" as contemplated by the bequest. (Guilmette v. Mossop. 7LT190)

8. Dr. Chandrachud also referred to definition of Orphan in Black's Law Dictionary, which reads as under:-

"orphan, 1. A child whose parents are dead. [Cases: Infants2. C.J.S. Infants 12, 108, 198] 2. A child with one dead parent and one living parent.- More properly termed half orphan, 3. A child who has been deprived of parental care and has not been legally adopted; a child without a parent or guardian. [Cases; Infants 157]

9. Dr. Chandrachud submitted that if these definitions of an Orphan are considered, they would also include an Abandoned Child. He submitted that, accordingly, since no distinction is made between an Orphan and an Abandoned Child, the said Government Resolution, by providing for reservation for an Orphan, and not for an Abandoned Child, is discriminatory and ultra vires Article 14 of the Constitution of India.

10. Further, in support of his abovementioned submissions, Dr. Chandrachud relied upon paragraph 8 of the Judgment of the Hon'ble Supreme Court in **State of Rajasthan Vs. Mukan Chand and Ors.**¹ which reads as under:-

8. We think that the High Court was right in holding that the impugned part of Section 2(e) infringes Article 14 of the Constitution. It is now well settled that in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. In our opinion, Condition 2 above has clearly not been satisfied in this case. The object sought to be achieved by the impugned Act was to reduce the debts secured on jagir lands which had been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the

1 (1964) 6 SCR 903 : AIR 1964 SC 1633

object of the Act was to ameliorate his condition. The fact that the debts are owed to a Government or local authority or other bodies mentioned in the impugned part of Section 2(e) has no rational relationship with the object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. The reason why a debt advanced on behalf of a person by the court of wards is clubbed with a debt due to a State or a scheduled bank and why a debt due to a non-scheduled bank is not excluded from the purview of the Act is not discernible.

11. Dr. Chandrachud also relied upon paragraph 75 of the Judgment of the Hon'ble Supreme Court in **Leelabai Gajanan Pansare & Ors. Vs. Oriental Insurance Company Limited & Ors.**² in which the Hon'ble Supreme Court, by relying upon the judgment in **Mukan Chand** (Supra), held that to meet the challenge of discrimination under Article 14 it would not be sufficient to state that there is an intelligible differentia, but it is further an essential requirement to show that the differentia has a rational nexus to the object sought to be achieved by the statute in question.

12. Dr. Chandrachud submitted that, in the alternative, in order to save the constitutionality of the said Government Resolution, the word Orphan in the said Government Resolution can be read to include an Abandoned Child. In support of his submission that such reading up is permissible, Dr. Chandrachud relied upon the judgments of the Hon'ble Supreme Court in **The Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Girish Kumar Navalakha & Ors.**³, **State of Tamil Nadu & Another Vs. National South Indian River Interlinking Agriculturist Association**⁴ and **Government of Andhra Pradesh Vs. P. Laxmi Devi**⁵. By relying upon the judgment in **P. Laxmi Devi**(Supra), Dr. Chandrachud submitted that, in order to uphold the constitutional validity of a statute, even a strained construction of the same may be given.

2 (2008) 9 Supreme Court Cases 720

3 (1975) 4 Supreme Court Cases 754

4 (2021) 15 Supreme Court Cases 534

5 (2008) 4 Supreme court Cases 720

13. Dr. Chandrachud submitted that one of the contentions of Respondent No.1 would be that, by not including an Abandoned Child in the said Government Resolution, there was only under inclusion and that under inclusion would not deny the equal protection of laws under Article 14 of the Constitution of India. By relying upon the aforesaid judgments in **Girish Kumar** (Supra) and **State of Tamilnadu** (Supra), Dr. Chandrachud submitted that, although under inclusion is tolerated by the Courts in India, that is subject to the exception that the same ought not be tolerated if it can be clearly seen that there is no fair reason for the law which would not require with equal force its extension to whom it left untouched.

14. Dr. Chandrachud also submitted that one of the contentions of Respondent No.1 is that, if an Abandoned Child is included in the said Government Resolution, then the same would be prone to misuse. He submitted that the mere fact that a policy may be misused does not mean that the said policy should not be made applicable. In this context he submitted that even the policy of caste reservations is, on occasions, misused, but the same does not mean that the State does not provide for caste reservations.

15. Although, not raised in the Petition, Dr. Chandrachud also submitted that the said Government Resolution was discriminatory even as far as the eligibility criteria for reservation was concerned. The eligibility criteria for the institutional category included an Abandoned Child whilst the eligibility criteria for the non-institutional category did not include an Abandoned Child and only included children whose parents had died. He submitted that this was one more reason as to why the said Government Resolution is ultra vires Article 14 of the Constitution of India.

16. In conclusion, Dr. Chandrachud submitted that the Petitioner had made out a *prima-facie* case to show that the said Government Resolution was unconstitutional, and, therefore, till the Petition was finally heard, Petitioner Nos. 2 and 3 should be considered in the said reservation quota provided by the said Government Resolution in the counseling and admission process of the undergraduate courses and colleges for medication education as, otherwise, they would be deprived of the opportunity to take admission in the medical course and become doctors.

17. In response, Dr. Birendra Saraf, the Learned Advocate General appearing on behalf of the Respondents, pointed out that the Petitioner No.1 was not an institution registered under the Woman and Child Department or recognized by any other Department of Respondent No.1, and it was not possible for the Respondents to verify whether the said two young ladies were actually Orphans. In this context, the learned Advocate General referred to a letter addressed by the Mother of Varsha Gaikwad on 5th February 2005 (at page 195-F of the Paper Book). The learned Advocate General submitted that the said letter showed that the mother of Varsha Gaikwad had admitted her into the Petitioner No.1 institution only for the purposes of obtaining education. He submitted that this shows that it is not at present possible for the Respondents to verify whether Varsha Gaikwad was actually an Orphan.

18. The Learned Advocate General also referred to a Judgment dated 29th June 2018 passed by this Court in **Balvikas Sansthachalak Vs. The State of Maharashtra** (Writ Petition No.11205 of 2016) wherein this Court had observed that the provisions of the Juvenile Justice Act were abused and misused.

19. The learned Advocate General submitted that one of the reasons as to why the State, in its wisdom, had not included an Abandoned Child in the said Government Resolution was that the said inclusion was capable of gross abuse and misuse. He submitted that this was a policy decision of the Government which ought not to be interfered with.

20. Further, the learned Advocate General submitted that the provisions of the Juvenile Justice Act, which does not deal with reservation at all, cannot be used as an aid to widen the scope of the word Orphan in the said Government Resolution.

21. The learned Advocate General referred to paragraph 49 of the Judgment of the Hon'ble Supreme Court in Hiral P. Harsora & Ors. Vs. Kusum Narottamdas Harsora & Ors.⁶, which reads as under:-

49. We may add that apart from not being able to mend or bend a provision, this Court has earlier held that "reading up" a statutory provision is equally not permissible. In B.R. Kapur v. State of T.N.⁴³, this Court held: (SCC p. 296, para 39)

"39. Section 8(4) opens with the words "notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)", and it applies only to sitting members of legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be "reading up" the provision, not "reading down", and that is not known to the law.

22. Relying on the aforesaid judgment, the learned Advocate General submitted that it was clear from the said judgment that reading up of a provision of law was not permissible.

6 (2016) 10 SCC 165

23. In conclusion, the learned Advocate General submitted that the Petition raises various issues which are required to be finally decided by this Court, and unless those issues are finally decided in favour of the Petitioners, there was no question of granting any relief to the Petitioners as sought by them. He submitted that granting of the interim relief sought by the Petitioners would tantamount to granting them final reliefs at the interim stage, which is not permissible in law.

24. We have been at great pains to set out the rival contentions in order to demonstrate that the present Petition raises various constitutional and legal issues. The first issue would be whether, by not including an Abandoned Child, the said Government Resolution is discriminatory and is ultra vires Article 14 of the Constitution of India. This issue would necessarily include the consideration of the question as to whether there was under inclusion and whether the same was justified. The second issue that would arise is that if this Court came to the conclusion that the said Government Resolution was unconstitutional, whether, in order to save the constitutionality of the said Government Resolution, the word Orphan in the said Government Resolution could be read to include an Abandoned Child. This would necessarily include a consideration of the question whether such reading up was permissible. The third issue, though not pleaded, is whether the said Government Resolution discriminates between institutional and non-institutional categories. The fourth issue would be whether the provisions of the Juvenile Justice Act, which does not deal with reservation at all, can be used as an aid to widen the scope of the word Orphan in the said Government Resolution.

25. In our view, keeping in mind that the aforesaid issues arise in the Petition, which would require a detailed examination at the stage of

final hearing, after considering the law on the subjects, the interim relief sought by the Petitioners cannot be granted, as the granting of the same would amount to granting of final reliefs at the interim stage, which is not permissible. This is more so since the Petitioners would be entitled to relief only if they are able to establish that the said Government Resolution is unconstitutional or has to be read up to include an Abandoned Child. This is the first reason for which we are not inclined to grant the interim relief sought by the Petitioners.

26. There is one more reason for declining the interim relief sought by the Petitioners. If the said interim relief sought is granted, and if at the final hearing of this Petition, this Court decides against the Petitioners, then the same would amount to depriving some other Orphans of seats in the medical courses in which the Petitioners are seeking admission. Even though the Petitioners have submitted that they would not claim any equities if interim relief sought by them is granted, the same would still deprive other Orphans of two seats in the medical course. For this reason also, we are not inclined to grant the interim relief sought by the Petitioners.

27. In the aforesaid circumstances, and for all the reasons stated hereinabove, prayer (c) of the Interim Application is hereby rejected and the Interim Application is disposed of accordingly.

26. In the facts and circumstances of the case there shall be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)

(SUNIL B. SHUKRE, J.)