
(2019) 04 RAJ CK 0006

In the Rajasthan High Court

Case No : Civil Writ No. 3475, 16572, 13489, Of 2018

Anita And Ors

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 02-04-2019

Acts Referred:

Rajasthan Municipalities Act, 2009 — Section 335, 337, 337(2), 337(6)
Rajasthan Municipalities Act, 1959 — Section 88
Rajasthan Municipalities (Safai Employees Service) Rules, 2012 — Rule 9, 9A
Constitution Of India, 1950 — Article 14, 16, 226, 309

Citation : (2019) 04 RAJ CK 0006

Hon'ble Judges : Sangeet Lodha, J;Dinesh Mehta, J

Bench : Division Bench

Advocate : Lokesh Mathur, Sanjay Raj Pandit, M.A. Siddiqui, Sikandar Khan,
Rekha Borana, Saransh Viz

Final Decision : Allowed

Judgement

The grievance raised and questions involved in these three writ petitions are common, hence they are being decided conjointly. All the above mentioned petitioners were selected against the vacancies advertised for Safai Employees, but subsequently appointment orders issued to the petitioners of the first writ petition (D.B. Civil Writ Petition No.16572/2018) have been canceled, whereas petitioners involved in the other two writ petitions (D.B. Civil Writ Petitions No.13489/2018 & 3475/2019), despite being selected, were not allowed to join duties. The reason for their rejection or denial is that they are having more than two children.

For the purpose of convenience, the facts of DB Civil Writ Petition No.16572/2018 are being taken into consideration.

(1) The petitioners have preferred the present writ petition invoking this Court's extra ordinary jurisdiction conferred by Article 226 of the Constitution of India for the following reliefs :-

"a) by an appropriate writ, order or direction rule 9A of Rajasthan Municipalities (Safai Employees Service) Rules, 2012 inserted vide notification dated 11.04.2018 may be declared to be contrary to Article 14 of the Constitution of India and Section 337(6) of the Rajasthan Municipalities Act, 2009 and may be quashed and set aside;

b) by an appropriate writ, order or direction impugned order dated 24.09.2018 (Annex.5) cancelling the appointments of petitioners may be declared illegal and be quashed and set aside;

c) by an appropriate writ, order or direction the respondents may be directed to reinstate the petitioners as safai employee with all consequential benefits;

d) Any other order or direction, which this Hon'ble Court deemed just and proper be passed in favour of the petitioner;

e) Costs of this petition may kindly be allowed to the petitioners;"

(2) The factual matrix within the precincts of the question raised and challenge laid in the instant writ petitions unfolds as under:-

(2.1) The State of Rajasthan, Department of Local Self Government framed the Rajasthan Municipalities (Safai Employees Service) Rules, 2012 (hereinafter referred to as "the Safai Employees Rules, 2012" or "the Rules of 2012") in exercise of powers conferred to it, by Section 337 and 335 of the Rajasthan Municipalities Act, 2009 (hereinafter referred to as "the Act of 2009"). These rules, which were promulgated vide notification dated 18.04.2012, came to be published in the Official Gazette on 04.05.2012 and came into force instantaneously. The Rules of 2012 deal with recruitment, appointment and terms of employment of Safai employees. Rule 9 thereof, which is relevant for the present purpose dealing with the procedure for direct recruitment, reads thus :-

"9. Procedure for direct recruitment - The Chief Municipal Officer shall invite applications for direct recruitment through advertisement in the two state level daily newspapers and shall make appointment on the basis of either conducting written examination/interview/ merit/experience [lottery system amongst eligible candidates] or on the basis of one or more criteria's as mentioned above."

(2.2) On 11.04.2018, the State Government issued a notification No.F.8(Ga)()/ Rules/LSG/12/8426 dated 11.04.2018, whereby a new Rule 9A had been inserted in the Rules of 2012, which provides that any person who has more than two children on or after 01.06.2002 shall not be eligible for appointment under the Rules of 2012. This rule is the bone of contention and thus, we deem it apt to reproduce the same, for ready reference:-

"9A. Disqualification for appointment.- No candidate shall be eligible for appointment to the service who has more than two children on or after 01.06.2002 Provided that :

(i) the candidate having more than two children shall not be deemed to be disqualified for appointment so long as the number of children he/she has on 1st June, 2002, does not increase.

(ii) where a candidate has only one child from earlier delivery but more than one child are born out of a single subsequent delivery, the children so born shall be deemed to be one entity while counting the total number of children.

(iii) the provision of this rule shall not be applicable to the appointment of a widow of the deceased employee on compassionate ground.

(iv) while counting the total number of children of a candidate, the child born from earlier delivery and having disability, shall not be counted.

(v) any candidate who performed remarriage which is not against any law and before such remarriage he is not disqualified for appointment under this rule, he shall not be disqualified if any child is born out of single delivery from such remarriage."

(2.3) No sooner had the above referred notification dated 11.04.2018 come into being, than the respondent No.3 - Commissioner, Municipal Council, Banswara issued an advertisement dated 13.04.2018, inviting applications for recruitment on the post of Safai Karmacharis (Safai employees). Apart from other conditions of eligibility, the said advertisement contained a condition postulating that any person having two or more children after 01.06.2002, shall be disqualified for the appointment. The said condition was drawn in the following terms:-

"अपात्रता:-

किसी भी अभ्यर्थी के दिनांक 01 जून, 2002 को या इसके बाद दो से अधिक संतान होने की अवस्था में अभ्यर्थी का आवेदन निरस्त योग्य होगा, लेकिन यदि किसी अभ्यर्थी के पूर्वोत्तर प्रसव से एक ही संतान हो, तो पश्चवर्ती प्रसव से पैदा होने वाले जुड़वां बच्चों को एक ही इकाई(यूनिट) समझा जावेगा।

किसी अभ्यर्थी के बच्चों की गणना के प्रयोजन से पूर्ववर्ती प्रसव से यदि निषक्तः संतान है तो उसकी गणना नहीं की जावेगी।

यदि कोई अभ्यर्थी कानून वैध तरीके से पुनर्विवाह करता है एवं यदि पुनर्विवाह से पहले वह नियुक्ति के लिये पात्र है तो पुनर्विवाह के पश्चात एक प्रसव से उत्पन्न होने वाली संतान के आधार पर वह अयोग्य घोषित नहीं होगा

(2.4) While dealing with the case at hands, we must bear one fact in mind that as per the advertisement aforesaid, the selection was to be made by way of lottery, as envisaged under Rule 9 of the Rules of 2012.

(2.5) The petitioners herein vied for the post of Safai employees pursuant to the above advertisement and were amongst the few fortunates, whose names were picked in the draw of lots. The petitioners, in turn, were issued appointment order(s) on 14.07.2018.

(2.6) Petitioners' appointments however stood cancelled by the respondent No.3, vide a common order No.9924 dated 24.09.2016. The sole and common reason

for such cancellation was that their number of children increased from two after 01.06.2002.

(2.7) Faced with such situation, the petitioners have knocked at the doors of this Court invoking its extra ordinary writ jurisdiction, challenging not only their termination order(s) dated 24.09.2018, but also the validity of Rule 9A, inserted vide notification dated 11.04.2018.

(3) Having laid the factual and statutory canvas of the case, we deem it appropriate to trace the history of such legislation, so as to have a better perspective of the problem.

(4) It is to be noted that various Municipalities had initiated recruitment of Safai employees, after the Rules of 2012 came into force. The advertisement concerned contained a clause, prescribing similar condition that a candidate whose number of children has increased to more than two after 01.06.2002, shall (8 of 28) [CW-16572/2018] be ineligible. When the matter came up before this Court, a learned Single Judge in case of Indira Devi Vs. State of Rajasthan & Ors. (SBCWP No.2703/2015) allowed the writ petition vide judgment dated 05.11.2015 and held that as the Rules of 2012 does not contain any such ineligibility, the condition in relation to number of children imposed in the concerned advertisement was illegal.

(5) The above judgment of learned Single Judge dated 05.11.2015 allowing the writ petition was duly affirmed by a Division Bench of this Court, vide its judgment dated 25.10.2016, rendered in DB Civil Special Appeal (W) No.703/2016.

(6) Apparently, keeping the aforesaid judgment in mind, the State Government proceeded to insert Rule 9A in the Rules of 2012, in a bid to overcome the legal impediment, which had come their way.

(7) Mr. Lokesh Mathur, learned counsel for the petitioners submitted that the notification dated 11.04.2018, inserting Rule 9A in the Rules of 2012 has not been laid before the Legislative Assembly, as mandated by sub-section (6) of Section 337 of the Act of 2009 and thus, Rule 9A is non-est and unenforceable in law. Advancing his argument further, he pointed out that the advertisement in question was issued on 13.4.2018 immediately on issuance of the notification. Curiously, the advertisement prescribed a disqualification in line with Rule 9A, which Rule was not legally enforceable till that point of time, as it had not been placed for ratification or consideration by the Legislative Assembly. The offending condition in the advertisement dated 13.4.2018, regarding ineligibility as a result of the petitioners' total number of children being more than two after 01.06.2002 and the (9 of 28) [CW-16572/2018] consequential cancellation of their selection vide impugned order dated 24.09.2018 were thus clearly without authority of law, vehemently argued, learned counsel.

(8) To buttress this contention, Mr. Lokesh Mathur relied upon judgment of

Hon'ble the Supreme Court in the matter of Krishna Kumar Singh & Anr. Vs. State of Bihar & Ors., reported in AIR 2017 SC (Supp) 161, particularly para 152, which reads thus :-

"152. The failure to place an ordinance before the legislature constitutes a serious infraction of a constitutional obligation which the executive has to discharge by placing the ordinance before the legislature. The laying of an ordinance facilitates the constitutional process by which the legislature is enabled to exercise its control. Failure to lay an ordinance before the legislature amounts to an abuse of the constitutional process and is a serious dereliction of the constitutional obligation. In the case of delegated legislation, Parliamentary or State enactments may provide a requirement of laying subordinate legislation before the legislature. It is well-settled that a requirement of merely laying subordinate legislation before the House of the legislature is directory. But where a disapproval of subordinate legislation is contemplated, such a requirement is mandatory. In Quarry Owners' Association v. State of Bihar this Court held :

"45.....Laying before the Houses of Parliament is done in three different ways. Laying of any rule may be subject to any negative resolution within a specified period or may be subject to its confirmation. This is spoken of as negative and positive resolution respectively. Third may be mere laying before the House. In the present case, we are not concerned with either the affirmative or negative procedure but consequence of mere laying before the legislature.....

48.....Even if submission for the appellants is accepted that mere placement before a House is only for information, even then such information, inherently in it makes the (10 of 28) [CW-16572/2018] legislature to play an important role as aforesaid for keeping a check on the activity of the State Government. Such placement cannot be construed to be non est. No act of Parliament should be construed to be of having no purpose. As we have said, mere discussion and questioning the Ministry concerned or authority in the House in respect of such laying would keep such authority on guard to act with circumspection which is a check on such authority, especially when such authority is even otherwise answerable to such legislature."

(9) Learned counsel for the petitioners, without prejudice to his first submission contended that impugned Rule 9A has come into force vide notification dated 11.04.2018, but it has been made effective from 01.06.2002, obviously giving the Rule, a retrospective effect of 16 years. According to him, if at all such disqualification was to be prescribed, the same could be prescribed prospectively and not retrospectively.

(10) He further contended that Section 337 of the Act of 2009, particularly clause XLI of sub-section (2) of Section 337 of the Act authorises the State Government to frame rules, for the purpose of prescribing terms and conditions of service in respect of Rajasthan Municipal Services. The State has framed various service rules for different classes of employees of the Municipalities, but

in none of the rules so framed by the State in exercise of powers under Section 337 of the Act of 2009 or under the corresponding provision contained in Section 88 of the erstwhile Rajasthan Municipalities Act, 1959, such disqualification on account of number of children being more than two has been introduced. Having pointed out this anomalous position, learned counsel submitted that the petitioners and other persons applying for the post of Safai Karmchari come from the lowest strata of the (11 of 28) [CW-16572/2018] Society, who are not only illiterate and poor but also socially backward. As such, the action on the part of the respondents in prescribing the impugned condition, while not prescribing such disqualification qua other services is absolutely arbitrary and violative of Article 14 of the Constitution of India. He argued that based on number of children, disqualifying persons aspirant of becoming Safai employee alone, amounts to hostile discrimination, vis-a-vis other persons or candidates who propose to apply for other higher posts.

(11) In the aforesaid backdrop, he contended that impugned Rule 9A of the Rules of 2009 is violative of Article 14 and 16 of the Constitution of India, which guarantees an inviolable right of equality and equal opportunities in the matters of public employment.

(12) Ms. Rekha Borana, learned Addl. Advocate General appearing on behalf of the respondents on the other end supported the rules promulgated vide notification dated 11.04.2018, by canvassing that Rule 9A has been inserted with an avowed object of encouraging family planning and welfare of the State. She submitted that it is high time when the State provided for such disqualification, so as to control and curb the menace of population, which this Country is faced with. She further submitted that it is a matter of policy of the State that persons having more than two children be not provided employment and in this process, vide a notification issued way back on 20.06.2001, various service rules of the State had been amended and an ineligibility/ disqualification has been prescribed on the basis of number of children being more than two. She invited attention of this Court towards the notification dated 20.06.2001, issued by (12 of 28) [CW-16572/2018] the Department of Personnel, Government of Rajasthan, vide which almost all the service rules of the State framed under Article 309 of the Constitution stood amended. She submitted that the impugned amendment vide notification dated 11.04.2018 is in conformity with the other service/recruitment rules of the State, amended by notification dated 20.06.2001, wherein cut-off date of 01.06.2002 has been given. She emphasized that two children norm, that too from the cut off date i.e. 01.06.2002, has been the policy of the State duly acclaimed and affirmed; and no fault can be found in the action of the State, simply because such ineligibility has been made operational from a retrospective date.

(13) In support of her contention that the State can prescribe such ineligibility, she relied upon a Reference answered by Full Bench of this Court on 09.01.2019, in case of Dalpat Singh Rajpurohit Vs. State of Raj. & Ors. (DB Civil Reference

No.1/2018), in which the constitutional validity of various service amendment rules brought into force vide notification dated 20.06.2001 has been upheld.

(14) Responding to the petitioners' contention in relation to retrospectivity of the Rules, she contended that not only the notification dated 11.04.2018, but also the corresponding condition in the advertisement dated 13.4.2018 were known to the petitioners. Having applied for the post notwithstanding such condition, the petitioners cannot raise any grievance at this stage, particularly when their selections stand cancelled. Her argument, in other words, has been that the petitioners having participated in the process of selection cannot be permitted to lay challenge to the conditions of advertisement and/or assail the legality of the corresponding rule.

(15) To buttress the aforesaid argument, learned Addl. Advocate General relied upon the following judgments:

(i) Judgment rendered by Hon'ble the Supreme Court on 13.09.2017 in the matter of D. Sarojakumari Vs. R. Helen Thilakom & Ors. (Civil Appeal Nos.8345-8346/2009);

(ii) Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors., reported in (2011)1SCC150.

(16) In response to the petitioners' contention regarding the fact and effect of the impugned Rule 9A not being placed for consideration of the Legislative Assembly, as mandated by sub-section (6) of Section 337 of the Act of 2009, learned Addl. Advocate General though frankly admitted the factual position, but submitted that it was not feasible to place it before the House, as since 11.04.2018, the date of issuance of the notification, the Legislative Assembly has not remained in Session consecutively for a period of 14 days.

(17) While admitting the factual position, albeit with the reasons supplemented, she did not agree with the consequence, which was suggested by Mr. Mathur. She submitted that non placement of the Amending Rules of 2018, before the Legislative Assembly, per se, will not render the Rules to be non-est or inoperative. She assertively argued that the stipulation contained in sub-section (6) saves the acts or actions taken during the period interregnum, even in the extreme case, when such amendment has been annulled by the Assembly, let alone the modification.

(18) With a view to consider her contention, it will be profitable to reproduce sub-section (6) of Section 337, which reads thus :-

"337. Power of State Government to make rules and orders.-

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx

(6) All rules made under this Act shall be laid, as soon as may be, after they are so made, before the House of the State Legislature, while it is in session, for a period not less than fourteen days which may be comprised in one session or in two successive sessions and, if before the expiry of the session in which they are so laid or of the session immediately following, the House of the State Legislature makes any modification in any of such rules or resolves that any such rule should not be made, such rules shall, thereafter, have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder."

*emphasis supplied.

(19) Heard learned counsel for the parties and perused the material available; the law enacted or framed; so also the law laid down by the various Courts of law.

(20) Before we begin our endeavour to test the validity of the impugned notification dated 11.04.2018, on the basis of the grounds raised and also on the aspects which came our way, we deem it appropriate to get the knack of the para-meters and principles, which Hon'ble the Supreme Court has laid down with respect to Article 14 of the Constitution of India. In this process, we are reminded of the judgment of Hon'ble the Apex Court, rendered in case of Municipal Corporation of the City of Ahmedabad & Ors., Vs. Jan Mohammed Usmanbhai & Anr., reported in (1986) 3 SCC 20, particularly para 23 thereof, which we gainfully reproduce hereunder :-

"23. It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been a clear violation of the constitutional principles. The courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common rapport, the history of the times and may assume every state of facts which can

be conceived to be existing at the time of legislation."

(21) Upon survey of various judgments of Hon'ble the Supreme Court in this regard, we discern that a rule will be presumed to be valid and enforceable, except where the challenge is on the ground of legislative competence or the restriction imposed is ex-facie unreasonable, arbitrary and violative of Part-III of the Constitution.

(22) Dwelling upon the first argument first, viz; the effect of the amendment, brought into effect vide notification dated 11.04.2018, without placing the same before the Legislative Assembly; we are of the view that the provisions contained in sub-section (6) of Section 337 of the Act of 2009 are mandatory, as is evident from a bare reading of the opening words of the Section, which reads "All rules made under this Act shall be laid, as soon as may be, after they are so made, before the House of the State Legislature". It is a matter of record that the State in unequivocal terms has admitted that the concerned amendment in the rules has not been placed for consideration of the Legislative Assembly so far. But then, the question which crops up for our consideration is; "merely because the amending Rule has not been placed for consideration of the Legislative Assembly, does any act or action taken in furtherance of framing of such rule become automatically illegal or deserve to be annulled out-rightly ?"

(23) Our answer is a clear "No". The reasons for arriving at such conclusion are not far to seek. The answer is simple and it is encompassed in sub-section (6) of Section 337 itself, which provides that even in case the House of the State makes any modification or annuls the same, such annulment shall be without prejudice to the validity of anything previously done.

(24) We, therefore, agree with the submission of learned Addl. Advocate General that in an extreme case, had the impugned amendment been placed before the Legislative Assembly and the provision being modified or annulled, then also, the condition stipulated in the advertisement; the contentious ineligibility prescribed in the Rules of 2012; so also the denial of the appointment to the petitioners would have been protected or saved. If that be so, the position at hands cannot be rendered worse than the situation, when the State Legislature decides to modify or even eschew an amendment.

(25) According to us, latter part of sub-section (6) of Section 337 provides enough insulation, rather immunity to the actions taken during the period between the date, when the rules were framed and the date of their amendment or anulment. As such the petitioners' argument that the amendment in the rules vide notification dated 11.04.2018 has no legal sanctity or effect, hardly holds any water and the same is therefore, rejected.

(26) We find that the notification dated 11.04.2018, vide which the impugned Rule 9A has been inserted in the Rules of 2012 had been published in the Official Gazette of the State of Rajasthan on 13.04.2018, on the same date, when the advertisement was issued. Hence, the condition encapsulated in the

advertisement cannot be said to be illegal, merely because till such time, the notification dated 11.06.2018 was not tabled before the Legislative Assembly.

(27) We are not oblivious of the fact that a Full Bench of this Court in case of Dalpat Singh Rajpurohit (supra) and another Division Bench vide its judgment dated 13.12.2013 in case of Dr. Swati Panwar Vs. State of Rajasthan (D.B. Civil Writ Petition No.18662/2012) have upheld the analogous provision brought into force by the State in the Rules framed by it under Article 309 of the Constitution of India. Incidentally, both of us were part of the Full Bench, which answered the reference in case of Dalpat Singh Rajpurohit's case (supra). The questions for consideration of the Full Bench and the Division Bench were; as to whether the State has power to prescribe the disqualification based on number of children and whether such disqualification is unconstitutional on the ground of repugnancy or otherwise violative of fundamental rights of the citizens.

(28) Needless to state that not only the question, but also the context before us are altogether different. In the present case, as noticed above, the petitioners have firstly challenged Rule 9A to be procedurally ultra-vires, as it has not been laid before the Legislative Assembly and secondly being violative of Article 14 of the Constitution, as they are both retrospective and discriminatory. This being the factual position, we are of the considered opinion that contention of learned Addl. Advocate General that no question is left to be answered or adjudicated as the validity of analogous rules has been upheld by this Court, is untenable in the eye of law.

(29) We are also not much impressed with the stand of the State that the petitioners being aware of the amendment in the Rules introduced vide notification dated 11.04.2018 and being cognizant of the impugned condition in the advertisement, are bound by the terms of the advertisement and are precluded from bringing a challenge to the rules and terms of the advertisement on the principle of estoppel.

(30) While dilating upon such contention of learned Addl. Advocate General, we cannot lose sight of the fact that the petitioners before us hail from the lowest strata of the Society and perhaps for this reason the Rules do not prescribe any educational qualification for Safai Employees. Apart from the above, since the petitioners have challenged the impugned condition and the corresponding rule to be violative of their fundamental rights, guaranteed by the Constitution, ingrained in Part III of the Constitution, we do not deem it appropriate to non-suit the petitioners, simply because they have approached this Court, after having taken part in the selection process.

(31) As far as judgments (noticed in para No.15) cited in support of the argument that the petitioners having participated in the selection process cannot turn around and lay challenge to the eligibility condition are concerned, it is to be noted that facts in the cases aforesaid were that the petitioners therein had challenged the eligibility condition or selection criterion to be illegal, whereas in

the present case, the petitioners have challenged not only the condition in the advertisement but also the very statute prescribing the disqualification concerned, to be ultra-vires the Act and violative of their fundamental rights. The judgments relied upon by Ms. Borana are, therefore, clearly distinguishable on facts and thus do not deter us from examining the questions posed before us.

(32) If an enactment or law is alleged to be violative of fundamental rights of a candidate and it hits at the root, the petitioners and like candidates cannot be denied audience, merely because they have taken their chance and participated in the process of selection. The indulgence to the petitioners is warranted more because of the fact that as per the Rules of 2012, the selection is based on occurrence of a fortuitous event i.e. "lottery". The petitioners or for that matter any other candidate would normally not venture into challenging the condition or disqualification by bringing appropriate remedy until and unless, he or she is assured of the selection.

(33) That apart, not only the petitioners' application forms were accepted, even appointment orders were issued to them. Hence, there was no occasion for them to lay challenge to the condition of the advertisement or the provision contained in Rule 9A of the Rules of 2012, till their selection stood cancelled.

(34) The petitioners have approached this Court well within a month of receiving the impugned order dated 24.09.2018, vide which their appointment/ selection had been cancelled or questioned.

(35) This being the position, we are of the considered opinion that it would not be just and proper to non-suit the petitioners, merely because they had appeared in the process of selection with the inherent ineligibility and failed to approach the Court prior to participating in the process of selection.

(36) Moving on to the vital, rather pivotal question, viz. the retrospectivity given to Rule 9A; we feel that this issue is not only of larger implications but also of longer repercussions and thus needs a deeper deliberation.

(37) The impugned Rule 9A brought into force vide notification dated 11.04.2018, provides that no candidate shall be eligible for appointment to the Service, who has more than two children "on or after 01.06.2002". A bare look at the offending part of Rule 9A is likely to startle or disturb everyone, including the Courts of law. With the insertion of impugned Rule 9A, the State Government has provided a disqualification or an ineligibility by a single stroke of pen with retrospective effect, relating the disqualification back to 01.06.2002.

(38) It is pertinent to note that the State Government enacted Various Service Amendment Rules, 2001 and amended almost all 109 Rules framed by the State under Article 309 of the Constitution on 20.06.2001. But while doing so, the State had given a future date to be the cut off date i.e. "01.06.2002".

(39) Keeping pace with such amendment, other Rules of the State came to be amended, prescribing ineligibility as a result of number of children exceeding

two. The Governor of Rajasthan in exercise of powers conferred by proviso to Article 309 of the Constitution, in consultation with the High Court of Judicature for Rajasthan, while promulgating the Rajasthan Judicial Service Rules, 2010 has incorporated similar disqualification, and the same was made effective from the date of commencement of the Rules viz. 19.01.2010. Similarly, the Rajasthan High Court Staff Service Rules, 2002 came to be amended and Rule 9A has been inserted therein and the amendment was given effect from the date of commencement of such rules, but an exception was carved out for taking care of 'yet to be born child'.

(40) In both the above referred rules framed by the High Court, the following Explanation was inserted to protect a candidate, who himself or his spouse has conceived a child, at the time of or around the date of insertion of the rules:-

"Explanation:- For the purpose of this clause, child born within 280 days from the date of commencement of these rules shall not constitute disqualification."

(41) The requirement of providing a window of one year or reasonable period is imperative so that one can manage his affairs. A window is also necessary while incorporating such rule, in view of the observation made by Hon'ble the Supreme Court in para No.4 of the judgment while affirming such enactment, though in election laws, in case of Javed & Ors. Vs. State of Haryana & Ors., reported in (2003)8SCC369:-

"Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. A person having more than two children upto the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two"

(42) As far as retrospectivity attached to the disqualification is concerned, we may state that in some cases, the Supreme Court has held that the disqualification can apply retroactively. In other words, it has been held that rule making authority can take into account the past conduct, offence or mis-conduct, while framing the rules regarding disqualification. A gainful reference of certain judgments of Hon'ble the Supreme Court can be made:-

(i) State of Bombay Vs. Vishnu Ram Chandran (AIR 1961 SC 307), wherein

Hon'ble the Supreme Court has held that "... .. No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any record whatever be had to his previous history... .."

(ii) In *Syed Bashiruddin Ashraf Vs. Bihar Subai Sunni Majlis-e-awqaf & Ors.* (AIR 1965 (SC) 1206), Hon'ble the Supreme Court has also held that "... .. if the object of statute is not to inflict punishment but to protect the public from the activities of undesirable persons, who bear the stigma of a conviction or misconduct on their character, the conviction or misconduct of such person before the operation of statute may be relied upon."

(43) But here lies a basic distinction, inasmuch the disqualification before us is a consequence of number of children exceeding two; whereas in the cases above referred the disqualification involved was offence or misconduct. Hence, the present situation cannot be equated with the disqualification which was under consideration before Hon'ble the Supreme Court, in which it has been laid down that the disqualification can be prescribed keeping in mind the past conduct or past incidents.

(44) No law enacted so far restricts or regulaties a citizen's right to procreate. Giving birth to a third child not being a misconduct, cannot be made a disqualification with a date much anterior to a date, when such disqualification or ineligibility was prescribed for the first time.

(45) In light of the discussion foregoing, we are of the view that such ineligibility or disqualification can not have a retrospective effect. At the best, it can be made operative from the date such disqualification has been introduced for the first time in the concerned Rules, that too while taking care of an already conceived child. In other words, if introduction of such rule is deemed necessary or expedient, then it has to be framed in a manner that at least a period of one year is provided to the candidates to plan their affairs accordingly.

(46) There is yet another angle to examine the validity of rule 9A of the Rules:- The State Government has framed various rules in exercise of powers available to it under erstwhile Section 88 of the Rajasthan Municipalities Act, 1959, namely Rajasthan Municipal (Subordinate and Ministerial Service) Rules, 1963 and Rajasthan Municipalities (Class-IV Service) Rules, 1964. These Rules govern the terms of employment and service conditions of various municipal employees. We are perplexed to learn that no amendment similar to the one under consideration, has been introduced in these rules. Prior to promulgation of Rules of 2012, the service conditions or method of recruitment of Safai employees used to be governed by the above referred Class-IV Service Rules, 1964. It is only in 2012 the State has framed separate rules for Safai employees; but while amending the Rules of 2012 applicable to Safai Employees, the Rules of 1964 pertaining to Class-IV employees have been kept unaltered or unamended.

(47) We record that in none of the rules, framed under the Municipalities Act,

except the present set of Rules of 2012, the State has inserted such disqualification, based on number of children.

(48) The State cannot selectively choose Safai employees under the pretext of "family welfare and family planning" and deny them employment, merely because they have given birth to a third child, while giving immunity to the other class(es) of the employees of Municipalities, from rigours of such law. While framing different sets of rules for different class(es) of employees, the State cannot be permitted to behave differently or discriminately.

(49) The impugned amendment in the Rules of 2012 sprouts or generates discrimination in another way also. If a candidate gives birth to a child in a manner that his number of children after 01.06.2002 exceeds two; then in that case, he cannot get an appointment if he wishes to become a Safai employee in the teeth of Rule 9A of the Rules of 2012, but if he applies for Class-IV employee or for the ministerial post, governed by the Subordinate Ministerial Service Rules, 1963 (both applicable to Municipalities), he shall steer clear the eligibility, as there is no bar or prohibition based on the number of children in the applicable Rules.

(50) The impugned amendment thus leads to anomalous rather ridiculous situation. A candidate having three children or more is entitled to be appointed as Class-IV employee or in the ministerial services, but he is precluded from being appointed as Safai employee as a consequence of the offending Rule 9A, inserted in the Rules of 2012.

(51) The impugned Rule 9A inserted vide notification dated 11.04.2018 leads to unsociable and hostile discrimination as it carves out a class within the class of the Municipal employees, without any rational nexus or intelligible differentia. The impugned rule, being discriminatory, deserves to be declared violative of Article 14 of the Constitution of India.

(52) The respondents have asserted that though similar provision had already been inserted in various Service Rules applicable to State Government employees but due to omission, corresponding stipulation could not be inserted in the Rules of 2012, and it is by way of the amendment in question, such provision has been introduced to cure the omission. The stand of the State that the amendment being curative in nature, can be inserted retrospectively, is unconscionable, besides being unsustainable in the eyes of law.

(53) As has been noticed by us, no such amendment has been brought into force in other Service Rules promulgated under Section 337 of the Act of 2009 or Section 88 of the earlier Act of 1959, as far as the employees of the Municipalities of the State are concerned. The impugned amendment lays down an altogether new ineligibility for an entirely new phenomenon, unknown to the Rules of 2012, or even earlier Class IV Rules of 1964. The offending amendment is substantive in nature and hence it cannot be treated to be curative, so as to permit its retrospective operation.

(54) It is a settled proposition of law that a clarificatory amendment, which has been introduced to remedy an omission or cure a lacuna in the basic statute, can apply retrospectively, but an amendment, which creates obligation or which is regressive in nature, has to apply prospectively, as has been observed by Hon'ble the Supreme Court in case of Commissioner of Central

Excise, Bangalore Vs. Mysore Electricals Industries Ltd., reported in (2006)12SCC448 and so also in the case of Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur, reported in (2006)12SCC452.

(55) Contention of Ms. Rekha Borana that this amendment has been introduced in a bid to create awareness about family planning cannot be countenanced. Given the fact that Safai Karmcharis belong to the lowest and deprived strata of the Society, the justification of sensitization towards population explosion, put forth by the State turns out to be a farce, particularly when they have not provided such ineligibility qua other Municipal employees.

(56) In case such provisions, denying public employment are deemed necessary to sensitize the masses, then, the State should introduce such amendment in other Service Rules governing all municipal employees, which have been framed under Section 337 of the Act of 2009 or Section 88 of the earlier Act of 1959. Besides this, if the object of population control is to be achieved, it serves no cause by denying employment based on the birth of a child, which has taken place prior to such insertion. If a disqualification from a future date is prescribed, then perhaps a citizen would think twice before giving birth to third child and that probably would cater to the State's policy of family welfare and family planning.

(57) As a result of the discussion aforesaid, we declare Rule 9A of the Rajasthan Municipalities (Safai Employees Service) Rules, 2012 to be :-

(a) violative of Article 14 of the Constitution of India for being discriminatory;

(b) violative of Article 14 & 16 of the Constitution of India for its retrospectivity;

(58) As a consequence of the declaration aforesaid;

(i) impugned order dated 24.09.2018 cancelling the appointment of the petitioners is quashed and set aside;

(ii) the respondents are directed to take the petitioners back on their duties and/or give them posting;

(iii) the petitioners shall be entitled for all the consequential benefits.

(59) While parting with the judgment, we wish to clarify that the present judgment shall not come in the way of the State, in case it decides to bring in appropriate Legislation, prescribing ineligibility based on the number of children, in accordance with law; subject of course to what has been held herein.

All the three writ petitions are allowed; however, without any order as to the

costs.