

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11403 OF 2022

Pragati d/o Prabhu Shinde,
Age 23 years, Occ. Education,
R/o. Dilipsingh Colony,
Govardhan Ghat Road,
Tq. and District Nanded
at present R/o. Row House No.32,
Akshad Park, Kumbephal,
Aurangabad

...Petitioner

versus

1. The State of Maharashtra
through its Chief Secretary
Revenue and Social Justice
Department, Mantralaya
Mumbai
2. The Commissioner,
Social Justice and Director of
Dr. Babasaheb Ambedkar Research
and Training Institute,
R/o. Yashwant Nagar
Yerwada, Pune
3. The District Caste Scrutiny Committee,
Samajik Nyay Bhavan
at Nanded
4. Divisional Caste Scrutiny Committee,
Aurangabad Division, Committee 2,
Ausa Road, Latur
5. The District Magistrate
at Nanded
6. The Sub Divisional Magistrate
at Nanded

...Respondents

.....
Mr. V.D. Sapkal, Senior Advocate, Amicus Curiae.
Mr. S.N. Zakade, advocate for the petitioner.
Mr. P.S. Patil, A.G.P. for the respondents.
.....

**CORAM : RAVINDRA V. GHUGE AND
SANJAY A. DESHMUKH, JJ.
DATED : 14th DECEMBER, 2022.**

ORAL JUDGMENT: (Per Ravindra V. Ghuge, J.)

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. On 29.11.2022, we had considered the submissions of the learned advocate, Shri Zakade, on behalf of the petitioner and had passed the following order:-

"1. The petitioner's claim of belonging to the 'Mahar' Schedule Caste Category has been invalidated by the impugned judgment.

2. We find peculiar facts involved in this case as under:

(a) The petitioner's mother is born and brought up in Nanded. She got married to Prabhu Sharannappa Shinde, a resident of Bidar.

(b) Within two years of the marriage, it is alleged that the father of the petitioner separated from her mother by travelling to Saudi Arabia and returned to settle down in Bidar along with another woman.

(c) Marital litigation between the parties is pending before the Courts at Nanded.

(d) The mother of the petitioner started living with her parents within two years of the marriage.

(e) The petitioner was born and brought up in Nanded.

3. *The issue raised is as to whether the petitioner can seek a validity certificate of belonging to the 'Mahar' Schedule Caste Category and draw advantages of reservation in the State of Maharashtra.*

4. *Considering the conspectus of the matter, we felt and desired that the learned Senior Advocate Shri. V. D. Sapkal would assist the Court, and therefore, we have appointed him as Amicus Curie. Shri. V. D. Sapkal has graciously consented.*

5. *Issue notice to the respondents, returnable on 14.12.2022. The learned AGP waives service of notice on behalf of all the respondents.*

6. *This matter would be called out at 2:30 pm, on 14.12.2022."*

3. The learned senior advocate, Shri Sapkal, appeared as amicus curiae and has assisted the Court on the following issue:-

"(a) Whether, in peculiar circumstances, the record of the mother pertaining to her social status concerning her caste, could be the basis of issuing the caste certificate to a child who is reared as a child of a single mother and whether such a child can then seek validation of such a caste certificate?"

4. The learned amicus curiae submits, after perusing the petition paper book, that the cause of action brought before this Court by the petitioner is on account of the order of respondent No.3, which has declared the petitioner's caste certificate, dated 26.08.2014, as being invalid since it is based on the documents produced by the petitioner from her maternal side.

5. Before we appreciate the submissions of the learned amicus curiae, we need to advert to the social status of the petitioner and her mother, on account of which the cause of action has arisen. The mother of the petitioner, Smt. Alka Nilkanth Zakade, (maiden name), was born and brought up in Nanded, in the State of Maharashtra. She married Prabhu Sharanappa Shinde, within her caste, who is resident of Shahgunj, Bidar, State of Karnataka. They got married at Bidar in 1996. The petitioner was born on 20.12.1998, at Nanded in her maternal home. The father of the petitioner had been to Saudi Arabia for a job and after returning from the said place, he settled down in Bidar. He then started residing with another lady. In a period of less than three years of marriage, the petitioner's mother was driven out of her matrimonial house and she had to return to Nanded. The litigation journey between the mother and her father, with reference to their matrimonial discord, commenced and the said litigation continued till 28.04.2018, when the father of the petitioner died in the State of Karnataka.

6. The petitioner received a caste certificate of belonging to "*Mahar*" Scheduled Caste category from the competent authority at Nanded. The petitioner has taken education in a professional degree course i.e. Engineering and presently possesses a degree of Bachelor of Engineer. For further education purposes and employment, she had applied to respondent No.4 Committee for seeking validity certificate. Considering the bifurcation of jurisdiction, the matter was transferred to respondent No.3, committee at Nanded.

By the impugned order dated 17.01.2019, the petitioner's caste certificate dated 26.08.2014, was declared as bad in law and was cancelled. The petitioner is directed to acquire the caste certificate on the basis of the record of her father from the State of Karnataka. She is also directed to approach the competent authority at Karnataka to seek validity certificate.

7. The learned amicus curiae has drawn our attention to the judgment delivered by the Hon'ble Supreme court in ***Rameshbhai Dabhai Naika vs. State of Gujarat and others, (2012) 3 SCC 400***, to contend that if the mother is rendered a destitute and single on account of any marital discord or is factually residing as a single mother, the peculiar circumstance in which the mother is living, has to be considered as a basis for granting the social status to the child of such a mother. He has specifically drawn our attention to paragraphs 2 to 9 in ***Rameshbhai (supra)***, wherein the facts of the case have been considered, as under:-

"2. The Gujarat High Court has proceeded on the basis that the issue is settled by the decisions of this Court in Valsamma Paul v. Cochin University followed by Punit Rai v. Dinesh Chaudhary and Anjan Kumar v. Union of India. On the strength of those three decisions the High Court upheld the order passed by the Scrutiny Committee cancelling the tribal certificate earlier obtained by the appellant on the sole ground that his father was a non-tribal, belonging to the Hindu caste Kshatriya.

3. The High Court did not advert to the fact that the mother of the appellant was undeniably a Nayak, one of the

Scheduled Tribes and the appellant himself and his other siblings were also married to Nayaks. The High Court also did not refer to the evidence adduced by the appellant on the question of his upbringing as a member of the Nayak community and his acceptance in that community (or for that matter the contra evidence produced by the respondent questioning his claim to be a member of the Scheduled Tribe). In view of the fact that his father was a non-tribal, the High Court deemed everything else as of no relevance and declined to record any finding on whether the appellant was, in fact, brought up as a tribal and, consequently, shared all the indignities and handicaps and deprivations normally suffered by the tribal communities.

4. *The appellant, thus, lost his tribal certificate and the fair price shop that was allotted to him on that basis. He has now brought the matter to this Court making the grievance that the High Court order does not impact him alone but as a result of the order of the High Court his children too, though undisputedly born to a tribal mother, are bound to lose their tribal identity.*

5. *The High Court seems to have read the decisions in Valsamma Paul, Punit Rai and Anjan Kumar as laying down the rule that in all cases and regardless of other considerations the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal would take his/her caste from the father. In the three decisions there are indeed observations (though by no means forming the ratio of the decisions) that may lend credence to such a view but the question is whether it can be said to flow from those decisions, as an inflexible rule of general application, that in every case of an inter-caste marriage or a marriage between a tribal and a non-tribal, the offspring must take his/her caste from the father. The clear answer, to our mind, is in the negative. A careful examination of the three cases together with some other decisions of this Court would clearly show that what was said in Valsamma in a certain context has been rather mechanically and inappropriately extended and applied*

to different other fact situations as the law laid down in Valsamma.

6. Valsamma was a Syrian Catholic woman (forward caste) who married a Latin Catholic man (Backward Class) and the question arose whether by virtue of her marriage she was entitled to appointment to a post of lecturer that was reserved for Latin Catholics (Backward Class fishermen). The Full Bench of the Kerala High Court held that though Valsamma was married according to the Canon law, being a Syrian Christian by birth, she could not by marriage with a Latin Catholic become a member of that class nor could she claim the status of Backward Class by marriage. Dealing with the consequences of a woman marrying outside her caste the Court relied upon two old Privy Council decisions of the nineteenth century and came to hold that when a woman marries outside her caste, she becomes a member of the caste of the husband's family. In para 31 of the judgment in Valsamma the Court said:

*"31. It is well-settled law from Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry that judiciary recognised a century-and-a-half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai. It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage the wife becomes an integral part of the husband's marital home entitled to equal status of husband as a member of the family. **Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted.**"*

(emphasis added)

7. Having said that in an inter-caste marriage the

woman takes on the caste of her husband, the Court proceeded to consider the next question which was:

“33. ... Whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Article 15(4) or 16(4), as the case may be?”

This question the Court firmly answered in the negative and in para 34 of the judgment observed and held as follows:

“34. In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde and R. Chandevappa v. State of Karnataka this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste, etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.”

(emphasis added)

8. *Proceeding further, in para 35 of the judgment in Valsamma case, the Court expressly held that acceptance by the community, a test that was earlier applied by the Court in cases of conversion and reconversion, would have no application to judge Valsamma's claim to the post reserved for Latin Catholics by virtue of her marriage in that caste.*

9. *The Court in Valsamma case, thus, gave two reasons for disallowing Valsamma the benefits of reservation under Articles 15 and 16 of the Constitution; first, being born in a forward caste she had an advantageous start in life and she had not gone through the same disabilities, disadvantages, indignities or sufferings as other members of the Backward Class, and secondly, claiming the benefits of reservation by getting transplanted into a Backward Class by means of marriage, that is to say, through voluntary mobility would amount to a fraud on the Constitution."*

8. The learned amicus curiae has then canvassed that the law laid down by the Hon'ble Supreme Court in **Valsamma (supra)**, has been followed consistently. The observations in **Rameshbhai (supra)**, in paragraphs 10 and 11, read as under:-

"10. On a careful reading of the judgment it becomes clear that the ratio of the Valsamma decision lies in para 34 of the judgment as quoted above. What was said earlier in para 31 of the judgment was in the facts of that case and it would be an error to take it as the ratio of the decision. More importantly, it would be very wrong to take para 31 of the Valsamma judgment as a premise for drawing the corollary or the deduction that the child born from an inter-caste marriage or a marriage between a tribal and a non-tribal would invariably take his caste from the father.

11. *But before examining Valsamma in any greater*

detail it would be useful to see how it was used, applied and “improved upon” in later decisions of the Court. Valsamma was a case of reservation under Articles 15 and 16 of the Constitution.”

(Emphasis supplied)

9. He has then adverted to paragraphs 21 to 28 from **Rameshbhai (supra)**, as under:-

“21. It is equally important to note that the judgment by the two Judges in Punit Rai case does not rule out the possibility of the child from an inter-caste marriage taking his/her caste status from the mother, if such a provision was made in a circular issued by the Government and, in para 7 of the judgment, made the following observations: _

“7. ... A person born in a Kurmi family, which details have been provided, would normally be taken to be a Kurmi by caste. But it is only in special circumstances, as may have been provided under a circular of the Government of Bihar, that the caste of the mother would be taken as the caste of the children, if she happens to be a Scheduled Caste, married to a non-Scheduled Caste.”

22. Sinha, J., the third member on the Bench wrote a separate, though concurring judgment. He applied the test of acceptance by the community for rejecting the respondent's claim that he qualified as a “Pasi” (Scheduled Caste). In paras 33 and 34 of the judgment Sinha, J. observed as follows: _

“33. In the instant case there is nothing on record to show that the respondent has ever been treated to be a member of the Scheduled Caste. In fact evidence suggests that he has not been so treated. He as well as his brothers and other members of his family are married to persons belonging to his own caste i.e. ‘Kurmi’.

34. There was no attempt on the part of the

respondent herein to bring on record any material to the effect that he was treated as a member of the 'Pasi' community. Furthermore, no evidence has been brought on record to show that the family of the respondent had adopted and had been practicing the customary traits and tenets of the 'Pasi' community."

Sinha, J., however, proceeded to make certain other observations and in para 27 of the judgment he said as follows:

"27. The caste system in India is ingrained in the Indian mind. A person, in the absence of any statutory law, would inherit his caste from his father and not his mother even in a case of inter-caste marriage."

(Emphasis added)

23. And in para 41 of the judgment in Punit Rai case as under:

"41. Determination of the caste of a person is governed by the customary laws. A person under the customary Hindu law would be inheriting his caste from his father. In this case, it is not denied or disputed that the respondent's father belonged to a 'Kurmi' caste. He was, therefore, not a member of the Scheduled Caste. The caste of the father, therefore, will be the determinative factor in absence of any law."

Here there is no reference to Valsamma but the connection is obvious. It is only the next logical step to what was said in para 31 of Valsamma. If as a result of an inter-caste marriage the woman gets transplanted into the family of the husband and takes her husband's caste it would logically follow that the child born from the marriage can take his/her caste only from the father. We shall presently consider the highly illogical consequences of this logical derivation but before that it needs to be noticed that Sinha, J. rejected the government circular also that provided that the caste of the mother might be taken as the caste of the child. In the same

paras 41 and 42 Sinha, J. observed:

“41. ... Reliance, however, has been placed upon a circular dated 3-3-1978 said to have been issued by the State of Bihar which is in the following terms:

‘Subject: Determination of the caste of a child born from a non-Scheduled Caste Hindu father and a Scheduled Caste mother.

Sir,

In the aforesaid subject as per instruction I have to state for the determination of a child born from a non-Scheduled Caste father and a Scheduled Caste mother, upon deliberation it has been decided that the child born from such parents will be counted in the category of Scheduled Caste.

2. In such cases before the issue of caste certificate there will be a legible enquiry by the Block Development Officer/Circle Officer/Block Welfare Officer.’

42. The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorised in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India.”

(Emphasis added)

He, thus, rejected the circular issued by the State of Bihar as invalid and of no consequence.

24. However, the judgment in Punit Rai case by the two Judges, as seen above expressly acknowledged that in special circumstances, as may be provided in the government circular, the caste of the mother may be taken as the caste of the children. Therefore, the view taken by Sinha, J. on the circular is clearly at variance with the judgment of the two Judges on that issue. On the question of the child inheriting the caste of the mother the judgment by the two Judges is silent as the question did not arise for consideration in view of the finding of fact that

the respondent's father, a Kurmi, had not married the Pasi woman. It is, therefore, difficult to clothe the observation by Sinha, J. on this point with precedential value, especially in view of the fact that the question did not arise at all after the decision of the majority of two Judges.

25. Seervai in his Constitutional Law of India, 4th Edn., pp. 2669-73 esp. Para 25.102 explains that a "decision" refers to the determination of each question of law which arose and was decided in that case. In Punit Rai case, the question did not arise at all, and moreover, there was no majority concurrence on the question that a child inherits his caste from the father. Thus, the concurring judgment of Sinha, J. must be interpreted by reference to paras 33, 34 and 47 of the judgment, where the learned Judge concurs with the majority on the question of fact. The other observations in the concurring judgment cannot be said to constitute binding precedent.

26. The question of the status of a child born to a Scheduled Tribe mother from a forward caste father again came up before the Court in Anjan Kumar v. Union of India. Anjan Kumar was the son of a Scheduled Tribe mother and a Kayastha (forward caste) father. The question was whether he could be considered to belong to the Scheduled Tribe. On the facts of the case, the Court found that though the mother of the child indeed belonged to a Scheduled Tribe, the child was brought up in the environment of forward caste community and he did not suffer any social disabilities or backwardness.

27. In paras 6 and 7 of the judgment the Court observed as follows:

"6. Undisputedly, the marriage of the appellant's mother (tribal woman) to one Lakshmi Kant Sahay (Kayastha) was a court marriage performed outside the village. Ordinarily, the court marriage is performed when either of the parents of bride or bridegroom or the community of the village objects to such marriage. In such a situation, the bride or the bridegroom suffers the wrath of the community of the village and runs the risk of being ostracised or excommunicated from the village community. Therefore, there is no question of such marriage

being accepted by the village community. The situation will, however, stand on different footing in a case where a tribal man marries a non-tribal woman (forward class) then the offshoots of such wedlock would obviously attain the tribal status. However, the woman (if she belongs to a forward class) cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practised by the tribals from time immemorial and accepted by the community of the village as a member of tribal society for the purpose of social relations with the village community. Such acceptance must be by the village community by a resolution and such resolution must be entered in the village register kept for the purpose. Often than not, such acceptance is preceded by feast/rituals performed by the parties where the elders of the village community participated. However, acceptance of the marriage by the community itself would not entitle the woman (forward class) to claim the appointment to the post reserved for the reserved category. It would be incongruous to suggest that the tribal woman, who suffered disabilities, would be able to compete with the woman (forward class) who does not suffer disabilities wherefrom she belongs but by reason of marriage to tribal husband and such marriage is accepted by the community would entitle her for appointment to the post reserved for the Scheduled Castes and Scheduled Tribes. It would be a negation of constitutional goal.

7. It is not disputed that the couple performed court marriage outside the village; settled down in Gaya and their son, the appellant also born and brought up in the environment of forward community did not suffer any disability from the society to which he belonged. Mr Krishnamani, learned Senior Counsel contended that the appellant used to visit the village during recess/holidays and there was cordial relationship between the appellant and the village community, which would amount to the acceptance of the appellant by the village community. By no stretch of imagination, a casual visit

to the relative in other village would provide the status of permanent resident of the village or acceptance by the village community as a member of the tribal community.”

28. The Court in para 6 of the judgment in Anjan Kumar case, as quoted above, applied the test of acceptance in the community in which the woman gets married. But more importantly in para 7 of the judgment went into the specifics of the case on the question of upbringing of the appellant Anjan Kumar and recorded a finding of fact that he was “brought up in the environment of forward community (and) did not suffer from any disability from the society to which he belonged”. Having arrived at the aforesaid finding of fact the Court proceeded to refer to several decisions, including Valsamma and the judgment of Sinha, J. in Punit Rai (in particular para 27 of the judgment) and in para 14 came to observe and hold as follows:

“14. In view of the catena of decisions of this Court, the questions raised before us are no more res integra. The condition precedent for granting tribe certificate being that one must suffer disabilities wherefrom one belongs. The offshoots of the wedlock of a tribal woman married to a non-tribal husband—forward class (Kayastha in the present case) cannot claim Scheduled Tribe status. The reason being such offshoot was brought up in the atmosphere of forward class and he is not subjected to any disability. A person not belonging to the Scheduled Castes or Scheduled Tribes claiming himself to be a member of such caste by procuring a bogus caste certificate is a fraud under the Constitution of India. The impact of procuring fake/bogus caste certificate and obtaining appointment/admission from the reserved quota will have far-reaching grave consequences. A meritorious reserved candidate may be deprived of reserved category for whom the post is reserved. The reserved post will go into the hands of non-deserving candidate and in such cases it would be violative of the mandate of Articles 14 and 21 of the Constitution.”

(Emphasis added)

Here the Court said that “the offshoots of the wedlock of a tribal woman married to a non-tribal husband-forward class (Kayastha in the present case) cannot claim Scheduled Tribe status”. But it was not on the reasoning of Valsamma that in an inter-caste marriage or in a marriage between a tribal and a non-tribal the woman gets transplanted into the community of the husband and gets her caste from the husband (para 31 of the judgment in Valsamma case) or the reasoning in Sinha, J.’s judgment that in the absence of any statutory law a person would inherit his caste from his father and not his mother even in a case of inter-caste marriage (para 27, Punit Rai case). Here the reasoning is that, “... such offshoot was brought up in the atmosphere of forward class and he is not subjected to any disability”. That is exactly the reasoning of Valsamma in para 34 of the judgment and that as noted above is the true ratio of the decision in Valsamma. It is, thus, clear that it is wrong and incorrect to read Valsamma, Punit Rai and Anjan Kumar as laying down the rule that in an inter-caste marriage or a marriage between a tribal and a non-tribal, the child must always be deemed to take his/her caste from the father regardless of the attending facts and circumstances of each case.”

(Emphasis supplied)

10. He has then canvassed that the petitioner’s case can be considered in the light of the law laid down by the Hon’ble Supreme court in the case of **Rameshbhai (supra)**. To strengthen his submissions, he has relied upon paragraphs 32, 33 and 34, which read thus:-

“32. After reaching this conclusion the Privy Council further noted that an additional difficulty in holding the estate of the widow to be divested

“may, perhaps, be found in the doctrine of Hindoo Law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection”.

33. The second decision of the Privy Council in *Lulloobhoy Bappoobhoy Cassidass Moolchund*, raised the question whether the widow of a paternal first cousin of the deceased became-by her marriage-a gotraja sapinda of the deceased, and whether she was, therefore, entitled to succeed to the estate in preference to male gotraja sapindas who were more distant heirs. The Privy Council, based on an interpretation of the Mitakshara law as it prevailed in Bombay at that time, affirmed the widow's right of inheritance.

34. The Privy Council observed:

“It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. ... Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered?”

(Emphasis supplied)

11. The learned amicus curiae has then drawn our attention to paragraphs 44 to 48 in ***Rameshbhai (supra)***, which are as under:-

*“44. The observation made by Gajendragadkar, J. half a century ago was tellingly shown to be true in *Rajendra Shrivastava v. State of Maharashtra*, a case that came before the Full Bench of the Bombay High Court. In *Rajendra Shrivastava* a Scheduled Caste woman, who had married a man from an upper caste, accused her husband and his family members of subjecting her to cruelty and abusing her in the name of her caste. A case was accordingly instituted against the accused, including the husband, under Sections 498-A, 406, 494, 34 of the Penal Code, 1860 read with the provisions*

of Sections 3(1)(ii) and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the anticipatory bail application filed on behalf of the husband it was contended that on getting married with him the complainant had assumed his caste and lost her identity as a Scheduled Caste person. She could, therefore, make no complaint under the provisions of the SCs and STs (Prevention of Atrocities) Act. It goes without saying that in support of the contention raised on behalf of the husband strong reliance was placed upon the observations made in Valsamma in para 31 of the judgment.

45. *The Full Bench in Rajendra Shrivastava case before which the matter came up for consideration on reference framed the following issue as arising for consideration:*

“If a woman who by birth belongs to a Scheduled Caste or a Scheduled Tribe marries to a man belonging to a forward caste, whether on marriage she ceases to belong to the Scheduled Caste or the Scheduled Tribe?”

46. *The Full Bench of the Bombay High Court in Rajendra Shrivastava case examined Valsamma in light of the two Constitutional Bench decisions of this Court, namely, Indra Sawhney v. Union of India and V.V. Giri v. D. Suri Dora. The Full Bench also considered the law of precedent and referred to the decision of this Court in State of A.P. v. M. Radha Krishna Murthy. It finally came to hold that the observations made in para 31 of the decision in Valsamma cannot be read as the ratio laying down that on marriage, a wife is automatically transplanted into the caste of her husband. In para 12 of the judgment in Rajendra Shrivastava the Full Bench of the Bombay High Court it held as follows:*

“When a woman born in a Scheduled Caste or a Scheduled Tribe marries to a person belonging to a forward caste, her caste by birth does not change by virtue of the marriage. A person born as a member of a

Scheduled Caste or a Scheduled Tribe has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with the person belonging to a forward caste. The label attached to a person born into a Scheduled Caste or a Scheduled Tribe continues notwithstanding the marriage. No material has been placed before us by the applicant so as to point out that the caste of a person can be changed either by custom, usage, religious sanction or provision of law."

We fully endorse the view taken by the Bombay High Court and we feel that in the facts of the case that was the only correct view.

47. *In light of the discussion made above it is clear that the view expressed in para 31 of the Valsamma judgment that in an inter-caste marriage or a marriage between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of the constitutional law is a proposition, the correctness of which is not free from doubt. And in any case it is not the ratio of the Valsamma decision and does not make a binding precedent.*

48. *It is also clear to us that taking it to the next logical step and to hold that the offspring of such a marriage would in all cases get his/her caste from the father is bound to give rise to serious problems. Take for instance the case of a tribal woman getting married to a forward caste man and who is widowed or is abandoned by the husband shortly after marriage. She goes back to her people and the community carrying with her an infant or may be a child still in the womb. The child is born in the community from where her mother came and to which she went back and is brought up as the member of that community suffering all the deprivations, humiliations, disabilities and handicaps as a member of the community. Can it still be said that the child would have the caste of his father and, therefore, not entitled to any benefits,*

privileges or protections sanctioned by the Constitution.”

(Emphasis supplied)

12. Considering the law laid down in ***Rameshbhai (supra)***, we find that the case of the petitioner is squarely covered by the conclusion drawn in paragraph 48, reproduced hereinabove. The mother of the petitioner married the father of the petitioner who belongs to the same caste. It was not an inter-caste marriage. Since the husband started residing with another lady, and drove out the mother of the petitioner, she was, thus, abandoned shortly after her birth. In order to survive and to rear and nurture the petitioner, who was a tender child of around two years, that she returned to her parent's home in Nanded and ever since then she has been residing with her parents. The petitioner was brought up in such a background and who is a witness to the entire sufferings of the mother, her deprivation, humiliation, discomfort and handicaps, being a member of a Scheduled caste community and more so when the society was looking upon her as an abandoned married lady. The petitioner has not only witnessed all these sufferings of her mother, but has suffered in equal measure as well. She has lived such a life each day in the shadow of her mother and despite such a background of having faced such sufferings, she is now a Bachelor of Engineering.

13. In conclusion, the Hon'ble Supreme Court held in paragraph Nos. 53 to 55 in ***Rameshbhai (supra)***, as under:-

“53. In Arabinda Kumar Saha v. State of Assam a Division Bench of the Gauhati High Court had a case before it in which a person whose father belonged to the upper caste and mother to a Scheduled Caste claimed the Scheduled Caste status. The Court found and held that though the father of the writ petitioner was admittedly a forward caste man he was brought up as a member of the Scheduled Caste. This was evident from the fact that the writ petitioner had not only been the office-holder of Anusuchit Jati Karamchari Parishad but the Scheduled Caste community treated the appellant as belonging to the Scheduled Caste and even the non-Scheduled Caste people treated him as Scheduled Caste, inasmuch as in his college career and in his service career he was treated as a person belonging to a Scheduled Caste.

54. In view of the analysis of the earlier decisions and the discussion made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case.

55. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the Scheduled Caste/ Scheduled Tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humiliations and handicaps like any other member of the community to

which his/her mother belonged. Additionally, that he was always treated as a member of the community to which her mother belonged not only by that community but by the people outside the community as well.”

14. The case of the petitioner before us is on a better foundation. Her mother was married within her caste. She lived as an abandoned mother and reared the Petitioner in the same community. Whether from her father or her mother, the Petitioner inherits the same caste and this cannot be disputed. The only issue is as to whether she can rely on the documents from her maternal side for establishing her social status as belonging to the Mahar scheduled caste category in the peculiar facts and circumstances.

15. The learned amicus curiae relied upon the judgment delivered by this Court in ***Vishal Ashok Acharya vs. Scrutiny Committee for Verification of Caste Certificate, MANU/MH/ 2407/2014***. In a short judgment, this court has considered the peculiar facts of the case which are quite a similar to the facts before us and by placing reliance upon ***Rameshbhai (supra)***, this Court concluded in paragraphs 10, 11 and 12, as under:-

“10. The petitioner however, can very well take support of the judgment of the Supreme Court in the matter of Rameshbhai Dabhai Naika (supra) and contend that since the mother admittedly belongs to ‘other backward class’ category and that he has been brought up by his mother and has suffered the deprivation, indignities, humiliations and handicaps like any other member of the backward community to which

he and his mother belong, he shall be considered as a member of 'other backward class' and the caste certificate issued in his favour shall be validated.

11. *In Rameshbhai Dabhai Naika (supra), the petitioner, a child born out of an intercaste marriage between upper caste father and tribal mother has claimed the benefits available to 'Naika' a scheduled tribe and requested for issuance of the certificate. The request of the petitioner was rejected by the Scrutiny Committee and the said order was confirmed by the High Court and, as such, the matter was taken up before the Supreme Court. The Supreme Court while dealing with the issue has observed in paragraph no. 55 of the judgment as quoted below:*

In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humiliations and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

12. *In the instant matter also the petitioner claims that by virtue of he being son of a father, who belongs to caste recognised as backward in the State of Karnataka and has migrated to the State of Goa and the caste of his father 'Acharya/Achari' is not recognised as 'OBC' in State of Goa*

and that his father having got married with his mother, who admittedly belongs to 'other backward' community has suffered deprivation, indignities, humiliations and handicaps like any other member of the backward community. The father of the petitioner died while he was of tender age of 13 years and he was brought up by his mother. These circumstances ought to have been considered by the Scrutiny Committee and the caste certificate issued in his favour ought to have been validated. This aspect of the matter has not been dealt with by the Scrutiny Committee in its proper perspective. We are of the view that the petitioner needs to be extended an opportunity to lead proper evidence before the Scrutiny Committee and put forth his contentions to support his claim in consonance with the judgment in the matter of Rameshbhai Dabhai Naika cited supra. The Scrutiny Committee in our view has erroneously brushed aside the contentions raised by the petitioner based upon the judgment in the matter of Rameshbhai Dabhai Naika (supra). The Scrutiny Committee, in our view, needs to reconsider the matter. The evidence placed on record by the petitioner needs to be appreciated in the light of observations made by us in this judgment. The petitioner also shall be extended an opportunity to lead further evidence, if deemed necessary. The respondent no. 2, who has lodged an objection shall also be extended an opportunity of hearing by Scrutiny Committee. Judgment and order passed by the Scrutiny Committee on 10/06/2014 thus deserves to be quashed and set aside and the same is accordingly quashed and set aside. The matter stands remitted back to the Scrutiny Committee for disposal in accordance with law and in the light of observations made in this judgment. The Scrutiny Committee shall permit the petitioner to lead further evidence in the matter and tender further documents in support of his claim. The respondent no. 2 shall also be extended an opportunity of hearing by Scrutiny Committee. The Scrutiny Committee shall after observing the procedure prescribed in that behalf shall decide the matter afresh as expeditiously as possible preferably within a period

of 6 months from the date of the appearance of the petitioner before the Scrutiny Committee. The petitioner as well as respondent no. 2 shall appear before the Scrutiny Committee on 5/01/2015 and, as such, no separate notice requiring their presence before the Scrutiny Committee shall be necessary. The parties shall have liberty to raise all contentions before Scrutiny Committee."

16. The learned amicus curiae then referred to few more judgments which have been delivered by the Bombay High Court and by other State High Courts. He has then delved upon a larger issue which we may not consider in this case that any candidate must be given an option to rely upon the social status of his mother or father since both of them are equal under the Constitution. According to him, the liberty should be left with the candidate to rely upon the caste of either of the parents and the documents available either from the paternal side or maternal side. In support of his contention, he has relied upon the judgment delivered by the Hon'ble Supreme court in ***Ms. Githa Hariharan and another vs. Reserve Bank of India and another, AIR 1999 SC 1149*** and has specifically relied upon paragraphs 2, 8, 9, 14, 16 and 45, which read as under:-

"2. The facts in WP (C) No. 489 of 1995 are shortly as follows: the first petitioner is the wife of the second petitioner. The first petitioner is a writer and several of her books are said to have been published by Penguin. The second petitioner is a Medical Scientist in Jawaharlal Nehru University, New Delhi. They jointly applied to the Reserve Bank of India (first respondent) on 10-12-1984 for 9% Relief Bonds in the name of their minor son Rishab Bailey for Rs 20,000. They stated expressly that both of them agreed that

the mother of the child, i.e, the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. The first respondent replied to the petitioners advising them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. That lead to the filing of this writ petition by the two petitioners with prayers to strike down Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the HMG Act) and Section 19(b) of the Guardian and Wards Act, 1890 (hereinafter referred to as the GW Act) as violative of Articles 14 and 15 of the Constitution and to quash and set aside the decision of the first respondent refusing to accept the deposit from the petitioners and to issue a mandamus directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor.

8. *Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word “after” in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as the guardian of the minor during the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only after the lifetime of the father and not during his lifetime.*

9. *Is that the correct way of understanding the section and does the word “after” in the section mean only “after the lifetime”? If this question is answered in the affirmative, the*

section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e, six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion - No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

14. The message of international instruments – the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them. (See with advantage Apparel Export Promotion Council v. A.K Chopra 1999 1 SCC 759.)

16. While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her

actions would be valid even during the lifetime of the father, who would be deemed to be “absent” for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act.

45. Be it noted further that gender equality is one of the basic principles of our Constitution and in the event the word “after” is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not dehors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter, the word “after” shall have to be interpreted in terms of the constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used.”

17. As we appreciate the contentions of the learned amicus curiae, we would steer away from the issue as to whether the father, by reason of a dominant personality, could be ascribed a preferential right over the mother independently or whether the issue of guardianship and all issues in connection with the social status of either of the parents, have to be left open for an offspring to exercise the right of election. This issue does not arise before us and we, therefore, would not delve into it, leaving the said issue open to be considered in a suitable case wherein such issue is raised for adjudication.

18. For the present, we refer to a circular issued by the Government of National Capital Territory of Delhi, dated 13.7.2022, wherein all authorities who are to issue caste/tribe certificates, are directed to issue certificates to children of Divorced/Separated/Single women by considering the record from the maternal side. He has also cited a circular issued by the Government of India, Ministry of Social Justice and Empowerment, Department of Social Justice and Empowerment, dated 03.10.2019, with reference to the caste status of an offspring of separated/divorced/single women. The law laid down in ***Rameshbhai (supra)*** has been considered and all authorities are directed to follow the said law while accepting the claim of an offspring born to separated/divorced/ single women.

19. The learned A.G.P. representing the committee has strenuously opposed this petition. He submits that the committee is bound by the provisions of the Maharashtra Scheduled Castes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Rules, 2012. He refers to the definition clause, more particularly to Rule 2(e) as regards the 'deemed date' and contends that a person's roots must be traced to the place where he ordinarily resides from the deemed date which is 10.08.1950, the date of the Presidential Order for scheduled Castes, 21.11.1961 for De-notified Tribes (Vimukta Jatis) and Nomadic Tribe and 13.10.1967 for Other Backward Classes and Special Backward Category. He then refers to Rule 2(h) which defines 'Relative' to

mean a blood relative from the paternal side of the applicant as per the genealogy. He then refers to Rule 3(1) and (2) to canvass that the competent authority can issue the caste certificate to the applicant who is a permanent resident of the concerned area on the deemed date, for which the Competent Authority is designated or appointed, by the Government. In case the applicant is born after the deemed date, the place of ordinary residence for the purpose of issuance of caste certificate shall be the place of permanent residence of his father or grandfather or great grandfather. He has then referred to Rule 4(2) (a) and (b) to strengthen his submission that it is only the father and no one else whose record is to be considered as a basis for issuing the caste or tribe certificate. He adverts to the type of record that is to be scrutinized by the competent authority and asserts that the said records have to be in relation to the father and nobody else.

20. The learned A.G.P. then refers to Rule 5 which contemplates the procedure to be followed by the competent authority for issuance or rejection of the caste certificate. He, therefore, submits that the committee has no option but to insist on the record of the father and lend no significance to the record from the maternal side.

21. Considering the above, we find that though the Rules and the provisions of the Act are in place, the law laid down in ***Rameshbhai (supra)***, ***Valsamma (supra)*** and the judgments cited by the learned amicus curiae dealing with peculiar cases, we are required to

consider the factum of such cases of women, having been abandoned, divorced, separated or are living as single women. The issue is that the problems suffered by such women and their children has been looked into by the Hon'ble Supreme Court and based on ***Rameshbhai (supra)***, this court has also delivered several judgments, concluding that such women and their children have to be dealt with in a different manner. In our considered view, the committee should find itself educated by the law laid down by the Hon'ble Supreme Court and the High Courts and the conclusions drawn by the Courts in judicial pronouncements, should enlighten the committee. The time has come for this court to warn such committees and caution them to fall in line with the view expressed by the Hon'ble Supreme court in the cases which are squarely covered by such judicial pronouncements. The case before us cannot be termed as a unique case. It is one such type of a case which has been dealt with by several courts and the judgments delivered in ***Rameshbhai (supra)*** and ***Valsamma (supra)***, have rendered an answer to such issue.

22. The learned A.G.P. has canvassed the issue of migration which has been the basis of the impugned order. The committee took a view that the mother of the Petitioner has migrated from Karnataka to Maharashtra and, hence, the Petitioner cannot be issued a scheduled caste certificate from any place in Maharashtra. Consequentially, she cannot be granted a validity certificate by any committee/authority from Maharashtra. The learned AGP has, therefore, canvassed that

the committee has rightly passed the impugned order concluding that the petitioner will have to acquire a certificate and a validity from Karnataka.

23. We find that the competent committee has completely misconstrued the legal concept of migration. Within a period of two years, a married woman is abandoned and driven out of her house who comes back to Nanded to reside with her parents. This cannot be termed as migration. The petitioner was born at Nanded. Pursuant to her mother being driven out, her accompanying her as a baby held in her arms, cannot be termed as migration. The mother of the petitioner had not come to Nanded to search for career prospects or to earn a livelihood. She was compelled by circumstances to leave her matrimonial home upon being driven out. She had no desire to return to her parents and that too in such circumstances, but on account of the matrimonial discord, that she was compelled to reside at Nanded. This cannot be termed as migration. We are of the view that the committee has stretched the issue of migration too far and instead of adopting a pragmatic approach had resorted to a pedantic view bereft of humane touch. Instead of dealing with such a case with a high degree of sensitivity and by adopting a humane approach, the committee has acted mechanically which we completely disapprove of.

24. In view of the above, this petition is allowed. The impugned order dated 17.01.2019 is quashed and set aside. The petitioner's

caste certificate bearing No. 6514 dated 26.08.2014 is rendered legal and appropriate and the direction of cancelling the said certificate is quashed and set aside.

25. Since the petitioner has succeeded in this court, the proposal of the Petitioner for seeking validity, which has been discarded by the committee, shall stand restored and the committee shall proceed from the stage at which it was rejected. The petitioner would render co-operation for an early decision in the said proceedings and the committee shall deliver it's order on or before 15.04.2023.

26. Rule is made absolute in the above terms.

27. We express our appreciation for the able assistance rendered to the Court by the learned Senior Advocate, Shri V. D. Sapkal.

(SANJAY A. DESHMUKH, J.)

(RAVINDRA V. GHUGE , J.)

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