
(2019) 03 PAT CK 0003

In the Patna High Court

Case No : Letters Patent Appeal No. 1535 Of 2017, Civil Writ Jurisdiction Case No. 604 Of 2017

Chairman, Central Selection Board (Constable Appointment)
And Ors

APPELLANT

Vs

Ishika Raj And Ors

RESPONDENT

Date of Decision : 01-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 15, 16, 21, 38, 42

Citation : (2019) 2 PLJR 281

Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Anjana Mishra, J

Bench : Division Bench

Advocate : Pushkar Narayan Shahi, Sanjay Pandey, Binod Kumar Mishra, Yogesh Chandra Verma, Prem Sheela Pandey, Saroj Kumar Sharma

Final Decision : Dismissed

Judgement

1.This appeal questions the correctness of the judgment dated 3rd August, 2017 of the learned Single Judge whereby the learned Single Judge has accepted the prayer of the respondent-petitioner for holding of her Physical Evaluation Test as well as that of other similarly situated candidates who on account of their advanced stage of pregnancy at the time of the Physical Endurance Test were unable to undertake the same.

2. The appellants have come up questioning the correctness of the said judgment on the ground that right of employment is not a fundamental right and there is no such condition stipulated either under the advertisement or under the Rules, whereby a female candidate who misses her chance to appear in the Physical Endurance Test on account of her own volition, the appellants are bound to extend or postpone the date of such test. It is the appellants' contention that the natural right of the respondents to beget a child is a voluntary act and not an act of compulsion or otherwise in any way a contingency so as to extend them a right to claim postponement. The state of pregnancy and attaining of maternity

to beget a child by choice may be a fundamental right of an individual female but such a fundamental right cannot compel the State to keep on hold a process of examination where neither the selection is complete nor a candidate has even entered employment. It is urged that whatever judgments have been cited at the Bar on behalf of the respondent-petitioners including the judgment in the case of *Air India Vs. Nargesh Meerza and Others*, reported in (1981) 4 SCC 335 and the latest judgment in the case of *Devika Biswas Vs. Union of India and Others*, reported in (2016) 10 SCC 726, all relate to situations where the right to lead a dignified and meaningful life as enshrined under Article 21 of the Constitution of India was discussed vis-à-vis the health conditions of females and also the application of Articles 14 and 16 of the Constitution of India where a female was in employment. In the case of *Air India* (supra) the observations made relate to conditions of service upon having entered employment or relating to the individual right of a female to beget a child. These judgments do not lay down that for the purpose of holding of competitive examinations for appointment, a candidate has a right to seek postponement of the examinations on account of having voluntarily acquired pregnancy. It is, therefore, their contention that the learned Single Judge has proceeded to determine an issue relating to a stage of selections of appointment where the candidates do not have any such right to claim benefits which may otherwise be available as a maternity benefit after employment.

3. The respondent-petitioners have supported the impugned judgments and Shri Yogesh Chandra Verma, learned senior counsel has urged that the inordinate delay which is evident in finalizing the process of selections itself indicates that there was absence of a time schedule with no declaration of the dates in the advertisement and, therefore, if during these prolonged process where delay was clearly attributable to the appellants, the acquisition of a pregnancy is not a self invited obstacle when the State itself has proceeded in a leisurely manner. The acquisition of pregnancy being a natural act cannot be termed as a disability so as to make a candidate ineligible who has otherwise cleared the written test. It is also submitted by Sri Verma that no prejudice would be caused to the selection process at all as keeping in view the fact that the candidates after delivery of a child were ready to face the Physical Endurance Test. In the circumstances, any denial to them would be discrediting their merit which they otherwise possess to be recorded as Constables.

4. It is in this background that the appellants have come up contending that there is no such fundamental right or even a legal right available to the candidates to seek postponement of the holding of the test and thereby prolong it further. This not being a recognized right, the same would also amount to discriminating those who may otherwise have come up for their claim in a similar way but did not choose to raise a challenge on account of non-availability of any such opportunity in future. It is, therefore, contended that the learned Single Judge has overstretched the application of fundamental rights so as to encompass even a process of a competitive examination and any interference

with the same clearly jeopardizes the entire selection process. It is, therefore, submitted that the impugned judgments be set aside and the petitions filed by the respondent-petitioners be dismissed.

5. The learned Single Judge found that the resistance put forth by the State through the counter affidavit in denying an extended opportunity amounted to denying the respondent-petitioner her right to be considered in public employment that was unjust given fact that there was a thirteen month gap between the advertisement dated 31st July, 2015 and the written examinations which were held on 18th September, 2016. This long waiting period during which the respondent-petitioner became pregnant was therefore itself a circumstance taken into account by the learned Single Judge that a delayed action of the appellants, without there being any such disclosure of the date of the holding of the physical test, was itself sufficient to indicate that the respondent-petitioner could be accommodated by postponing her Physical Evaluation Test and for this heavy reliance was placed on a judgment of a Division Bench of the Kerala High Court in the case of Kerala Public Service Commission vs. K. Jayasree reported in 2014 (1) KHC 358 that was followed in another judgment of the same High Court in the case of Kerala Public Service Commission vs. Sini reported in 2014 (2) Kerala Law Times. The learned Single Judge also relied on a Division Bench judgment of the Delhi High Court in the case of Inspector (Mahila) Ravina vs. Union of India and Ors. (Writ Petition (C) No. 4525 of 2014) which in turn relied on the judgment of the Apex Court in the case of Suchitra Srivastava vs. Chandigarh Administration reported in AIR 2010 SC 235.

6. The learned Single Judge in order to arrive at that conclusion also took aid of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India to hold that the State cannot be prevented from making any special provision for women and children.

7. Apart from the aforesaid stipulations in Part-III, the learned Single Judge also took note of the duty cast upon the State under Article 38 of the Constitution of India for the promotion and the welfare of the people and Article 42 in particular which casts an obligation on the State to make provisions for securing just and humane condition of work and maternity leave as contained under the directive principles of State Policy.

8. The argument of the State and the appellants was rejected where they maintained such benefits of maternity would be available after appointment and not prior thereto on the ground that the action of the appellants in fixing a schedule was absent.

9. The learned Single Judge, however, accepted the argument being sound or logical but it was rejected because the action of the Board was not found to be genuine in delaying the process and then denying the opportunity to the respondent petitioner. The learned Single Judge held that the indefinite approach of the examining body led to the delay of thirteen months after the

advertisement and this could not have impeded the right of a female candidate to make reproductive choices in between an indefinite schedule. This would amount to denial of an opportunity to get employment if the candidate is not accommodated and would be insensitive forcing a female candidate to choose between motherhood and career.

10. The appellant Selection Board resisted the claim of the respondent-petitioner, firstly, on the ground that this being a matter of Policy of employment which fell within the domain of the employer, the same could not be imposed upon under the cover of protection of fundamental rights inasmuch as a woman may have a fundamental right to beget a child but that by itself cannot be a guarantee of employment if she has chosen to opt for motherhood voluntarily. The State relied on the Apex Court judgment in the case of *Union of India vs Pushpa Rani and Ors.* and other analogous cases reported in (2008) 9 SCC 242. It was also urged that the judgments of the Kerala High Court and the Delhi High Court referred to hereinabove have extended the law as understood by the Apex Court in the case of *Air India vs. Nargesh Meerza and Others*, reported in (1981) 4 SCC 335 and *Devika Biswas vs. Union of India and Others*, reported in (2016) 10 SCC 726 by placing the said fundamental right on a pedestal overlooking the fact that the said judgments of the Apex Court did not concern a situation before employment. The learned Single Judge allowed the writ petition granting fresh opportunity of Physical Endurance Test to the respondent-petitioner and other similarly situated candidates.

11. The selection Board is in appeal and it is urged that the writ petition was allowed without even considering the terms and conditions as contained in the advertisement, the notice inviting the candidates who had cleared the written examination for undergoing the Physical Endurance Test and without appreciating that the selections had been prolonged that were required to be concluded expeditiously in view of the monitoring of all such selections by the Apex Court that was reflected in the order passed by the Supreme Court on 5th of May, 2017 in the case of *Manish Kumar vs. Union of India and Ors.* (Writ Petition (C) No. 183 of 2013).

12. It is also the contention of the Board that the holding of the selection process in a compartmentalized manner was not practical as it involves huge expenses and such concessions for candidates would also create a heavy burden on the Exchequer of the State.

13. Before we proceed to deal with the arguments advanced, the first issue that we would deliberate upon is about the stipulations contained in the advertisement and the notice of employment of Jail Warders which does not appear to have been tested or even commented upon by the learned Single Judge. The respondent-petitioner, namely Ishika Raj, applied for the post of Jail Warder against the Advertisement No. 03 of 2015. A copy of the said advertisement has been filed as Annexure-B to the counter affidavit of the Selection Board in the writ petition. The selection or appointment of Jail Warders

in prisons throughout the State of Bihar are governed by the Bihar Board Cadre Rules, 2014, a copy of the same has been filed as Annexure-A to the counter affidavit. The prescribed criteria through direct recruitment envisages a written examination, a race to be conducted, the criteria and standard whereof shall be the same as prescribed for Constables in Bihar Police and the Physical Measurement Test as provided in relation thereto. Clause 6.2 is extracted hereinunder:-

"6.2 Procedure of Direct Recruitment- 6.2.1 There shall be following stages for the process of Direct Recruitment:- (i) First Stage-A written examination shall be conducted for candidates. On the basis of received applications by the Examination Agency.

(ii) Second Stage-The Examination Agency shall prepare a list of candidates, five times the number of reported vacancy on the basis of written examination. In case of unavailability of sufficient number of qualified candidates for medical test, the ration of candidates may properly be reduced. All such candidates shall have to undergo for a race.

(iii) Third Stage- Candidates qualified in race, a physical measurement and test shall be followed. On the basis of list of candidates found fit in physical measurement and test, the merit wise and reservation category wise list of candidates equal to the number of vacancies selected by the Examination Agency from the qualified candidates shall be provided to the Appointing Authority.

(iv) Fourth Stage:- A medical test shall be conducted by a Medical Board constituted under prescribed provisions after receiving the list of qualified candidates from the Examination Agency. It will be mandatory for candidates to be found fit in medical examination for appointment.

(v) If some of the candidates do not succeed in the medical test, then the Examination Agency will be asked to recommend names of candidates from the merit list, reservation category wise, against the number of unsuccessful candidates in the medical test by the appointing authority; and proper action shall be taken by the appointing authority after getting such a list.

6.2.2 Prescribed Criteria for selection through Direct Recruitment:- (i) Written Examination- The criteria and standard of written examination shall be same as prescribed for Constable in Bihar Police. Besides, minimum marks for written examination and process and provisions for preparing the merit list will be same as applicable for recruitment of constable in Bihar Police.

(ii) Race- The criteria and standard of race examination shall be same as prescribed for constable in Bihar Police.

(iii) Physical Measurement and test- The criteria and standard of physical measurement and test shall be same as prescribed for constable in Bihar Police."

14. The advertisement with regard to physical abilities provides as under:-

Physical Abilities:-

(i) Run For Men-Time limit for 1 mile run-6 minutes (those taking more time will be declared disqualified) For Women-Time limit for 1 kilometer run-6 minutes (those taking more time will be declared disqualified)

(ii) High Jump For Men-Minimum 4 feet For Women-Minimum 3 feet

(iii) Long Jump For Men-Minimum 12 feet For Women- Minimum 9 feet

(iv) Shot Put For Men-16 pound, minimum 16 feet to throw For Women-12 pound, minimum 10 feet to throw"

15. An important notice was issued by the appellant Board that was published in the Newspapers and was also uploaded on the website on the basis whereof the test of Physical Evaluation Test on the declaration of written examination results was announced. This notice dated 29th November, 2016 is Annexure-C to the counter affidavit. Clauses 2, 3, 5 and 6 are extracted hereinunder:-

"2. लिखित परीक्षा के आधार पर योग्य पाये गये

अभ्यर्थियों को स्क्रीनिंग (सत्यापन), शारीरिक माप,

शारीरिक क्षमता जाँच-माप परीक्षण ;चूलेपबंस

म्अंसनंजपवद जमेज क्षम्जद्वद्ध में भाग लेना

अनिवार्य होगा। जिसका आयोजन दिनांक

-09जनवरी, 2017 से पटना में किया

जायेगा।

3. भूतपूर्व सैनिक तथा बिहार राज्य के गृह

रक्षक अभ्यर्थियों के लिए आरक्षित पदों के विरुद्ध

उम्मीदवारों की "बिहार कक्षपाल संवर्ग

नियमावली-2014" के प्रावधान के अनुसार दौड़

आदि शारीरिक क्षमता जाँच नहीं होगी किन्तु

अभ्यर्थियों की स्क्रीनिंग जाँच, ऊँचाई एवं सीना

की माप तथा प्रमाण-पत्रों की जाँच की जायेगी।

5. चयनित अभ्यर्थियों की

स्क्रीनिंग/शारीरिक माप/शारीरिक क्षमता

जाँच-माप हेतु निर्धारित समय एवं स्थान की

सूचना प्रवेश-पत्र तथा पर्षद की वेबसाईट पर

उपलब्ध करायी जायेगी।

6. स्क्रीनिंग/शारीरिक माप/ शारीरिक क्षमता

जाँच -माप परीक्षण में निर्धारित तिथि को

प्रत्येक अभ्यर्थी का सम्मिलित होना अनिवार्य

है, अन्यथा वे अयोग्य माने जायेंगे और उन्हें

दूसरा अवसर नहीं दिया जायेगा।"

16. A perusal of the aforesaid entire information including the terms and conditions of Physical Evaluation Test was therefore well-known to the respondent-petitioner as well as to all other candidates which categorically provides that failure to undergo the PET that is compulsory on the appointed date, would disqualify a candidate and no further opportunity would be given.

17. At this juncture, it would be relevant to point out the claim of the respondent-petitioner where she states, with the help of two documents, that her expected date of delivery was between March and April, 2017. It is therefore evident that the respondent-petitioner had approximately become pregnant long before the written test was held on 18th September, 2016, the results whereof were declared within two months and the Physical Evaluation Test was notified immediately thereafter. There is no prayer in the writ petition for quashing any terms and conditions of the advertisement, the Rules applicable for selection or the notice dated 29.11.2016. The only prayer made in the writ petition was to extend the period of four months till April, 2017 to enable the respondent-petitioner to deliver her child and then appear in the Physical Evaluation Test.

18. It is also to be noted that along with the counter affidavit the appellant had brought on record a chart of fourteen such similar candidates having requested for extension of time till March 2017, April, 2017 or for a period of six months or for any other date to be fixed separately for them. This chart Annexure-D is being reproduced for ready reference:-

"केन्द्रीय चयन पर्षद (सिपाही भर्ती) विज्ञापन संख्या-03/2015 के अंतर्गत कारा कक्षपाल पद पर नियुक्ति हेतु लिखित परीक्षा के सफल अभ्यर्थियों की शारीरिक जाँच-माप परीक्षण (दिनांक-09.01.2017 से 19.01.2017) के अवसर पर निम्न महिला गर्भवती अभ्यर्थियों द्वारा अपनी शारीरिक जाँच-माप परीक्षण की तिथि को उनके नाम के सामने अंकित समयानुसार बढ़ाने का अनुरोध किया गया है :-

क्र०सं० अभ्यर्थी

का नाम

1. ईसिका

राज

रौल नं० 4123170138

- समय बढ़ाने की अवधि कुछ माह बढ़ाने के लिए अनुरोध
2. स्तुति 4111240044 मार्च 2017, तक बढ़ाने के कुमारी लिए अनुरोध।
 3. प्रियंका 4115160240 बाद में कोई तिथि निर्धारित कुमारी करने के संबंध में
 4. नीतु 4113090233 जून 2017 तक बढ़ाने के लिए कुमारी अनुरोध।
 5. रून्ती 4113370186 अलग से तिथि निर्धारित करने कुमार के लिए अनुरोध।
 6. संगीता 4120050014 बाद में कोई तिथि निर्धारित कुमारी करने के संबंध में।
 7. किरण 4115080702 बाद में कोई तिथि निर्धारित कुमारी करने के संबंध में।
 8. चांदनी 4119060428 बाद में कोई तिथि निर्धारित कुमारी करने के संबंध में।
 9. ललिता 4112100258 बाद में कोई तिथि निर्धारित कुमारी करने के संबंध में।
 10. नाज 4123090210 मार्च 2017 तक बढ़ाने के परवीन लिए अनुरोध।
 11. राधा 4125060584 छः माह के बाद में कोई तिथि कुमारी निर्धारित करने के संबंध में।
 12. कनक 4111230109 छः माह के बाद में कोई तिथि कुमारी निर्धारित करने के संबंध में।
 - 13 गायत्री 4120030089 अप्रैल 2017 तक बढ़ाने के कुमारी लिए अनुरोध।
 - 14 अनमोला 4113110448 छः माह के बाद में कोई तिथि कुमारी निर्धारित करने के संबंध में।
- विशेष कार्य पदाधिकारी,

19. It is therefore evident from the facts in the present case that the respondent-petitioner had acquired pregnancy long before the written test itself. This was of course her own choice but the said choice is now sought to be pleaded as a fundamental right to seek extension of time in the holding of the examinations which has been granted by the learned Single Judge on the ground that the written examinations were held after thirteen months of the advertisement.

20. We do not find any consideration by the learned Single Judge of the terms and conditions as indicated in the advertisement, the 2014 Rules and more particularly the terms and conditions in the notice dated 29.11.2016 which was not even challenged.

21. The recital in clause 5 and 6 of the notice dated 29.11.2016 makes it explicitly clear that every candidate has to undergo the Physical Evaluation Test on the date fixed which is compulsory, or else they would be treated to be disqualified and more importantly they will not be given a second opportunity. The purpose for which a Physical Endurance Test has to be carried on is to test the physical ability and for which all candidates who have succeeded in the written examinations are supposed to undergo the same without fail. They, if acquire an incapacity voluntarily by entering the stage of pregnancy as in the present case, the question is, can it be pleaded that a further extension of time, as desired by them and as per their convenience, is a right accrued unto them which if not granted would violate their fundamental rights? Such terms and conditions of Physical Evaluation Test were not discussed in the light of above either by the Division Bench of the Kerala High Court or the Delhi High Court where the voluntary act of acquiring motherhood was held as a fundamental right in respect of delayed examinations for gaining employment.

22. We have considered the submissions raised and we find that the entire judgment of the learned Single Judge proceeds on a two fold premise, firstly, that there was no fixed time schedule for holding of the test in the advertisement and that the selection process spread over for a fairly long time. Secondly, any denial of an opportunity to participate even after having cleared the written examinations would be depriving the respondent-petitioners of an opportunity of employment and they cannot be discriminated on the ground of sex as that would violate Article 15 of the Constitution of India. Aid has further been taken of Article 14 read with Article 21 of the Constitution of India to conclude that any such denial of opportunity amounts to infringing the right of a female to have a dignified life and also amounts to a denial of women empowerment, particularly in respect of those who have already proved their merit. The limited postponement of the Physical Endurance Test does not in any way prejudice the process of selection more in the background that the respondent-petitioners were duly qualified, eligible and were within the merit of the selected candidates.

It is in these peculiar facts when holding of the examinations were spread over for a fairly long time that the learned Single Judge found that the rights of the respondent-petitioners were being impinged for no fault on their part.

23. We are unable to subscribe to the said view with respect, inasmuch as, the right to claim employment on the strength of such facts where an individual is incapacitated by virtue of health conditions cannot be said to have a fundamental right to claim employment. The act of acquisition of pregnancy is a voluntary act and the right to beget a child is not being infringed by the State in any manner. It is open to any of the writ-petitioners to have a child by choice but if the same brings about any disability or incapacity in facing the Physical Endurance Test, the same has not been imposed by the State and, therefore, the same does not get converted into such a right or a fundamental right so as to be enforced against the State. The State has nowhere infringed or impinged the right of a female to have a child. On the other hand, it is the respondent-petitioners who want a concession in order to enable them to have a family and protect their family rights at the cost of postponing a competitive examination. This is not a case where any of the respondent-petitioners have acquired a vested right after employment. The benefit of any law relating to maternity during service cannot be applied in the matters of holding examinations that have to be completed as expeditiously as possible. Learned counsel for the appellants are right in their submission that the process of examinations had to be concluded in view of the directions issued by the Supreme Court where no further postponement was permissible. Nonetheless, there is no law that may compel the State to postpone an examination or Physical Endurance Test as involved in the present case on the basis of any such right that may be traceable to Part-III of the Constitution of India. There is no element of arbitrariness or illegality in the stand taken by the appellants which in the opinion of the Court is a justified stand on behalf of the appellants as against the voluntary act of the respondent-petitioners to have voluntarily decided to have a child of their choice. The State does not prevent them from exercise of any such choice by refusing to postpone the dates of Physical Endurance Test.

24. A female candidate who enters into a marriage and conceives of her own choice cannot be a matter of prediction by the appellant Board thereby breaching the fundamental right of a woman. The Board cannot control or regulate this fundamental right of a woman by providing a contingency that might come into existence by making provisions in the advertisement. The advertisement is not under-challenge nor the terms and conditions of the 2014 Rules are questioned. This right of convenience to appear in the examinations as per the choice of the candidate by seeking extension of the dates of physical evaluation on account of a self-acquired incapacity cannot form the basis of a fundamental right of a woman to seek employment. The judgments in relation to the post-employment marriage benefits, therefore, in our opinion cannot be stretched to the extent of matters relating to holding of examinations or Physical Efficiency Test before employment. If the logic as applied is extended, then female candidates in

respect of any examinations whatsoever would claim extension as per her convenience and choice or extending the dates of examinations because she by her own choice is unable to undertake the examinations. The choice therefore to beget a child clearly involves entering into the stage of a self-imposed incapacity where a female cannot undertake a Physical Evaluation Test of the kind presently involved. The candidate knows consciously that she will not be able to undertake the test, yet she has of her own choice decided to attain motherhood. A female candidate, as in the present case has not acquired any vested right of employment even before clearing the physical examination test which is essential and compulsory. Thus by her own choice she incapacitates herself which clearly amounts to a disqualification as per the terms and conditions above. She does not get prohibited from again appearing in any fresh examinations and, therefore, her right to seek an opportunity of employment is not lost for all times to come. She by her own act having willingly, free from any influence, has chosen to organize her own family life. Thus, she has in an intended way exercised her option to acquire motherhood. There are a large number of candidates who have not chosen to do so. The Kerala High Court in its judgment has treated such class of women as a separate class. This creation of a class is an outcome of voluntary act and not an act which may be attributable to the State or the Selection Board. The State or the Board therefore did not choose to violate the fundamental rights of the respondent-petitioner. The action of the State in issuing the advertisement or by holding the Physical Evaluation Test, which the learned Single Judge states to have been delayed, nowhere declares that a female does not have a right to beget a child. It only prescribes that all candidates have to pass the Physical Evaluation Test and on their failure to appear in the same would bring about an automatic disqualification. There is no relaxation on the ground of separate classes of women, one who are pregnant and the other who are not. The situation would have been different if such pregnancy was acquired after employment and it is only then that maternity benefits either in the shape of leave or otherwise are comprehended.

25. To our mind, the interpretation as given in the said judgments and followed by the learned Single Judge in the impugned judgment does not appear to be legally sound as it not only overlooks the reasonable restrictions that can be placed in matters of employment for expeditiously concluding the selection process simultaneously in respect of all female candidates treating them to be placed on an equal footing. The interpretation seeks to create an unequal class amongst the females for extending the benefit on the ground of convenience and at the cost of impeding the selection process. This also would violate Article 14 and Article 16 of the Constitution of India inasmuch as there would be a large number of such candidates who may not have even applied or would have left the examinations on account of such incapacity of pregnancy.

26. We may also refer to a Division Bench Judgment of the Kerala High Court in the case of Kerala Public Service Commission vs. K. Jayasree reported in 2014 (1) KHC 358 that has been heavily relied on by the learned Single Judge to arrive

at the conclusions in the impugned judgment. In the aforesaid case, the Division Bench of the Kerala High Court observed that a pregnant woman cannot be denied an opportunity to seek her means of livelihood for biological reasons of her having entered the stage of motherhood. The Division Bench held that since the final selection list had not been published therefore the Commission was not required to conduct a fresh endurance test. This fact in the present case has to be viewed from the angle that the date which was fixed for physical endurance test was sought to be advanced to enable the respondent-petitioners to become capable for appearing in the test. The Division Bench further held that the primary concern is to have female candidates which is a larger public interest and, therefore, a category of such candidates who have qualified the other tests but they are unable to appear in the physical endurance test because of their pregnancy or maternity therefrom, they form a different class.

27. In our opinion, this sub-classification for the purpose of giving protection would run counter to Articles 14 and 16 within the category of females themselves. If this interpretation is accepted then a large number of such females would have unhesitatingly applied who were also undergoing the same stage of pregnancy provided there had been any such relaxation given either in the advertisement or rules. All aspirants for the post were uniformly informed of the holding of Physical Endurance Test and it is quite natural that such aspirants who were undergoing pregnancy or maternity may not have applied because of their incapacity to face such a test, but had it been publicly known about the extension of such relaxation, there would have been many such candidates who could have applied and would have competed along with the respondent-petitioners. Thus, by carving out a class of such candidates after the selections have reached the selection of Physical Endurance Test would be denying such opportunity to those similarly placed aspirants who did not apply because of their pregnancy or even if they had applied may not have chosen to appear in the examinations because of such a situation. The law therefore in respect of a class within the class has to be applied uniformly in respect of similarly situated aspirants. The Division Bench of the Kerala High Court did not investigate the matter any further and assumed the existence of this sub-category amongst female candidates entitled to be protected without any consideration of the competing claims of similarly situated aspirants. The learned Single Judge has also not examined the matter from this angle even though he has ultimately extended benefits to those who were similarly placed.

28. The flip side of the coin has not been viewed. The fate of thousands of female candidates waiting in the queue who have not acquired any health incapacity cannot be made to suffer at the hands of those who have voluntarily chosen to do so and are a miniscule number. Opportunity was offered to all including the petitioners at par with others. They were given a level playing field with the same opportunity being considered which they have denied to themselves. It is the petitioners who chose to waive the opportunity by opting for maternity thereby altering their own priorities. A voluntary act by them cannot be

transposed as a blame on the appellants as if they had acted deliberately to defeat the rights of respondent-petitioners.

29. The respondent-petitioners did have a right to appear in the Physical Evaluation Test and they were offered the same opportunity. As to what is one's right has been described in Paragraph 15 of the Apex Court Judgment in the case of Mr. 'X' vs. Hospital 'Z' reported in (1998) 8 SCC 296. The same is extracted herein under:-

"15 "Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right."

30. The respondent-petitioners therefore had a right of an opportunity but they gave it up because of their voluntarily acquired pregnancy. The choice therefore was exercised by them of their fundamental right to have a child. This right is sought to be enforced on the ground that they are being impinged on account of denial of adjustment by granting a separate opportunity of physical ability test.

31. We find on the other hand that the appellants have placed a reasonable restriction by giving one opportunity to everyone to appear in the Physical Evaluation Test and failure to appear therein would entail a disqualification. Such restriction of a single opportunity to appear in the Physical Evaluation Test is neither arbitrary nor discriminatory and is neither against public interest or public policy. Consequently, in our opinion, the fundamental right to beget a child is nowhere violated when the right to appear in the Physical Evaluation Test is protected by providing an opportunity. It is the respondent-petitioners who want an additional opportunity or concession or holding of a separate Physical Evaluation Test for them which in our opinion is neither a legal right nor a fundamental right. There is no fundamental right to have a second chance in a matter of selection and appointment. There is therefore no conflict in the competing rights of the respondent-petitioners so as to castigate the appellants of having violated the fundamental rights of the respondent-petitioners.

32. On the other hand, it is the competing legal rights of those who have appeared at the test, on the appointed day and time, abiding by the terms and conditions that would be infringed by accommodating the respondent-petitioners on concession. As stated herein this would also be unfair to those who either had not applied in absence of any such announcement for future adjustment and

second chance or had applied and chose to opt out on account of their pregnancy. The competing rights of those who have succeeded in the PET cannot be jeopardized at the desired convenience of the respondent-petitioners. This would be treating others unequally.

33. The appellants have not been found to have planned the elimination of the respondent-petitioners so as to infer either malice in fact or in law. If the respondent-petitioners are now accommodated then those who have faced the test and have been successful will have to be eliminated. This will be unjust as against those who have competed against those who have chosen to abstain voluntarily.

34. In our opinion, unless such a rule is declared or made known to the aspirants either through an advertisement or otherwise the same cannot be applied selectively in respect of candidates who on account the pendency of the final selections had on their own volition chosen to exercise their right to have a child.

35. The respondent-petitioners have exercised their own option knowing fully well that they may have to undergo a PET any time. This option to beget a child cannot be converted as a compulsion on the appellants to hold a separate PET after the candidate delivers a child. This option cannot be termed as a right to compel the appellants to keep on adjourning the dates of PET as per the convenience of maternity or stage of pregnancy.

36. In the present case, it may also be placed on record that this matter of selection was being monitored by the Apex Court and on 5th of May, 2017 the Apex Court had passed orders that is part of the record whereby the selections had to be completed in a time bound manner.

37. These facts have not been dealt with by the learned Single Judge which clearly makes the present case distinguishable as against the case before the Kerala High Court. The judgment of the learned Single Judge was delivered on 03.08.2017 and it appears that the above-quoted direction of the Apex Court escaped the notice of the Court even though the order had already been passed by the Apex Court to conclude the selection process within a time bound frame. In the present case selections have been concluded and the Physical Endurance Test has already been held. Accordingly to concede any further opportunity would be to further delay the appointments of the selected candidates which would also violate the orders of the Apex Court dated 5th of May, 2017.

38. In our opinion, the right of a female to choose a family life and have a child at the pre-employment stage cannot be a compulsion on the employer to mould the terms and conditions of the selection process at the convenience of candidates which is evident from the choice expressed by such candidates as indicated in the chart reproduced hereinabove.

39. For all the aforesaid reasons, we do not find the appellant to be under any obligation in law to extend the time for making it convenient to the respondent-

petitioner to avail another opportunity of Physical Evaluation Test. The fundamental rights of the respondent-petitioner are nowhere violated as held by the learned Single Judge and we do not find ourselves in agreement with either the judgments of the Kerala High Court or the Delhi High Court as relied on by the learned Single Judge for extending any such benefit to the respondent-petitioner.

40. Accordingly, the appeal is allowed and the impugned judgment dated 3rd August, 2017 is set aside. The writ petition stands accordingly dismissed.