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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 5th January, 2024
Date of decision: 15th May, 2024
+ **W.P.(C) 1754/2020 & CM APPL. 6133/2020**

RACHITA FRANCIS XAVIER Petitioner
Through: Mr. Bharadwaj S. Iyengar & Mr.
Vikas Upadhyay, Advocates,
(M.9871900105)

versus

UNION OF INDIA & ORS. Respondent
Through: Mr Anurag Ahluwalia CGSC with
Mr Abhigyan Siddhant Adv. R, 1-3.
(M. 9811418995)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been held through hybrid mode.

Background

2. This writ petition has been filed by the Petitioner, Rachita Francis Xavier – a young girl who was born, raised and educated in India. She is now 17 years of age and has never held a passport. She was born to Indian parents who had acquired US citizenship. Her parents were in India when she was born, however, as neither of her parents were Indian citizens at the time of her birth, her application for issuance of a passport was rejected by Respondent No.3- Regional Passport Officer, Bengaluru, vide order dated 6th November 2019. The Petitioner seeks issuance of a passport and also seeks quashing of the office memorandum dated 25th October, 2018 issued by the Ministry of



External Affairs, which was the basis for the rejection of her passport.

3. The Petitioner – Ms. Rachita Francis Xavier, who is a minor, was born on 7th November, 2006 to Mr. Joseph Francis Xavier – father and Ms. Leela Francis Xavier– mother in Andhra Pradesh, India. Both her parents were earlier Indian citizens. However, her father acquired citizenship of the United States of America (USA) on 28th September, 2001. Similarly, her mother acquired citizenship of the USA on 28th July, 2005. Thus, on the date she was born in India, both her parents were not Indian citizens. However, they had been granted the status of Overseas Citizens of India in June, 2006 and were OCI card holders.

4. The Petitioner pursued her education at St. Michaels’ High School, Bengaluru under the ICSE Board. However, she has currently discontinued her schooling after 9th Standard. She is stated to be taking courses with Kenpro Learning and submitted before the Court that she is interested in taking up web designing and web development courses as also some advanced computer courses abroad. For the said purposes, she requires a passport as the minimum travel document. She does not possess any travel documents and has therefore, remained in India since birth.

5. In this background, on 30th September, 2019, the Petitioner submitted her application for issuance of a passport to enable her to travel abroad. The parents of the Petitioner also submitted all the necessary forms for the said purpose. The Petitioner also has an Aadhaar card which was issued to her. The Regional Passport Office, Bengaluru on 6th November, 2019, refused to issue her passport by citing Section 6(2)(a) read with Section 5(2)(c) of the Passports Act, 1967. The said order records that both parents had renounced Indian citizenship and in view of the Ministry’s circular dated 25th October,



2018, the Petitioner is not entitled to be recognized as an Indian citizen. Various RTI applications were filed by the Petitioner. The Office Memorandum dated 25th October, 2018, bearing No. V1/401/1/1/2018, issued by the Chief Passport Officer, PSP Division, Ministry of External Affairs, India has been relied upon by the Petitioner, as per which, a child born in India does not acquire Indian citizenship automatically by birth until the conditions laid down in the Citizenship Act, 1955 read with Citizenship Amendment Act, 2003 are satisfied. The said Office Memorandum is relevant and is set out below:

“OFFICE MEMORANDUM

Subject: Modification in para 3.1(b) of Chapter 9 of Passport Manual 2016-Reg.

Ministry has been receiving several queries seeking clarifications on the issue of passport to Minors, especially when their Indian citizenship has to be confirmed for the purpose of Issuance of Indian passport.

2. As clarified by MHA, para 3.1 of Chapter 9 of the Passport Manual, 2016, Is revised as under:

3.1 Eligibility of a minor for an Indian Passport:

a) A child does not acquire Indian citizenship automatically by birth in India. The conditions laid down in the Citizenship Act, 1955 read with the Citizenship (Amendment) Act, 2003 are to be satisfied for the child to qualify as a citizen of India before Indian passport could be issued to the child.

b) In cases where one parent has renounced the Indian citizenship and the other parent is still an Indian citizen, the citizenship of the minor shall be of that person who has legal custody of that minor child and the eligibility of an Indian passport will be determined on the basis of his/her citizenship.



c) If both parents have acquired foreign citizenship, the minor child ceases to be an Indian citizen and hence not eligible for an Indian passport.

d) Every minor child of a person (either parent) who has renounced Indian citizenship may, however, within one year after attaining full age, make a declaration in the prescribed form and manner that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India. Eligibility for an Indian passport in this case would be subject to resumption of Indian citizenship and due certification to that effect by the Ministry of Home Affairs.

e) The requirements of Police Verification for minors will be as per Chapter 3 of the Passport Manual, 2016.”

6. The present writ petition then came to be filed seeking the following reliefs:

“a) Issue a Writ in the nature of certiorari to quash the circular dated 25/10/2018 issued by the Ministry of External Affairs in consultation with Ministry of Home Affairs; and/or

b) Issue a Writ in the nature of Mandamus or any other appropriate writ, order, direction against the Respondent No. 1 to remove the travel embargo on the Petitioner and direct the concerned authorities to reconsider the application of the Petitioner dated 30/09/2019 for issuance of the Passport facilities to the Petitioner; and/or

c) Issue a Writ in the nature of Mandamus or any other appropriate writ, order, direction against the Respondents to issue the Passport facilities to the Petitioner without any further delay; and/ or

d) Pass any other orders as the Court may deem fit in the interest of justice”



7. The writ petition was listed before the Court on 17th February, 2020 and on the said date, the Court directed one of the parents of the Petitioner to file an affidavit before the Court that the Petitioner does not hold any passport of the United States of America. In compliance with the said direction, the father of the Petitioner filed the requisite affidavit dated 24th February, 2020 stating that neither was the Petitioner ever holding a passport of the USA, nor was the Petitioner ever a citizen of the USA or any other country. Consequently, upon filing of the requisite affidavit, and Mr. Ahluwalia, Id. CGSC for the Respondents, requesting to file a counter affidavit, notice was deemed to have been issued and the Respondents were asked to clarify their stand in respect of the reliefs sought in the present writ petition.

8. Vide order dated 14th December, 2022, the Court had directed the Union of India to consider as to whether the age can be relaxed in terms of this Office Memorandum for obtaining a declaration and issuance of a passport. The relevant extracts of the said order are set out below:

“4. In light of the factual matrix of the case, the issue that now arises in this matter is as to whether the Petitioner, who is a minor, can give a declaration prior to attaining the ‘full age’ that she intends to obtain Indian Citizenship and her application can then be considered for obtaining an Indian passport and what is the meaning of ‘full age’ in the impugned office memorandum.

*5. In the opinion of the Court, **the impugned office memorandum does not take care of various scenarios which could arise when a minor may wish to obtain Indian Citizenship and an Indian Passport, though, both the parents are foreign nationals.***

6. Let instructions in this regard be obtained by Mr. Ahluwalia, CGSC as to whether the age can be relaxed for the purpose of obtaining the declaration under the



office memorandum dated 25th October, 2018 under these facts and circumstances of the present case.

7. The Petitioner shall file within two weeks an affidavit giving the details of the school, in which grade the Petitioner is studying, with whom she is staying in Bangalore and her relationship with the said person/s.”

9. The Union of India had, however, reverted and stated on 26th April, 2023 that unless and until the Petitioner attains majority and gives a declaration, a passport cannot be issued to her. In fact, on the said date, the Petitioner and her father had joined the proceedings virtually. The father stated that he is working in a U.S. based company, but he has an option for work from home and is thus residing in Bengaluru with his daughter.

10. Vide order dated 30th October, 2023, the Court recorded that the following two issues arise for consideration.

“i) Whether the Petitioner ought to be directed to apply for citizenship in India under Section 5(1)(a) of the Citizenship Act.

ii) Whether the Petitioner would be considered as an illegal migrant.”

11. Submissions have been thereafter heard on behalf of the Petitioner and the Respondent. The stand of the Respondent in its affidavit dated 20th July, 2021 is that impugned order is an appealable order under Section 11 of the Passport Act, 1967. Further, the Office Memorandum dated 25th October, 2018 is relied upon that a child of two parents who have both acquired foreign citizenship, would not be entitled to an Indian passport. Further to order dated 30th October, 2023, when the two issues were crystalized, an affidavit dated 3rd January, 2024 has been filed by the Ministry of Home Affairs (MHA), as per which since the details of the place and date of birth of the father were not



available, the Petitioner cannot be considered as a person of Indian origin. The MHA also took the position that she would be considered an illegal migrant under Section 2(1)(b) of the Act as she does not have any valid travel document, or a visa under which she can stay in India.

Contentions of the Petitioner

12. In response to the denial of a passport as per the Refusal Order dated 6th November, 2019, which references the impugned Office Memorandum, Id. Counsel for the Petitioner has submitted that the memorandum is discriminatory and arbitrary. According to Id. Counsel, the impugned memorandum prevents the Petitioner, who is a minor born in India and not an illegal migrant, from obtaining citizenship and a passport solely because of her age. He submits that the Memorandum discriminates against minors by excluding them from immediate citizenship eligibility, even though they may otherwise be eligible to get citizenship. It is asserted by the Id. Counsel for the Petitioner that the consequence of the impugned memorandum is that the Petitioner is rendered stateless, and her Fundamental Right to life, personal liberty, and travel, are impinged.

13. According to the learned counsel for the Petitioner, the action of the Passport Authorities is not only arbitrary but also overlooks legal provisions that permit a minor to exercise their rights through a legal guardian. He emphasizes that such a restrictive interpretation ought not to be applied for the grant of citizenship to the Petitioner, solely based on her minor status.

14. In response to the contention surrounding the status of the Petitioner as an illegal migrant, Id. Counsel for the Petitioner refers to the Amendment of 2004 to the Citizenship Act, 1955, which revised Section 2(1)(b) of the Citizenship Act, 1955, to define an “*illegal migrant*” as a foreigner who either



entered India without a valid passport or other valid travel document, or one who overstays despite entering with a valid passport. It is his submission that the Petitioner does not fall within the scope of definition of “*illegal migrant*,” especially considering the fact that the Petitioner has never gone out of India. Ld. Counsel also emphasizes that the legislative framework is clear in distinguishing between illegal migrants and other classes of persons associated with India.

15. Ld. Counsel also highlights that while OCI cardholders are restricted from public employment, running for certain elected offices, and appointments within higher judicial positions, they retain all other civil rights accorded to Indian citizens. Consequently, he submits that given that the Petitioner was born to parents who are registered OCIs, she cannot be treated as an illegal migrant. He also contends that the amendments to the Citizenship Act, 1955 were primarily enacted to prevent illegal migrants from neighbouring countries from obtaining Indian citizenship by birth for their children. Since the Petitioner or her parents, do not fall into the category of illegal migrants, she is, therefore, entitled to pursue citizenship under the Constitution as also the Citizenship Act, 1955.

16. Accordingly, Id. Counsel for the Petitioner has submitted that, Central Government has the clear authority under Section 5(4) of the Citizenship Act, 1955, to register a minor as an Indian citizen. Further, he contends that since the Petitioner is not an illegal migrant and is otherwise eligible for citizenship and a passport, she cannot be denied these rights solely because she is a minor. According to Id. Counsel, such denial would violate Articles 14 and 21 of the Constitution of India.



Contentions of the Respondents

17. Initially, the Respondents had filed a counter affidavit dated 20th July, 2021 and raised a preliminary objection, challenging the maintainability of the present writ petition. It was the averment of the Respondents that the present petition ought to be dismissed on the ground that an alternate efficacious remedy under Section 11 of the Passports Act, 1967 was available to the Petitioner. The Respondents also contended that the existence of this remedy had been communicated to the Petitioner along with the refusal order dated 6th November, 2019.

18. Without prejudice to the above contention, the Respondents have submitted that as per Section 6(2)(a) of the Passport Act, 1967, the Regional Passport Office, Bengaluru was obligated to refuse the issuance of a passport or travel document to the Petitioner. It is their contention that as per the said provision, the Petitioner was not a citizen of India and consequently, no Passport or Travel Document could be issued to the Petitioner.

19. In the counter affidavit, the Respondents have highlighted that both the parents of the Petitioner have acquired citizenship of the USA, (the father on September 28, 2001, and the mother on July 28, 2005) as acknowledged by the Petitioner in the petition. Therefore, as per the Respondents under Section 8(2) of the Citizenship Act, 1955, the Petitioner, as a minor child of individuals who have renounced their Indian citizenship, ceases to be an Indian citizen. Consequently, the Petitioner is not eligible to obtain an Indian passport, in accordance with Paragraph 3.1(c) of the impugned office memorandum. Finally, the Respondents have also averred that in view of the fact that both the parents of the Petitioner were foreign citizens at the time of her birth, the Petitioner does not qualify to be an Indian Citizen under Section



3(1)(c) of the Citizenship Act, 1955.

20. Mr. Ahluwalia, Id. CGSC, representing the Respondents has relied upon an affidavit dated 4th January, 2024 which has been shown to the Court electronically. As per the said affidavit, it is stated that the Petitioner would not even fall in the category of a person of Indian origin in terms of Explanation 2 of Section 5(1) of the Citizenship Act, 1955 as there are no details of the birthplace of the father of the Petitioner available with the Respondents. Further through the affidavit, it is submitted that if the father of the Petitioner was born in Undivided India or such territory which became part of the India after 15th August, 1947, the Petitioner may be eligible to be considered as a “*person of Indian origin.*” Secondly, he submits that insofar as the question as to whether the Petitioner is an illegal migrant is concerned, in terms of Section 2(1)(b) of the Citizenship Act, 1955, since the Petitioner does not have a valid travel document, she would be construed as an illegal migrant. The parents being foreigners had an obligation to register her with the FRRO immediately within 90 days after her birth which has not been done in this case and, therefore, she is staying in India without a valid permission.

21. Finally, Mr. Ahluwalia, Id. Counsel, representing the Respondents submits that there are only three methods in which the citizenship can be acquired in India:

- i. By birth, in terms of Section 3(1)(c) if one of the parents is an Indian Citizen.
- ii. By way of registration under Section 5 if a person is of Indian origin.
- iii. Under Section 8, if the person after attaining full age makes a declaration that he or she wishes to resume India citizenship.



22. In addition, he submits that the provision relating to the OCI Card holders under Section 7A of the Citizenship Act, 1955 would not apply, as the person has to be an overseas citizen first and only then an OCI card can be granted. According to Mr. Ahluwalia, Id. CGSC, under Section 8 of the Citizenship Act, 1955, if both parents were Indian citizens at the time of renunciation, then she could have applied under Section 8 of the Citizenship Act, 1955.

Additional Submissions by Mr. Bharadwaj, Id. Counsel for the Petitioner

23. On the other hand, Mr. Bharadwaj, Id. Counsel for the Petitioner, submits that a person of Indian origin need not be seen only under Explanation 2 under Section 5 but also in terms of Section 7(a) of the Citizenship Act, 1955. According to him, even a child or a grandchild or great grandchild of a citizenship who may be born much after 1947 is entitled to an OCI card. Thus, if a person born abroad but to either parents, grandparents or great grandparents who were Indian citizens can be given an OCI card, the Petitioner who was born in Bengaluru to parents who were both Indian citizens and had obtained US passports just two years before birth, would be entitled to an Indian citizenship. He further submits that she has resided in India all through since birth and after the demise of mother she is now living with her father but has not been issued any travel document.

24. Id. Counsel further submits that as per Section 5 of the Act, if any person is not an illegal migrant, citizenship can be granted by registration and, thus, the Petitioner is entitled to a passport. He also relies on Section 5(4) of the Act that the Central Government has overarching powers under special circumstances to grant registration in case of minors who are to be registered as citizens of India.



25. He submits that the Citizenship Act, 1955 does not provide for the power to cure difficulties and, therefore, under Section 5(4) of the Act the Central Government has been vested with the power to register such persons who fall under special circumstances. He thus submits that the Petitioner is not an illegal migrant but she is a person of India origin and in view thereof she is entitled to citizenship under Section 5 of the Citizenship Act, 1955. Finally, he submits that in any event, even under Section 8 proviso of the Citizenship Act, 1955, the Petitioner can assume citizenship after she turns 18 and attains the age of majority. Currently, the Petitioner is 17 years of age. Thus, her case requires to be considered favourably.

Analysis and Findings

26. The Court has heard the Id. Counsels for parties at length and perused the records. The present writ petition presents the Court with a *vexata quaestio*. Central to the deliberation of this petition is the status of the minor petitioner- Ms. Rachita Francis Xavier, who presents a unique case of being born and raised in India to parents who were originally Indian citizens, but at the time of birth of the Petitioner, were American citizens. The issues before this Court are twofold:

- firstly, the legality of the denial of the passport based on her parents' citizenship; and
- secondly, the broader implications of this denial, particularly concerning the right to citizenship.

This case necessitates that the Court scrutinize the conditions imposed by the Citizenship Act, 1955, and the Passports Act, 1967, against the backdrop of both the Constitution and international human rights standards, *qua* the Petitioner.



27. Accordingly, in the present petition, this Court shall be considering the contentions of the Respondents that the Petitioner is liable to be classified as an illegal migrant, along with an examination of the provisions of the Citizenship Act, 1955 as it applies to the unique factual circumstances of the Petitioner as also the ‘Interplay Between National Law and International Law’ to determine how international covenants ratified by India align with the Citizenship Act. **‘Illegal migrant’**

28. The first and foremost issue that deserves consideration is whether the Petitioner is an ‘illegal migrant’ or not. Under Section 2(b) of the Citizenship Act, the said term is defined as under:

“2. Interpretation

(b) illegal migrant means a foreigner who has entered into India-

- (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf, or*
- (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;*

Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;”



29. The term '*migrant*' itself contemplates movement from one country to another that too of a foreigner. The Petitioner is not a migrant, as she was born in India and has not moved to India from any other country. In addition, both her parents were OCI card holders who were legally residing in India. They had not come to India illegally. Therefore, the definition of the term '*illegal migrant*' by itself would not apply to the Petitioner.

30. A perusal of the recent amendment to the proviso to Section 2(b) of the Citizenship Act, 1955 would show that the spirit of the said amendment is to give recognition even to those persons who have migrated to India prior to 31st December, 2014 from specified countries. Even if, as argued by the MHA, the definition of illegal migrant is considered, she is a person who could be covered under Section 2(b) proviso as she was born in India prior to 31st December, 2014 - however, the Petitioner is not from any of the identified countries and hence unable to obtain any benefit under the said Proviso.

'OCI card holders'

31. It is not in dispute that the Petitioner's father and mother who were earlier Indian citizens were OCI card holders. The mother has since passed away. The father's OCI card has been placed on record. Under Section 7(b), OCI card holders are entitled to all rights other than those rights mentioned in sub-Section (2). A perusal of sub-Section 7(b)(2) would show that broadly OCI card holders are not entitled to claim rights for the purpose of:

- a) Employment
- b) For contesting as President or Vice-President
- c) Appointment as a Judge in a constitutional court i.e., High Court or Supreme Court
- d) Not entitled to register as voters



- e) Not eligible for being Members of Parliament or Assemblies
- f) Not entitled to appointment in public services.

32. There are no other restrictions on OCI card holders on the number of days of stay in India. There is therefore a clear possibility of OCI card holders giving birth to a child in India while they are legally living here.

33. Thus, OCI card holders are free to stay in India and can also rear their families which is what has transpired in the present case. Both the parents who are OCI card holders have given birth to the Petitioner in India, she has continuously stayed in India since birth. She has been educated in India and she now seeks issuance of a passport.

34. It is relevant to note that the Petitioner does not have a travel document of any country and in effect is a Stateless person. Her closest connection is with India owing to her descent.

35. A perusal of the requirement of OCI card holders would show that any child, grand-child, or great-grandchild of a person who has been a citizen or even a minor child of a person who has been a citizen, would be entitled to an OCI card. Under the extant position, the Petitioner would in fact be entitled to OCI card under Section 7(a), even if she was born abroad. However, here the Petitioner was born in India.

Citizenship by Birth

36. There are various classes of citizenship that can be obtained in India. Section 3, recognizes citizenship by birth. The said provision reads:

“3. Citizenship by birth

(1) Except as provided in sub-section (2), every person born in India,-

(a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987,



- (b) *on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth,*
- (c) *on or after the commencement of the Citizenship (Amendment) Act, 2003, where-*
- (i) *both of his parents are citizens of India; or*
- (ii) *one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth,*
- shall be a citizen of India by birth.*
- (2) *A person shall not be a citizen of India by virtue of this section if at the time of his birth-*
- (a) *either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or*
- (b) *his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy."*

Section 3(1)(c) recognizes grant of citizenship to individuals whose both parents are citizens or one parent is a citizen while the other not being an illegal migrant. In the present case, both the parents of the Petitioner were citizens and are recognized as such, by issuance of OCI (Overseas Citizen of India) cards. Neither of them is an illegal migrant. Unfortunately, however, at that time of Petitioner's birth, both her parents had renounced Indian citizenship. Now, the mother of the Petitioner has also passed away. In view of this position, the Petitioner is not entitled to citizenship by birth.

Citizenship by descent

37. Section 4 of the Act recognizes citizenship by descent.

"4. Citizenship by descent



(1) A person born outside India shall be a citizen of India by descent -

(a) on or after the 26th day of January, 1950, but before the 10th day of December, 1992, if his father is a citizen of India at the time of his birth
or

(b) on or after the 10th day of December, 1992, if either of his parents is a citizen of India at the time of his birth:

Provided that if the father of a person referred to in clause (a) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless-

(a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

(b) his father is, at the time of his birth, in service under a Government in India:

Provided further that if either of the parents of a person referred to in clause(b) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless-

(a) his birth is registered at an Indian consulate within one year of its occurrence or on or after the 10th day of December, 1992, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

(b) either of his parents is, at the time of his birth, in service under a Government in India.

Provided also that on or after the commencement of the Citizenship (Amendment) Act, 2003, a person shall not



be a citizen of India by virtue of this section, unless his birth is registered at an Indian consulate in such form and in such manner, as may be prescribed-

- (i) within one year of its occurrence or the commencement of the Citizenship (Amendment) Act, 2003, whichever is later; or*
- (ii) with the permission of the Central Government, after the expiry of the said period*

Provided also that no such birth shall be registered unless the parents of such person declare, in such form and in such manner as may be prescribed, that the minor does not hold the passport of another country.

- (1A) A minor who is a citizen of India by virtue of this section and is also a citizen of any other country shall cease to be a citizen of India if he does not renounce the citizenship or nationality of another country within six months of attaining full age.*
- (2) If the Central Government so directs, a birth shall be deemed for the purposes of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.*
- (3) For the purposes of the proviso to sub-section (1), any person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution shall be deemed to be a citizen of India by descent only."*

If a person is born outside India and if either of the parents is a citizen of India at the time of birth, such person can obtain citizenship. Further, Section 4 contemplates grant of citizenship by descent. The Petitioner does not qualify under this provision, as the father was not an Indian citizen at the time of her



birth. He was a OCI card holder. In addition, she was not born abroad, but in India.

Citizenship by Registration

38. The third category under which citizenship can be obtained is one by Registration, under Section 5. The said provision reads:

“5. Citizenship by registration

(1) *Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provision of this Act if he belongs to any of the following categories, namely:-*

- (a) **a person of Indian origin who are ordinarily resident in India for seven years before making an application for registration;**
- (b) *a person of Indian origin who is ordinarily resident in any country of place outside undivided India;*
- (c) *a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration;*
- (d) *minor children of persons who are citizens of India;*
- (e) *a person of full age and capacity whose parents are registered as citizens of India under clause (a) of this sub-section or sub-section (1) of section 6;*
- (f) **a person of full age and capacity who, or either of his parents, was earlier citizen of independent India, and is ordinarily resident in India for twelve months immediately before**



making an application for registration:

(g) *a person of full age and capacity who has been registered as an Overseas Citizen of India Card holder for five years, and who is ordinarily resident in India for twelve months before making an application for registration.*

Explanation 1.- For the purposes of clauses (a) and (c), an applicant shall be deemed to be ordinarily resident in India if

(i) he has resided in India throughout the period of twelve months immediately before making an application for registration; and

(ii) he has resided in India during the eight years immediately preceding the said period of twelve months for a period of not less than six years.

Explanation 2.- For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, was born in undivided India or in such other territory which became part of India after the 15th day of August, 1947.

(1A). *The Central Government, if it is satisfied that special circumstances exist, may after recording the circumstances in writing, relax the period of twelve months, specified in clauses (f) and (g) and clause (i) of Explanation 1 of sub-section (1), up to a maximum of thirty days which may be in different breaks.*

(2) *No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.*

(3) *No person who has renounced, or has been deprived of, his Indian citizenship or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section*



- (1) except by order of the Central Government.
- (4) **The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.**
- (5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b)(ii) of article 6 or article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.
- (6) If the Central Government is satisfied that circumstances exist which render it necessary to grant exemption from the residential requirement under clause (c) of sub-section (1) to any person or a class of persons, it may, for reasons to be recorded in writing, grant such exemption."

39. In the present petition, the Respondents have stated in their affidavit, that if the Petitioner is held to be a person of Indian Origin, then she can be eligible to apply for citizenship under Section 5(1)(a) of the Citizenship Act, 1955. The relevant extract of the said affidavit is set out below:

"In order to establish status of applicant as "a person of Indian Origin", as per Explanation 2 of Section 5(1) of the Citizenship Act, 1955, either the Petitioner or either of her parents should have been born in Undivided India or in such other territory which became part of India after 15.08.1947. As per the information available, Petitioner was born on 07.11.2006 in Nidamanuru, Andhra Pradesh, and her mother, Ms. Leela F. Xavier, was born on 10.07.1958 in Poranki, Andhra Pradesh. Details regarding place and date of birth of her father are not available with the



Respondents. Therefore, from the details of the Petitioner and her mother, the Petitioner is not a person of Indian Origin. If her father was born in Undivided India or in such other territory which became part of India after 15.08.1947, she may be deemed to be "a person of Indian Origin" and she may be eligible for applying under Section 5(1)(a) of the Citizenship Act, 1955, and the Rules made thereunder."

40. Section 5(1)(f) also contemplates that a person who is of full age and capacity can apply for citizenship if either of the parents was earlier a citizen of independent India and is automatically resident in India for 12 months. Under this provision, the Petitioner would have fully qualified for citizenship, except the fact that she is not yet of full age and is a minor and is also being classified as an illegal migrant. What is relevant, however, is the Explanation to Section 5(1)(g) of the Citizenship Act, 1955 which clearly provides that the Petitioner would be deemed to be of an Indian origin. The said explanation as also the Section reads as under:

Explanation 1.—For the purposes of clauses (a) and (c), an applicant shall be deemed to be ordinarily resident in India if—

- (i) he has resided in India throughout the period of twelve months immediately before making an application for registration; and*
- (ii) he has resided in India during the eight years immediately preceding the said period of twelve months for a period of not less than six years.*

Explanation 2.—For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, was born in undivided India or in such other territory which became part of India after the 15th day of August, 1947.

41. From Explanation 2, it becomes clear that admittedly since the mother



was born in India, after Independence, the Petitioner would be a person of Indian origin. The above discussion of the various provisions of the Citizenship Act is deemed necessary to highlight the fact that the Petitioner's case does not fall in any of the categories of citizenship contemplated in the Act, as the stance of Union of India is that the Petitioner is an 'illegal migrant.'

Interplay between Domestic Law and International Law

42. In light of the submissions made by both parties, and the far-reaching implications to the life and liberty of the Petitioner, in the present case, it is necessary to examine the interaction of the Citizenship Act, 1955 and the Passport Act, 1967 with international legal obligations which India has ratified, especially in the context where issues of human rights and citizenship converge.

43. The Universal Declaration of Human Rights (UDHR), which captures the basic human rights to which humans are entitled, outlines a set of rights seen as universal and inalienable entitlements. Further the UDHR has immense significance for India as not only did India adopt the UDHR at its inception during the UN General Assembly in 1948, but India also was played a leading role in its drafting, notably advocating the adoption of gender-neutral language in the UDHR.

44. In this backdrop, it is indispensable to note the UDHR underscores the significance of nationality as a fundamental human right in Article 15 of the UDHR. Article 15 of the UDHR is extracted as under:

"Article 15

Everyone has the right to a nationality.

*No one shall be arbitrarily deprived of his nationality
nor denied the right to change his nationality."*



45. This above extracted portion of the UDHR is relevant to the present case, where the Petitioner finds herself effectively stateless within her country of birth, i.e., India, despite having substantial ties through birth, upbringing, and continuous residence. The UDHR presents an international legal framework that supports the contention that being denied the basic right to a nationality, and by extension – a passport, constitutes an infringement of her human rights. The UDHR serves as a globally recognised standard which serves as a foundational backdrop against which the contentions concerning citizenship, statelessness, and the right to have rights, as articulated by both parties, must be evaluated. However, it is also clear that as per the second part of Article 15, the question which the Court would have to evaluate at this stage, is if the decision of the Respondent to deny the Petitioner citizenship of India and by extension Indian nationality is arbitrary.

46. Accordingly, the Court would have to consider the rationale of the Respondents to deny a passport to the Petitioner, and if the said refusal of the passport and the implied denial of nationality, as experienced by the Petitioner, constitutes an arbitrary deprivation of nationality under the Citizenship Act, the Passports Act as also general principles of law recognised by international law.

47. The Supreme Court in *People's Union of Civil Liberties (PUCL) v. Union of India (UOI) and Ors., (MANU/SC/0149/1997)*, while considering India's obligations under UDHR as also International Covenant on Civil and Political Rights, 1966 (ICCPR) has held that international law, though not automatically integrated into domestic law, influences the interpretation of domestic laws, especially when it pertains to human rights and fundamental freedoms. As per the said judgment, this alignment should be pursued as long



as it does not conflict with existing municipal law. However, in cases where the domestic law is open to multiple interpretations, the interpretation that aligns with international law and India's treaty obligations should be preferred to foster respect and compliance with international legal standards. The relevant extract of the said decision is set out below:

“21. India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 of the said covenant is as under:

Article 17

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honour and reputation.

2. Every one has the right to the protection of the law against such interference or attacks.

Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

22. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

23. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

24. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the



said Article, Sikri, C.J in *Kesavananda Bharathi v. State of Kerala* MANU/SC/0114/1972 : 1972CriLJ1526 , observed as under:

It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the right of the United Nations Charter and the solemn declaration subscribed to by India.

In A.D.M. Jabalpur v. 5. Shukla, Khanna J. in his minority opinion observed as under:

Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligation on the other, the Courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law. on treaty obligations. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of international law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.

In Jolly George Varghese v. Bank of Cochin MANU/SC/0014/1980:[1980]2SCR913, Krishna Iyer, J. posed the following question:

From the perspective of international law the question posed is whether it is right to enforce



a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

The learned Judge interpreted Section 51 of the CPC consistently with Article 11 of the International Covenant.

25. Article 17 of the International Covenant-quoted above - does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.”

48. In this backdrop, the Court has also considered the relevant provisions of International Law, and particularly ICCPR, which India has ratified on 10th April, 1979. As per Article 24 of the ICCPR, every child has the right to acquire a nationality. The said article is extracted as under:

“Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.”

49. Further, the Court has also perused the text of the Convention of the Rights of the Child adopted by the United Nations General Assembly vide



General Assembly Resolution 44/25 on 20th November, 1989. India has ratified the said Convention on 11th December, 1992. In the said Convention also, Article 7 has recognized the right of a child to acquire nationality. The relevant articles of the said convention are set out below:

“Article 7

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, **the right to acquire a nationality** and, as far as possible, the right to know and be cared for by his or her parents.*
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

Article 8

- 1. **States Parties undertake to respect the right of the child to preserve his or her identity, including nationality**, name and family relations as recognized by law without unlawful interference.*
- 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”*

50. Therefore, in view of the above provisions mandating the protection and acknowledgment of every Child’s right to nationality and identity, it is fundamentally evident that *Citizenship and Nationality is fundamental for the enjoyment of all rights*. This perspective is crucial for comprehending the challenges faced by the Petitioner, who has effectively been rendered stateless, thereby facing significant limitations on her fundamental rights as also universal human rights in the absence of citizenship and political belonging. This foundational principle is not only relevant for the adjudication



of the present case, but also deepens the understanding of human rights and citizenship by emphasizing that without a political community to guarantee fundamental or basic human rights, individuals' risk being left unprotected and unrecognized, thus undermining the very essence of their human existence. Given these considerations, this Court is tasked with ensuring that the denial of the Petitioner's rights does not reflect an arbitrary deprivation of the foundational rights associated with citizenship.

Special circumstances of the Petitioner

51. The Petitioner's position is unique. The case of the Petitioner is not expressly covered by any specific provision of the Citizenship Act, 1955 or the Passports Act, 1967. A passport can only be issued to a person who is a citizen of India and satisfy the eligibility conditions as prescribed. The rejection of the Petitioner's passport is under Section 6(2)(a) read with Section 5(2)(c) of the Passport Act, 1967. Section 6(2)(a) provides that if the applicant is not a citizen of India, a passport cannot be issued.

52. Accordingly, the question that arises is whether the Petitioner can be treated as a citizen for issuance of a passport. If the Petitioner is not treated as an illegal migrant, she would have been clearly entitled to citizenship. In the opinion of this Court, the Petitioner is not an illegal migrant. The Petitioner also qualifies as a person of Indian origin. The Petitioner would thus, be entitled to citizenship by registration under Section 5(1)(a) of the Act under the category of 'person of Indian origin'. The case would be covered under Explanation 2, as both parents of the Petitioner were Indian citizens who had thereafter obtained US citizenship. In addition, the Petitioner was born in India when her parents were legally residing in India as OCI card holders.



53. It is of enormous significance to note that Section 5(4) of the Citizenship Act, 1955 vests powers in the Central Government under special circumstances for granting citizenship by registration. The said provision reads as under:

“(4) The Central Government may, if satisfied that there are special circumstances justifying such registrations, cause any minor to be registered as a citizen of India.”

The above provision is one which recognizes the need to give citizenship under unusual circumstances, to minors. Usually, this provision may not required to be put to use. However, the existence of such a provision in the statute shows the vision of law makers to enact an enabling provision for grant of citizenship to minors who may be placed in special circumstances. In a country like India, there could be instances where grant of citizenship could be justified, especially to minors who may be placed in extraordinary circumstances. Minors such as the Petitioner cannot be rendered stateless and left to struggle for basic human rights such as freedom of movement, freedom to have an identity, freedom to be educated as per their will even in a foreign country etc., The non-grant of citizenship and the consequent non-grant of a passport can have a deleterious impact on the Petitioner and her family. There is no reason why the Petitioner, a young girl ought to be made to struggle due to an unusually uncomfortable position she has been placed in – may be due to decisions made by her parents/family.

54. The Petitioner’s circumstances are that despite having been born in India to two OCI Card holders, educated in India and lived in India with her family, she is unable to obtain a passport. The circumstances under which the Petitioner is situated are clearly special circumstances as contemplated under



Section 5(4) of the Act.

55. The said circumstances are:

- i. The Petitioner was born in India;
- ii. Both her parents were citizens of India;
- iii. At the time the Petitioner was born, her parents were U.S. citizens, but they have predominantly lived in India;
- iv. The Petitioner's parents possessed & were granted OCI cards;
- v. The Petitioner's mother has passed away;
- vi. She presently lives with her father in Bengaluru;
- vii. She has been wholly educated in Bengaluru;
- viii. She does not possess travel documents of any country;
- ix. She does not fall under the definition of illegal migrant and is entitled to be considered as a person of Indian origin.
- x. Non-issuance of a travel document to her would render her Stateless;
- xi. She has close affiliation in India and family ties in India.

56. In the opinion of this Court, the present case is one where there are special circumstances, for the Central Government to use the enabling powers, as contemplated under Section 5(4) for favorably considering grant of citizenship to the Petitioner. Accordingly, the following directions are issued:

- i) The Petitioner is permitted to apply for registration as a citizen under Section 5 of the Act. The application shall be processed and the decision on the citizenship, shall be rendered, considering the legal position set out above, within 30 days, upon completion of all formalities;
- ii) Upon obtaining the said citizenship by registration, the Petitioner



shall file a fresh application under the Passports Act for issuance of a passport, which shall be granted expeditiously – i.e., within 15 days from date of application.

Further, considering that the Petitioner herself is acquiring the age of majority in November 2024 and has clearly expressed her intent and choice to be an Indian citizen, as per the Office Memorandum dated 25th October, 2018, the above order is being passed in the unique and special facts and circumstances of the present case.

57. Accordingly, the writ petition is allowed in the above terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

MAY 15, 2024
Rahul/am