CASE NO.:
Appeal (civil) 6638 of 2004

PETITIONER:
Zile Singh

RESPONDENT:
State of Haryana & Ors.

DATE OF JUDGMENT: 07/10/2004

BENCH:
CJI. R.C. Lahoti, G.P. Mathur & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

(Arising out of S.L.P (c) No.459/2004)

R.C. Lahoti, CJI

Leave granted.

Haryana Municipal Act, 1973 (hereinafter, the Principal Act, for short) is a State enactment dealing with local self-government through the municipalities. Chapter III of the said Act deals with composition of municipalities. The Haryana Municipal (Amendment) Act, 1994 (Act No.3 of 1994) inserted Section 13A in Chapter III of the Principal Act which provision reads as under :-

"13A. Disqualification for membership.
(1) A person shall be disqualified for being chosen as and for being a member of a municipality __

xxx xxx xxx

(c) if he has more than two living children :

Provided that a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified".

xxx xxx xxx"

The Amendment Act received the assent of the Governor of Haryana on the 1st April, 1994 which was published in the Haryana Gazette, (Extraordinary), Legislative Supplement, Part I, dated April 5, 1994 and on that date the Amendment Act came into force. The amendment spelled out a disqualification effective from 5.4.1994 on a person for being a member of municipality either by election or by continuing to hold the office even if elected prior to the date of coming into force of the Amendment Act. The substantive provision contained in clause (c) abovesaid spelling out the disqualification is explicit and specific. However, the proviso appended to clause (c) turned out to be a trouble-maker on account of its faulty drafting. Anomalous consequences verging on absurdity flew from the proviso. While a person having more than two living children on 5th April, 1994 became disqualified for being a member of municipality on that day and the disqualification continued to operate for a period of one year calculated from 5th April, 1994 yet on the expiry of the period of one year the disqualification ceased to operate.

Meaning thereby that the legislative embargo imposed on a person from procreating and giving birth to a third child in the context of holding the office of a member of municipality remained in operation for a period of one year only and thereafter it was lifted. Even those who became disqualified on 5.4.1994, the disqualification ceased to operate and they became qualified once again to contest the election and hold the office of member of a municipality on the expiry of one year from 5.4.1994. Obviously, this is not what the Legislature intended.

It took more than six months for the State Legislature to realize its error. The Haryana Municipal (Second Amendment) Act, 1994 (Act No.15 of 1994) was enacted by the Legislature which received the assent of the Governor of Haryana on 3rd October, 1994 published in Haryana Gazette (Extraordinary) dated 4th October, 1994. Section 2 of the Second Amendment reads as under :-

"2. In the proviso to clause (c) of sub-section (1) of section 13A of the Haryana Municipal Act, 1973 (hereinafter called the principal Act), for the word "after", the word "upto" shall be substituted."

The Second Amendment brought the text of the relevant part of Section 13A in conformity with the legislative intent which prevailed behind the preceding amendment, that is, the First Amendment.

Zile Singh, the appellant was married with one Om Pati in April 1970. The couple had three living children when Om Pati died in April 1991. The appellant then married one Sunita on 20.7.1991. Out of the latter marriage, two children were born to the appellant __ a daughter, Puja born in April 1992 and a son Gaurav born on 13.8.1995. The appellant was holding the office of member of Municipality. One Nafe Singh filed a complaint against the appellant bringing it to the notice of the State Government that on a child having been born after 5th April, 1995, i.e., one year after the commencement of the First Amendment Act, the appellant had incurred disqualification for holding the office of member. Clause (f) of sub-section (1) of Section 14 of the Principal Act confers power on the State Government to remove by notification any member of a committee if he has, since his election or nomination become subject to any disqualification which, if it had existed at the time of his election or nomination, would have rendered him ineligible under any law for the time being in force relating to the qualifications of candidates for election or nomination or if it appears that he was, at the time of his election or nomination subject to any such disqualification. The factum of the birth of Gaurav on 13.8.1995 is not disputed though the appellant contended that Gaurav was given away in adoption on 10.9.1995. The State Election Commission, Haryana which is the competent authority found the appellant having incurred the disqualification within the meaning of Section 13A(1)(c). The disqualification was notified.

Feeling aggrieved the appellant filed a writ petition in the High Court which has been dismissed. This is an appeal by special leave.

At the very outset we may state that the retrospectivity in operation of the text as amended by the Second Amendment came up for the consideration of a two-Judges Bench of this Court in Sunil Kumar Rana Vs. State of Haryana and Ors. \026 (2003) 2

SCC 628. This court held that the legislative intent to compute the period of one year under the proviso is from the "commencement of this Act" meaning thereby from the date of coming into force of Haryana Act 3 of 1994 and not Haryana Act 15 of 1994 which merely substituted the word "after" by the word "upto". The result of the substitution was to read the provision as amended by the word ordered to be substituted. The Court held __ "The legislature seems to have realized the need for substitution on becoming aware of the anomalies and absurdities to which the provision without such substitution may lead to, even resulting, at times, in repugnancy with the main provision and virtually defeating the intention of the legislature. The modification of the provision, as carried out by the substitution ordered, when found to be needed and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution. The right to contest to an office of a member of a municipal body is the creature of statute and not a constitutional or fundamental right."

In spite of the issue posed for decision before us being squarely covered by the abovesaid decisions, the learned counsel for the appellant does not feel satisfied. In his humble submission Sunil Kumar Rana's case (supra), which is two-judges Bench decision, was not correctly decided and hence needs a reconsideration and an over-ruling thereafter. In view of the submission so made and forcefully pressed, we proceed to examine and deal with the pleas raised before us independently of the holding in Sunil Kumar Rana's case (supra).

The constitutional validity of 'two child norm' as legislatively prescribed, and a departure therefrom resulting in attracting applicability of disqualification for holding an elective office, has been upheld by this Court as intra vires the Constitution repelling all possible objections founded on very many grounds in Javed and Ors. Vs. State of Haryana and Ors. \026 (2003) 8 SCC 369. This Court has also held that the disqualification is attracted no sooner a third child is born and is living after two living children and merely because the couple has parted with one child by giving it away in adoption, the disqualification does not come to an end. However, the present case poses a different issue.

According to the appellant, the disqualification imposed by Section 13A (1)(c) of the First Amendment remained in operation only for a period of one year and would have in ordinary course ceased to operate on the expiry of the period of one year from April 5, 1994. The citizens were justified in arranging their affairs including the enlargement of their families keeping in view the provision of law as it stood. However, the Second Amendment Act effective from 14.10.1994 made a difference. On that day, the Legislature specifically provided that a person having more than two children on or after the expiry of one year shall stand disqualified. This period of one year, in the submission of the appellant, should be calculated from 4.10.1994 and not 5.4.1994 and if that be done the birth of the child on 13.8.1995 would not attract the disqualification.

This plea of the appellant raises a few interesting questions, such as, the nature of amendment, i.e., whether it is at all retrospective in operation, and if not, whether the provision as amended by the Second Amendment applies to the appellant.

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in

general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis' __ a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole. (ibid, p.440)

The presumption against retrospective operation is not applicable to declaratory statutes\005\005.In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended\005\005\005An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp.468-469).

Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right (p.392).

Where a Statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. The classic illustration is the case of Att. Gen. Vs. Pougett ([1816] 2 Price 381, 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson C.B., in giving judgment for the Attorney-General, said: "The duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were

one and the same Act." (p.395).

Maxwell states in his work on Interpretation of Statutes, (Twelfth Edition) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it." (p.225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p.226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p.231).

In a recent decision of this Court in National Agricultural Cooperative Marketing Federation of India Ltd. And Another Vs. Union of India and Others, (2003) 5 SCC 23, it has been held that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as : (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.

The Constitution Bench in Shyam Sunder & Ors. Vs. Ram Kumar & Anr., (2001) 8 SCC 24, has held ___ "Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective. Mere absence of use of word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the Court finds an Act as declaratory or explanatory it has to be construed as retrospective." (p. 2487).

In The Bengal Immunity Company Ltd. Vs. The State of Bihar & Ors., [1955] 2 SCR 603, Heydon's case (3 Co. Rep.7a; 76 E.R.637) was cited with approval. Their Lordships have said ___

"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case was decided that ___"\005\005for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.,

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth., and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico"."

In Allied Motors (P) Ltd. Vs. Commissioner of Income-tax, Delhi, (1997) 3 SCC 472, certain unintended consequences flew from a provision enacted by the Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply. "A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

The State Legislature of Haryana intended to impose a disqualification with effect from 5.4.1994 and that was done. Any person having more than two living children was disqualified on and from that day for being a member of municipality. However, while enacting a proviso by way of an exception carving out a fact-situation from the operation of the newly introduced disqualification the draftsman’s folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the Legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retrospective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have the retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes.

The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein \026 "shall be substituted".

The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. ’Substitution’ has to be distinguished from ’supersession’ or a mere repeal of an existing provision.

Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, ibid, p.565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. and Ors. Vs. State of U.P. and Ors. \026(2002) 2 SCC 645, State of Rajasthan Vs. Mangilal Pindwal \026 (1996) 5 SCC 60, Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co. \026 (1969) 1 SCC 255 and A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael & Ors. \026 AIR 1963 SC 933. In West U.P. Sugar Mills Association and Ors.'s case (supra) a three-Judges Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centering around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case (supra) this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar's case (supra) a three-Judges Bench of this Court emphasized the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps : first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place.

In Javed (supra) it was held that the right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. The statute which confers the right to contest an election can also provide for the necessary qualifications and disqualifications for holding an elective office. The bar by way of disqualification created against holding the office of a member of a municipality by clause (c) of sub-section (1) of Section 13A was absolute. Merely because a disqualification is imposed by reference to certain facts which are referable to a date prior to the enactment of disqualification, the Act does not become retrospective in operation. No vested right was taken away. The First Amendment was not a piece of legislation having any retrospectivity. However, the legislature thought that it would be more reasonable if the disqualification was not applied by reference to a child born within a period of one year from the date of commencement of the Act. The period of one year was appointed keeping in view the period of gestation which is two hundred and eighty days as incorporated in Section 112 of the Indian Evidence Act of 1872 and added to it a little more margin of eighty five days. The proviso spells out this meaning but for the error in drafting. Even if there would have been no amendment (as introduced by the Second Amendment Act) the proviso as it originally stood, if subjected to judicial scrutiny, would have been so interpreted and the word 'after' would have been read as 'upto' or assigned that meaning so as to carry out the legislative intent and not to make a capital out of the draftsman's folly. Or, the proviso \026 if not read down \026 would have been declared void and struck down as being arbitrary and discriminatory inasmuch as the persons having more than two living children on the date of enactment of the Act and within one year thereafter and the persons having more than two living children after the date of one year could not have formed two classes capable of being distinguished on a well defined criterion so as to fulfill the purpose sought to be achieved by the legislature. However, the legislature got wiser by realizing its draftsman's mistake and stepped in by substituting the mistaken word 'after' by the correct word 'upto' which should have been there since very beginning. In our opinion the Second Amendment is declaratory in nature. It alters the text of the First Amendment in such manner

as to remove the obvious absurdity therefrom and brings it in conformity with what the Legislature had really intended to provide. It explains and removes the obvious error and clarifies what the law always was and shall remain to be. The Second Amendment would operate retrospectively from the date of the First Amendment and in giving such operation no mandate of any law or principle is violated. Else, the evil sought to be curbed continues to exist for some period contrary to legislative intent. The application of rule against retrospectivity stands excepted from Second Amendment Act.

In Javed (supra) the Court has been at pains to point out how the growth of population of India was alarming and posed a menace to be checked. It was in national interest to check the growth of population by casting disincentives even through legislation. The First Amendment Act targets the evil and seeks to cure it. The legislative competence of the State is not disputed. Thus, keeping in view the general scope and purview of the statute, the remedy sought to be applied, the former state of law, the legislative intent and the employment of the expression \026 "for the word 'after' the word 'upto' shall be substituted" in the text of the Second Amendment, we have no doubt in our mind that the Second Amendment has the effect of amending the text of First Amendment ever since the date of commencement of the First Amendment, i.e., April 5, 1994.

We hold that Sunil Kumar Rana's case has been correctly decided. It does not call for any reconsideration. The appeal is wholly devoid of any merit and the same is dismissed. The decision by the High Court is maintained.