

UNION OF INDIA & ORS.

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v.

LT. CDR. ANNIE NAGARAJA & ORS.

(Civil Appeal No. 2182-87 of 2020)

MARCH 17, 2020

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**[DR. DHANANJAYA Y. CHANDRACHUD AND
AJAY RASTOGI, JJ.]**

Navy Act, 1957 – s.9(2) – Women Short Service Commissioned (SSC) Officers – Grant of Permanent Commissions (PCs) – Right to be considered for – Held: Statutory bar on the engagement or enrolment of women in the Indian Navy was lifted to the extent envisaged in notifications dated 09.10.1991 and 06.11.1998 issued by Union Government u/s.9(2), 1957 Act – Right to be considered for the grant of PCs arises from the policy letter dated 25.02.1999 r/w Regulation 203, Chapter IX, Part III, 1963 Regulations – Further, policy decision dated 26.09.2008 granted PCs to SSC women officers in Army, Navy and Air Force – Stipulation therein making it prospective and restricting its application to specified cadres/ branches of the Indian Navy not to be enforced – Implementation guidelines dated 03.12.2008, to the extent they are made prospective and restricted to specified cadres are quashed and set aside – All SSC officers in Education, Law and Logistics cadres presently in service to be considered for the grant of PCs – Women SSC officers of Air Traffic Controller (ATC) cadre in Annie Nagaraja's case not entitled to consideration for the grant of PCs – As a one-time measure, SSC officers in ATC cadre are entitled to pensionary benefits – Respondent nos.2 to 6, in addition to the grant of pensionary benefits, entitled to compensation of Rs. 25 lakhs each – SSC officers in ATC cadre in Priya Khurana's case inducted in pursuance of specific representation in the advertisements that they would be considered for the grant of PCs, to be considered in terms as directed – Further directions issued – Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963 – Regulations 122, 124, 126, 203 – Constitution of India – Arts. 33, 142 – Ex turpi causa non oritur actio.

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- A *Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963 – Regulation 203 (1) – Grant of PCs – Factors – Held: Regulation 203 (1) conditions the grant of PCs to three factors: availability of vacancies in the stabilised cadre, consideration of suitability, and a recommendation of the Chief of Naval Staff.*
- B *Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963 – Regulations 122 (14) and 203 – Comparison between – Discussed.*
- C Notification dated 09.10.1991 was issued by Union of India making women eligible for appointment as officers of Indian Navy in three cadres/branches. On 1 July 1992, the intake of thirty-five officers on SSCs was sanctioned in the ATC cadre stipulating that no PCs would be granted (for both men and women) in the ATC cadre. In 1998, the stipulation on the tenure of seven years was extended to ten years and to fourteen years in 2002. Notification dated 06.11.1998 made women eligible for
- D appointment as officers of Indian Navy in all branches. The policy decision dated 25.02.1999 (referring to the two earlier letters dated 20.12.1991) granted PCs to all SSC officers including women in accordance with Regulation 203, 1963 Regulations. Further, another policy decision dated 26.09.2008 granted PCs to SSC officers in all three branches of Armed Forces. However,
- E it was restricted to certain categories and operated prospectively for future batches inducted on SSCs after January 2009. Implementation guidelines issued for selecting SSC officers for grant of PCs in the Navy were also prospective and restricted to specified cadres. In *Annie Nagaraja's* case, seventeen women SSC officers (inducted between 1992 and 2001) before the Delhi High Court challenged not being considered for the grant of PCs despite completing fourteen years of service. High Court *inter alia* directed offering of PCs to SSC officers who had opted for but were not granted PCs and had not retired at the time of the filing of the writ petitions. Reinstatement was directed for
- F petitioners who had attained the age of superannuation prior to the filing of writ petitions, subject to the decision of Supreme Court in *Babita Puniya* case which was pending. In *Priya Khurana's* case, Armed Forces Tribunal (AFT) in a batch of six Original Applications (OAs) by seven SSC officers *inter alia* declared the policy letter dated 26.09.2008 as invalid and directed H reconsideration of the requests for the grant of PCs. Hence, the present appeals.

Disposing of the appeals, the Court

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HELD: 1.1 Statutory and policy framework

Section 9 of the Navy Act 1957 deals with the eligibility for appointment or enrolment in the Indian Navy. Sub-section (2) of Section 9 conditions the eligibility of women to be appointed or enrolled in the Navy or the Indian Naval Reserve Forces. The provision commences with the expression “no woman shall be eligible” and follows it up with the expression “except in such department, branch or other body”. The prohibition on the appointment or enrolment of women is subject to the lifting of the restriction by the Union Government. The Union Government has been conferred with the authority to stipulate the departments, branches or bodies forming a part of or attached to the Navy or the Indian Naval Reserve Forces in which women can be appointed or enrolled. The Union Government is also vested with the authority to define the conditions on which the appointment or enrolment may take place. [Paras 10, 11][452-F; 453-C-D]

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1.2 Section 184 of the 1957 Act contemplates regulations being made by the Central Government for governance, command, discipline, recruitment, conditions of service and regulation of the Naval Forces and, generally for the purpose of effectuating the provisions of the 1957 Act. The power to frame regulations includes those in relation to the rank, terms and conditions of service, pay, pension, allowances and other benefits. The Regulations are required to be laid before each House of Parliament under Section 185. Part III of Chapter I of the Regulations for the Indian Navy contain the 1963 Regulations. Section II deals with officers in the Executive branch inducted on SSCs. Regulation 122(1) makes provisions governing “the entry, training and promotion of officers granted SSCs in the Executive branch of the Indian Navy”. Regulation 122(2) contains a stipulation that the candidate must be an “unmarried male”. Under Regulation 122(9), an officer is to be on probation for one year or until the completion of initial training, whichever is later. Regulation 122(14) provides for Permanent Commissions. Section IV of the Regulations deals with officers in the Engineering branch inducted on SSCs. Regulation 124(2) contains

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- A a provision similar to Regulation 122(2) which restricts SSCs only to “unmarried males”. Section VI provides for SSCs in the Electrical branch. Regulation 126(2) contains a similar restriction of eligibility to “unmarried males”. Regulations 124(14) and 126 (14) contain provisions for the grant of PCs. [Paras 15-18][454-D-G; 455-B-D]
- B 1.3 Chapter IX of the Regulations is titled “Grant of Permanent Commission to Short Service Commission Officers”. Regulation 203 contains the stipulation in regard to the grant of PCs. Regulation 203 (1) conditions the grant of PCs to three factors: (i) Availability of vacancies in the stabilised cadre; (ii) Consideration of suitability; and (iii) A recommendation of the Chief of Naval Staff. Regulation 203 applies to SSC officers of the rank of Sub-lieutenant and above. A comparison may be made of the provisions of Regulation 122 (14) and Regulation 203. Regulation 122(14) stipulates that suitable officers may be considered for the grant of PC in the Navy after the successful completion of the period of probation, subject to the existence of vacancies and the regulations current at the time. Regulation 203 provides for the consideration of the grant of PCs from time to time to SSC officers of the rank of Sub-lieutenant and above subject to their suitability, availability of vacancies in the stabilized cadre of the Navy and the recommendation of the Chief of Naval Staff. Regulation 122(14) applies to all officers in the Executive branch of SSC officers. Regulation 203 applies to all officers of the rank of Sub-lieutenant and above. The AFT observed that Regulation 203 would apply to the OAs before it since the applicants were recruited as SSC officers in the rank of Sub-lieutenant and were promoted thereafter. [Paras 19-21][455-E; 456-A-E]
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- G 1.4 The Indian Navy consists of four branches – Executive, Electrical, Engineering and Education. On 9 October 1991, the Union Government, pursuant to the enabling power conferred by Section 9(2), issued a notification by which women were made eligible for appointment as officers of the Indian Navy in three cadres/branches which were: Logistics; Law; and Education. The Law and Logistics cadres belong to the Executive branch of the Indian Navy. At the material time when the 1963 Regulations
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were notified, no notification had been issued in pursuance of the power conferred under Section 9(2) and no women were commissioned as SSC officers. Consequently, the regulations were restricted only to male officers. The notification which was published in the Gazette of India on 9 October 1991 was to be in force for five years. The consequence of the issuance of this notification under Section 9(2) was that the restriction on the appointment or enrolment of women was lifted for specified cadres/branches of the Navy. Once the notification was issued under Section 9(2), the provisions in the 1963 Regulations restricting the grant of SSCs to males would stand lifted insofar as the cadres/branches where the entry of women was notified. [Paras 22, 23][456-E-H; 457-A-B]

2. Preliminary Objection

A preliminary objection was urged to the maintainability of the appeal filed by the Union of India in Priya Khurana's case. It was urged that when the SSC women officers sought to challenge the judgment of the AFT, leave to appeal was separately sought and was granted by the AFT to move this Court. This led to the filing of six Civil Appeals by the officers. However, the Union of India sought the leave of the AFT to file an appeal before this Court only in one OA. No leave was sought to appeal in the other OAs. It was urged that the AFT rendered one common judgment in six OAs. The Union of India having filed an appeal only in one of the cases arising from the AFT, it was urged that the common judgment binds the Union Government and operates as *res judicata* in the other five OAs. The learned Counsel appearing before this Court have addressed arguments on the merits of the issues raised in the judgments of the Delhi High Court and AFT. This Court is nevertheless required to adjudicate upon the validity and effect of the policy letter dated 26 September 2008 in the appeals filed by the SSC women officers in Annie Nagaraja's and Priya Khurana's case. In order to render a final adjudication, this Court proposes to deal with the appeals on merits. The question of law raised in the preliminary objection is left open to be considered in an appropriate case in future.[Paras 51, 56][470-E-G; 473-G-H; 474-A]

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- A *Sri Gangai Vinayagar Temple v. Meenakshi Anmal* (2015) 3 SCC 624 : [2014] 12 SCR 845; *Union of India v. Brigadier PS Gill* (2012) 4 SCC 463 : [2012] 2 SCR 571 – referred to.

3.1 Validity of the policy letter dated 26 September 2008

- B Article 33 of the Constitution entrusts to Parliament to determine, by law, the extent to which any of the rights conferred by Part III of the Constitution can be restricted or abrogated in their application to the members of the Armed Forces “so as to ensure the proper discharge of their duties and the maintenance of discipline among them”. Besides the requirement that a restriction must be determined by law, Article 33 postulates a nexus between the restriction or abrogation and the need for the proper discharge of duties and the maintenance of discipline among members of the Armed Forces. Acting in exercise of authority under Section 9(2), the Union Government initially issued a notification on 9 October 1991 and thereafter on 6 November 1998. The second notification dated 6 November 1998 broadened the scope of the permissible areas for the entry of women as officers in the Indian Navy by enabling their entry in all the four branches - Executive, Engineering, Electrical and Education. Significantly, neither of the notifications dated 9 October 1991 nor 6 November 1998 restrict the appointment or enrolment of women only on SSCs. Both notifications stipulate that women shall “be eligible for appointment as officers in the Indian Navy” in the branches specified. The consequence of the two notifications is to lift the bar envisaged in Section 9(2) and to allow for the induction of women as officers in the Indian Navy in the specified cadres/branches. [Paras 57, 60][474-B-C; 477-A-D]

R Viswan v. Union of India (1983) 3 SCC 401 : [1983] 3 SCR 60 – followed.

G *Lt. Col. Prithi Pal Singh Bedi v. Union of India* (1982) 3 SCC 140 : [1983] 1 SCR 393 – relied on.

Union of India v. LD Balam Singh (2002) 9 SCC 73 : [2002] 3 SCR 385; *Mohd. Yunus Khan v. State of UP*

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(2010) 10 SCC 539 : [2010] 12 SCR 448 – referred A

to.

3.2 Close on the heels of the first notification dated 9 October 1991 issued under Section 9(2), the MoD issued two notifications on 20 December 1991 with successive numbers of reference providing for the terms and conditions of service of SSC officers, including women. The first letter (bearing reference No. 1110) concerned SSC officers in the Education branch. Para 4 of the notification specifically contemplated that the policy in regard to the grant of PCs would be promulgated in 1997. The second letter (bearing reference No. 1111) concerned SSC officers in the Law and Logistics cadres and adopted the terms of the earlier letter, save to the extent specified therein. As there was no specific stipulation concerning the grant of PCs in the second letter, the stipulation in para 4 of the first notification (bearing reference No. 1110) applies to SSC officers inducted in the Law and Logistics cadres. Hence from 20 December 1991, it was within the contemplation of the Union Government that the policy for the induction of SSC officers, including women, on PCs would be notified within a period of six years. This was because officers who were inducted on SSCs would have a tenure of seven years. The policy for the grant of PCs was hence envisaged to be notified before or around the expiry of the short service tenures notified in 1991. The stipulation on the tenure of seven years was subsequently extended to ten years in 1998 and to fourteen years in 2002.[Paras 61, 62][477-D-H; 478-A]

3.3 The policy communication dated 25 February 1999 was not anticipatory in nature. What the communication spelt out was that the grant of PCs to SSC officers would be in terms of Regulation 203. This would cover both men and women officers serving on SSCs. The expression “the policy for grant of Permanent Commission will be” in accordance with Regulation 203 cannot be construed to mean that the policy was yet to be framed or that until a future date when a policy would be notified, there was no entitlement to be considered for the grant of PCs. The import of the policy document dated 25 February 1999 was to bring the grant of PCs to all SSC officers including women in accordance with Regulation 203. The course of the evolution of

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- A **policy from 9 October 1991 clearly indicates a legitimate expectation on part of the SSC officers (both men and women) of being governed by the provisions of Regulation 203 being considered for the grant of PCs. The Navy Regulations, when they were originally drafted in 1963, did not contemplate the induction of women. For this reason, Regulations 122(2), 124(2) and 126(2) spoke of only “unmarried males” being eligible for induction on SSCs. The Regulations being subservient to statute, incorporated restrictions which comported with the provisions of Section 9(2). However, what Section 9(2) envisages is that the restrictions on the enrolment or appointment of women in branches or departments of the Indian Navy would be lifted upon the issuance of a notification by the Union Government sanctioning the entry of women officers, subject to the conditions which may be specified. Both in the notifications dated 9 October 1991 and 6 November 1998, the Union Government lifted the statutory bar in exercise of its enabling power under Section 9(2) by allowing for the entry for women as officers in the Indian Navy in stipulated branches. Once the statutory bar stood lifted, the appointment of SSC officers, both men and women on PCs would be governed uniformly by the provisions of Regulation 203. This was made abundantly clear by the policy letter dated 25 February 1999 which was issued in compliance with the legal regime. The grant of PCs to SSC men and women officers aligned with the provisions of Regulation 203 which plainly is a matter of law. Thus, the contention that the communication dated 25 February 1999 was merely anticipatory in nature and that the entitlement to be considered for the grant of PCs would have to await a further policy, which came into being on 26 September 2008 cannot be accepted. The communication dated 25 February 1999 of the MoD had the sanction of the President and consequently cannot be disregarded as suggested in the arguments urged by the Union of India in these proceedings. In addition to the above observations, in Priya Khurana’s case which concerned women officers of the 2002 batch, an advertisement had been issued by the authorities inviting applications from men and women for joining as SSC officers in the ATC and Logistics cadres and the Education branch. The advertisement clearly stipulated that based on their performance and the requirements of service, deserving**
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officers “may also be considered for Permanent Commission.” A
Subsequent employment notices did not contain such a stipulation.
The employment notice of July 2002 was not in conflict with the
provisions contained in Regulations 203. [Paras 64-66][478-C-
H; 479-A-E]

3.4 The policy decision of the MoD dated 26 September B
2008 governed the grant of PCs to SSC women officers in the
Army, Navy and Air Force. The communication, by stipulating
that it would apply to SSC women officers “to be inducted”,
purported to exclude women SSC officers in service from being
considered for the grant of PCs. It also sought to restrict the
cadres/branches in which PCs could be granted to women SSC
officers. The AFT has noted after it had summoned the files, that
the earlier policy decision of 25 February 1999 was not placed
before the decision making authorities. Evidently, in the view of
the AFT, the decision which was arrived at on 26 September 2008
was not a conscious departure from the earlier policy of 25
February 1999. It could not have been a conscious departure for
the simple reason that the earlier policy was not evaluated nor
was there any basis formulated to justify a departure from it. No
submission was urged on behalf of the Union of India controve
rting the above findings of the AFT. The 1963 Regulations contain
specific provisions in regard to the grant of SSCs and for the
grant of PCs. Regulations 122, 124 and 126 govern the grant of
SSCs, while Regulation 203 governs the grant of PCs. Regulation
203, in its own terms, is not restricted in its application to only
male officers. Once the appointment of women officers in the
Indian Navy was permitted in terms of the statutory notifications
dated 9 October 1991 and 6 November 1998, the statutory bar
under Section 9(2) stood lifted and women officers inducted on
SSCs would be entitled to be governed by Regulation 203. Hence,
the policy letter dated 26 September 2008 to the extent it seeks
to restrict the grants of PCs to specified cadres/branches as well
as only to women officers “to be inducted” is contrary to the
notifications dated 9 October 1991 and 6 November 1998 and
shall not be enforced. The policy letter dated 26 September 2008
was not in supersession of the statutory notifications dated 9
October 1991 and 6 November 1998. At the highest it may be
construed as an administrative decision to implement the C
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- A statutory notifications. Hence, it cannot be construed to be prospective in character as any other view to the contrary would be in violation of Section 9(2) of the Act. The conclusion which was arrived at by the High Court and by AFT is unimpeachable in its logical consistency and is in keeping with the legal regime envisaged by the 1957 Act, the 1963 Regulations and the notifications issued on 9 October 1991, 6 November 1998 and 25 February 1999. [Para 67][479-G-H; 480-A, E-H; 481-A-D]

4.1 The stereotypical sailor

The battle for gender equality is about confronting the

- C battles of the mind. History is replete with examples where women have been denied their just entitlements under law and the right to fair and equal treatment in the workplace. In the context of the Armed Forces, specious reasons have been advanced by decision makers and administrators. They range from physiology, motherhood and physical attributes to the male dominated hierarchies. A hundred and one excuses are no answer to the constitutional entitlement to dignity, which attaches to every individual irrespective of gender, to fair and equal conditions of work and to a level playing field. A level playing field ensures that women have the opportunity to overcome their histories of
- E discrimination with the surest of responses based on their competence, ability and performance. Women officers have worked shoulder to shoulder with their men counterparts in every walk of service. The supposed explanations based on duties at sea or Russian vessels (which are deployed by the Indian Navy, no provision has been made for women as sailors and there are no bathrooms to accommodate them) are devices adopted to justify an action which is not germane to the proper discharge of duties and the maintenance of discipline among members of the Armed Forces. These submissions which have been made by the ASG are plainly contrary to the policy letter dated 25 February
- G 1999 issued by the MoD to the Chief of the Naval Staff. The policy letter emphatically stipulates that women officers of all branches/ cadres could be directed to serve on board ships both during training and subsequent employment in accordance with the exigencies of service. In the face of this communication, it is impossible to countenance a submission that women cannot sail alongside men sailors. [Paras 68, 73][481-E-G; 483-F-H]

4.2 Quite apart from the policy letter dated 25 February 1999, the contention that certain sea-going duties are ill-suited to women officers is premised on sex stereotypes that male officers are more suited to certain duties by virtue of the physiological characteristics. In arguments founded on the physical strengths and weaknesses of men and women do not constitute a constitutionally valid basis for denying equal opportunity to women officers. In the compilation of documents which forms a part of the record, there is documentary evidence of the accolades which have been bestowed on women officers in the Indian Navy. Performance at work and dedication to the cause of the nation are the surest answers to prevailing gender stereotypes. To deprive serving women officers of the opportunity to work as equals with men on PCs in the Indian Navy is plainly discriminatory. [Paras 74-76][484-A-C, H; 485-A] A

5.1 Ex turpi causa non oritur actio

During the pendency of the appeal filed by the Union of India arising from the judgment of the Delhi High Court in Annie Nagaraja's case, an interim order was passed by this Court on 20 November 2015 while issuing notice by which (i) those of the petitioners before the High Court who were serving as SSC officers in the Navy on 26 September 2008 were allowed to continue on the terms and conditions applicable to them; and (ii) those who had been released from service after 26 September 2008 upon completion of SSC tenures would be allowed to rejoin in that capacity and to continue in service. By this order, protection was restricted only to those officers before this Court who were in service on 26 September 2008. Respondent Nos 2 to 6 were commissioned as officers of the Indian Navy as SSC officers between 13 July 1992 and 12 August 1994 and were among the first batch of women officers in the Navy. They were released from service between 12 July 2006 and 11 August 2008. These officers were released before the issuance of the policy letter dated 26 September 2008. Consequently, the protection of the interim order of this Court was not extended to these officers. In the appeals arising out of the judgment of the AFT in Priya Khurana's case, an interim order was passed by this Court on 28 October 2016 directing the continuation in service of the SSC D

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- A women officers in that capacity until further orders. [Paras 79, 80 and 83][485-H; 486-A-D; 487-D]
- 5.2 The present situation has arisen as a plain consequence of the actions of the Naval authorities in: (i) The failure to implement the statutory notifications under Section 9(2) dated 9 October 1991 and 6 November 1998; (ii) The failure to abide by the policy letter dated 25 February 1999; and (iii) The breach of the obligation to implement the judgments of the Delhi High Court and the AFT which had not been stayed and has resulted in the creation of an impasse for the SSC women officers. Once the policy decision of the Union Government was communicated on 25 February 1999, the authorities were bound to consider the claims of the SSC officers for the grant of PC in terms of Regulation 203. The naval authorities and the Union Government failed to do so, depriving them of the entitlement to be considered for the grant of PC. By the failure of the authorities to consider the SSC officers for PCs in terms of the policy communication of 25 February 1999, SSC officers lost out on the opportunity to be granted PCs and all the responsibilities and benefits attached to the grant of PC, including promotions and pensionable service. To deny substantive relief to the SSC officers would result in a situation where a breach of duty on the part of the authorities to comply with binding legal norms would go unattended. This would result in a serious miscarriage of justice to the SSC officers who have served the nation and is unsustainable in law. The second to sixth respondents in Annie Nagaraja's case had retired upon the completion of fourteen years of service prior to the issuance of the policy letter dated 26 September 2008. Of these officers, three officers are from the Logistic cadre, one officer is from the Education branch and one officer is from the ATC cadre. The Delhi High Court had issued directions for the reinstatement of the second to sixth respondents. By virtue of the interim order of this Court dated 20 November 2015, protection was extended to only those SSC women officers who were in service on 26 November 2008. This cut-off date was evidently adopted with reference to the policy communication dated 26 September 2008. The interim order of this Court was based on the policy dated 26 September 2008 which envisaged the grant of PCs on a prospective basis to officers "to be inducted" in the future. The

prospective application of the policy dated 26 September 2008 has been held to be invalid. It cannot be ignored that it was because of a restricted interim order passed by this Court that the above five respondents were not reinstated during the pendency of the appeals. Where a situation which detrimentally affects the rights of citizens arises as a result of an order of the Court, it is the duty of the court to remedy the situation and to rectify the injustice to the extent that is possible. [Paras 90-94][492-A-H; 493-A-F] A

6.Directions: (i) The statutory bar on the engagement or enrolment of women in the Indian Navy has been lifted to the extent envisaged in the notifications issued by the Union Government on 9 October 1991 and 6 November 1998 under Section 9(2) of the 1957 Act; (ii) By and as a result of the policy decision of the Union Government in the Ministry of Defence dated 25 February 1999, the terms and conditions of service of SSC officers, including women in regard to the grant of PCs are governed by Regulation 203, Chapter IX, Part III of the 1963 Regulations; (iii) The stipulation in the policy letter dated 26 September 2008 making it prospective and restricting its application to specified cadres/branches of the Indian Navy shall not be enforced; (iv) The provisions of the implementation guidelines dated 3 December 2008, to the extent that they are made prospective and restricted to specified cadres are quashed and set aside; (v) All SSC officers in the Education, Law and Logistics cadres who are presently in service shall be considered for the grant of PCs. The right to be considered for the grant of PCs arises from the policy letter dated 25 February 1999 read with Regulation 203 of Chapter IX Part III of the 1963 Regulations. SSC women officers in the batch of cases before the High Court and the AFT, who are presently in service shall be considered for the grant of PCs on the basis of the vacancy position as on the date of judgments of the Delhi High Court and the AFT or as it presently stands, whichever is higher; (vi) The period of service after which women SSC officers shall be entitled to submit applications for the grant of PCs shall be the same as their male counterparts; (vii) The applications of the serving officers for the grant of PCs shall be considered on the basis of the norms contained in Regulation 203 namely: availability of vacancies in B

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- A the stabilised cadre at the material time; determination of suitability; and recommendation of the Chief of the Naval Staff. Their empanelment shall be based on *inter se* merit evaluated on the ACRs of the officers under consideration, subject to the availability of vacancies; (viii) SSC officers who are found suitable for the grant of PC shall be entitled to all consequential benefits
- B including arrears of pay, promotions and retiral benefits as and when due; (ix) Women SSC officers of the ATC cadre in Annie Nagaraja's case are not entitled to consideration for the grant of PCs since neither men nor women SSC officers are considered for the grant of PCs and there is no direct induction of men officers
- C to PCs. In exercise of the power conferred by Article 142 of the Constitution, it is directed that as a one-time measure, SSC officers in the ATC cadre in Annie Nagaraja's case shall be entitled to pensionary benefits. SSC officers in the ATC cadre in Priya Khurana's case, being inducted in pursuance of the specific representation contained in the advertisements pursuant to which they were inducted, shall be considered for the grant of PCs in accordance with directions (v) and (vi) above; (x) All SSC women officers who were denied consideration for the grant of PCs on the ground that they were inducted prior to the issuance of the letter dated 26 September 2008 and who are not presently in service shall be deemed, as a one-time measure, to have completed substantive pensionable service. Their pensionary benefits shall be computed and released on this basis. No arrears of salary shall be payable for the period after release from service; (xi) As a one-time measure, all SSC women officers who were before the High Court and the AFT who are not granted PCs shall be deemed to have completed substantive qualifying service for the grant of pension and shall be entitled to all consequential benefits; and (xii) Respondents two to six in the Civil Appeals arising out of Special Leave Petition (C) Nos 30791-96 of 2015 shall be entitled, in addition to the grant of pensionary benefits,
- D as a one-time measure, to compensation quantified at 25 lakhs each. The clarification issued in sub-para (a) of paragraph 50 of the impugned judgment and order of the Delhi High Court is affirmed. [Paras 96, 97][494-D-H; 495-A-H; 496-A-E]

H *The Secretary, Ministry of Defence v. Babita Puniya*
 2020 (3) SCALE 712 : (2020) 7 SCC 469 – relied on.

<u>Case Law Reference</u>	A
(2020) 7 SCC 469	relied on
[2014] 12 SCR 845	referred to
[2012] 2 SCR 571	referred to
[1983] 1 SCR 393	relied on
[1983] 3 SCR 60	followed
[2002] 3 SCR 385	referred to
[2010] 12 SCR 448	referred to
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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2182-2187 of 2020.

From the Judgment and Order dated 04.09.2015 of the High Court of Delhi at New Delhi in Writ Petition (C) Nos. 7336 of 2010, 7056, 5714, 7419 of 2012, 6818 of 2013, 7727 of 2014.

With

Civil Appeal Nos. 10225-10230 of 2016, 3359 of 2017, 5392 of 2019, 2181, 2177, 2178, 2179 of 2020.

Tushar Mehta, SG, Sanjay Jain, ASG, R. Balasubramanian, Ms. Aishwarya Bhati, P.S. Narasimha, C.U. Singh, Sr. Advs., Ms. Neela Gokhale, Ms. Saniya Scott, Yuvraj Sharma, Padmesh Mishra, Arkaj Kumar, Ashray Behura, Ms. Shradha Agrawal, Ms. Shruti Dixit, Ilam Paridi, Chitrangda Rastravara, Ms. Kirti Khangarot, Ms. Oorjasvi Goswami, Celeste Agarwal, Nitin Pavuluri, Ms. Archana Pathak Dave, Ms. Aditi Tripathi, Ms. Sindoora VNL, Ms. Kanti, Sridhar Potaraju, Ms. Shweta Parihar, Ms. Shiwani Tushir, Ms. G. Ushari, Vishnu Tulasi Menon, Md. Ali, Nikhil Goel, Ms. Naveen Goel, Dushyant Sarna, Vinay Mathew (for Santosh Krishnan), Ms. Arunima Dwivedi, Arvind Kumar Sharma, Harish Pandey, Mukesh Kumar Maroria, Sudhanshu Shekhar Pandey, Gaichangpou Gangmei, Abhishek R. Shukla, Arjun D. Singh, Anant Vijay Palli, Ms. Garima Sachdeva, Nikhil Palli, Deepak Goel, Anil Kumar Bakshi, Ms. Meenakshi Lekhi, Harish Pandey, Jitender Kr. Tripathi, Alok Kr. Pandey, Sanchar Anand, Anant K. Vatsya, Devendra Singh, Deepak Goel, Vivek Narayan Sharma, Jasdeep Singh, Pragyan Mishra, Shubham Awasthi, Akash Sharma, Rajeev Kumar Jha, Ms. Suman Rani, Santosh Krishnan, B. V. Balaram Das, Ms. Pooja Dhar, Ms. Haripriya

A Padmanabhan, Shurtanjaya Bharadwaj, Vishal Sinha, Ms. Sunieta Ojha, Mayank Tripathy, Ms. Monisha Handa, Mohit D. Ram, Sachin Kaushal, Ms. Liz Mathew, Navneet R., Ms. Sonali Jain, Anupam Raina, Maninder Jit Singh, Hitesh Kumar Sharma, Akhileshwar Jha, Ms. Beendu Singh, Advs. for the appearing parties.

B The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

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A Background of the dispute

1. The present batch of Civil Appeals comes up for adjudication from two decisions, the first in point of time being that of the High Court of Delhi and the second, being that of the Armed Forces Tribunal¹.

A.1 Annie Nagaraja's case

2. Six Writ Petitions under Article 226 of the Constitution were instituted before the Delhi High Court. The petitioners, seventeen in number, were women officers who joined the Indian Navy as Short Service Commissioned² Officers in the Logistics and Air Traffic Controller³ cadres and the Education branch. Six of them were officers

¹ "AFT"

² "SSC"

³ "ATC"

H

in the Logistics cadre, nine in the Education branch and two in the ATC cadre. Their grievance is that despite completing fourteen years of service as SSC officers, they were not considered for the grant of Permanent Commissions⁴ and were discharged from service. A

3. The case which was set up before the High Court was that women SSC officers of the Indian Army and Air Force had been granted PCs by the judgment of the Delhi High Court in **Babita Puniya v Union of India**⁵ (“**Babita Puniya**”). The Air Force implemented the decision of the Delhi High Court. The Indian Army was in appeal before this Court against the judgment in **Babita Puniya**. B

4. The Union of India in the Ministry of Defence⁶ issued a policy letter dated 26 September 2008 granting PCs to SSC officers in all the three branches of the Armed Forces. However, the offer was restricted to certain categories and was to operate prospectively for the benefit of future batches inducted on SSCs after January 2009. The Delhi High Court expressly noted that the denial of combat roles to women was not in issue in the Writ Petitions. By its judgment dated 4 September 2015, the High Court issued the following directions: C

“50. a) The claim of absorption in areas of operation not open for recruitment of women officers cannot be sustained being a policy decision. E

b) The Short Service Commissioned Officers of the Navy who had opted for PC and were not granted PC but instead were granted extension of SSC and were not retired at the time of filing of these Writ Petitions and had attained the age of retirement during the pendency of the present petitions, they shall be offered PC within a period of 6 weeks from the date of this order. They shall be entitled to all consequential benefits such as promotion and other financial benefits subject to their medical fitness. However, their appointment to the post of PC shall be subject to the final outcome of the said SLP i.e. CC No. 10437/2010 title Secr. Ministry of Defence v. Babita Puniya & Anr. pending consideration before the Hon’ble Supreme Court; F G

⁴ “PC”

⁵ Writ Petition (C) No. 1597 of 2013, delivered on 12 March 2010

⁶ “MoD”

- A c) With respect to the petitioners who had attained the age of superannuation prior to the filing of the Writ Petitions by them the following directions are required to be issued:
1. The respondents shall reinstate these petitioners within a period of six weeks from today on their respective posts;
- B 2. Such reinstatement shall be subject to the final outcome of the said SLP i.e. CC No. 10437/2010 titled Secr. Ministry of Defence vs. Babita Puniya & Anr. pending consideration before the Hon'ble Supreme Court;
- C 3. The petitioners are entitled to no benefits;
4. The reinstatement of the petitioners shall be subject to their medical fitness.”
5. Since the earlier decision of the Delhi High Court in **Babita Puniya** was the subject matter of proceedings before this Court, the direction in regard to offering PCs was made subject to the decision that would eventually emerge from this Court. The first petitioner in the Writ Petition⁷ before the High Court was Lieutenant Commander Annie Nagaraja. Hence, the decision of the Delhi High Court in that batch of cases has, in the course of the submissions, been adverted to as the decision in **Annie Nagaraja v Union of India** (“Annie Nagaraja’s case”). In the appeals arising out of the judgment of the Delhi High Court in **Annie Nagaraja**, an interim order was passed by this Court on 20 November 2015 which directed:
- F “Pending further orders from this Court we direct that such of the respondents (petitions before the High Court) as were serving as short service commissioned officers in the Navy as on 26th September 2008, shall be allowed to continue on the terms and conditions applicable to them in that capacity. We further direct that such of the officers out of the respondents (petitioners before the High Court) as may have been released from service after 26th September 2008, upon completion of the short service commission tenure, shall be permitted to join back in terms of the order passed by the High Court and continue in service in that capacity.”
- G

H ⁷ Writ Petition (C) No. 7336 of 2010

By this order, protection was restricted only to those women officers in service on 26 September 2008. A

A.2 Priya Khurana's case

6. The second batch of proceedings which has led to appeals before this Court arises from the decision of the AFT at the Principal Bench in New Delhi in a batch of six Original Applications.⁸ The lead Original Application⁹ was instituted by Commander Priya Khurana. The applicants before the AFT in this batch of cases were seven SSC officers recruited in 2002 in the Indian Navy in the Logistics and ATC cadres and the Education branch. They sought the grant of PCs and challenged the policy document dated 26 September 2008 as unconstitutional to the extent that it operated prospectively and restricted the grant of PCs to a few cadres/branches. Consequently, there was also a challenge to the implementation guidelines dated 3 December 2008 issued by the Integrated Headquarters of the MoD. The officers challenged their release from service on the completion of their tenure of SSC engagement. D

7. The AFT, by a judgment dated 11 August 2016, came to the conclusion that on 25 February 1999, the Union Government in the MoD had taken a policy decision for the grant of PCs to both men and women officers in terms of Regulation 203 of Chapter IX of the Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963¹⁰, which is contained in Part III of the Regulations. The AFT held that the policy decision dated 25 February 1999 held the field and the subsequent policy decision of 26 September 2008 was arrived at without considering the earlier policy decision and as a matter of fact, even the Union Defence Minister had been kept in the dark about the earlier decision. While accepting the principle that it is open to government to review and alter an earlier policy decision, the AFT held that an alteration has to be based on a reasonable exercise of power. The subsequent decision making the grant of PCs only prospective and confining it to stipulated branches was held to be invalid. The AFT has placed a considerable degree of reliance on the fact that the advertisements on the basis of which the SSC officers were inducted had held out a specific representation that the officers would be considered for the grant of PCs. F

⁸ "CA"

⁹ "OA No. 143 of 2016"

¹⁰ "1963 Regulations"

- A 8. The AFT accordingly directed the reconsideration of the request for the grant of PCs on the basis of Regulation 203 and the policy decision dated 25 February 1999 within six months. Until this exercise was undertaken, the applicants were directed to be continued as SSC officers on existing terms and conditions. The decision of the AFT was subsequent to the earlier judgment of the Delhi High Court in **Annie Nagaraja**, which is the subject matter of appeals instituted before this Court. The AFT clarified that its direction to reconsider the case of the SSC women officers for the grant of PCs was subject to the decision of this Court in **Annie Nagaraja**. While directing the consideration of the claim of SSC women officers to the grant of PCs by the Indian Navy, the AFT stopped short of the direction which was issued by the Delhi High Court for the grant of PCs. The AFT was of the view that the appropriate relief was to direct that the applicants be considered by the authorities and to this extent it disagreed with the absolute relief granted by the Delhi High Court for the grant of PCs.
- D 9. The judgment of the AFT has been assailed by the Union Government. The applicants before the AFT are in appeal to the extent that the wider relief which was granted by the Delhi High Court was denied to them by the AFT. The first applicant in the OAs instituted before the AFT was Commander Priya Khurana. Hence, the decision of the AFT in this batch of cases has, in the course of the submissions, been adverted to as the decision in **Priya Khurana v Union of India** (“**Priya Khurana’s case**”). In the appeals arising out of the judgment of the AFT in **Priya Khurana**, an interim order was passed by this Court on 28 October 2016 directing the continuation in service of the SSC officers in that capacity until further orders.

F **B Statutory and policy framework**

10. Section 9 of the Navy Act 1957¹¹ deals with the eligibility for appointment or enrolment in the Indian Navy. Section 9 reads thus:

- G “9. Eligibility for appointment or enrolment.—(1) No person who is not a citizen of India shall be eligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces except with the consent of the Central Government:

H

¹¹ “1957 Act”

Provided that nothing in this section shall render a person ineligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces on the ground that he is a subject of Nepal. A

(2) No woman shall be eligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces except in such department, branch or other body forming part thereof or attached thereto and subject to such conditions as the Central Government may, by notification in the Official Gazette specify in this behalf." B

11. Sub-section (2) of Section 9 conditions the eligibility of women to be appointed or enrolled in the Navy or the Indian Naval Reserve Forces. The provision commences with the expression "no woman shall be eligible" and follows it up with the expression "except in such department, branch or other body". The prohibition on the appointment or enrolment of women is subject to the lifting of the restriction by the Union Government. The Union Government has been conferred with the authority to stipulate the departments, branches or bodies forming a part of or attached to the Navy or the Indian Naval Reserve Forces in which women can be appointed or enrolled. The Union Government is also vested with the authority to define the conditions on which the appointment or enrolment may take place. C

12. The provisions of the Bill which were to lead to the enactment of the 1957 Act were deliberated upon in a report of the Joint Committee of Parliament. A note of dissent was appended by four Members of the Joint Committee on the restriction which was proposed to be imposed on the appointment of women in the Indian Navy. While opposing the restriction proposed in the report of the Joint Committee, the dissenting members (TCN Menon, KK Warior, VK Dhage and V Prasad Rao) stated: E

"An important provision of the Bill is the one which excludes women from the right of joining the Indian Navy. It will be superfluous if we record in detail the courage and capacity shown by the women of India in the past and especially during our glorious freedom struggle. In almost all countries women have proved themselves to be equal to men if not more and today there is no sphere of life nor is there any kind of work where women cannot compete with men. Moreover we feel that the admission of women F

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- A into our armed services will, to a very large extent, have a salutary and welcome effect upon the outlook and morale of our fighting men. This injustice done to our women should be removed and we recommend that the clause which prohibits women from joining the navy be removed.”
- B 13. The dissenting Members stated that restrictions on the fundamental rights of the members of the Armed Forces should be only to the extent strictly necessary for the maintenance of discipline and the discharge of duties. In their view, “the law that Parliament enacts today in respect of the Indian Navy should be a law which will facilitate the
- C development of a Navy composed of contented men and women whose primary allegiance shall be to the people of India”. The object, they stated, of achieving such a fighting forces should be “not to suppress their democratic rights as far as possible”.¹²
- D 14. The dissent has remained a note in history. The task of the Court is to construe the provisions of Section 9 as they stand.
- E 15. Section 184 of the 1957 Act contemplates regulations being made by the Central Government for governance, command, discipline, recruitment, conditions of service and regulation of the Naval Forces and, generally for the purpose of effectuating the provisions of the 1957 Act. The power to frame regulations includes those in relation to the rank, terms and conditions of service, pay, pension, allowances and other benefits. The Regulations are required to be laid before each House of Parliament under Section 185. Part III of Chapter I of the Regulations for the Indian Navy contain the 1963 Regulations. The AFT in its decision noted that in the absence of a counter to the stand taken by the applicants
- F that the 1963 Regulations are statutory in nature, it will have to be presumed that the Regulations are referable to the provisions of Section 184.
- G 16. Section II deals with officers in the Executive branch inducted on SSCs. Regulation 122(1) makes provisions governing “the entry, training and promotion of officers granted SSCs in the Executive branch of the Indian Navy”. Regulation 122(2) contains a stipulation that the candidate must be an “unmarried male”:

H ¹² We acknowledge the research into this aspect made by ms Liz Mathew, learned Counsel who has drawn it to the attention of the Court during the course of the hearing.

“(2) Nationality. – A candidate must be an unmarried male and must fulfil the conditions regarding the nationality as laid down by the Government.” A

17. Under Regulation 122(9), an officer is to be on probation for one year or until the completion of initial training, whichever is later. Regulation 122(14) provides: B

“(14) Permanent Commissions. – Suitable officers may be considered for the grant of Permanent Commission in the Indian Navy at any time after successful completion of the period of probation, subject to the existence of vacancies and the regulations current at the time.” C

18. Section IV of the Regulations deals with officers in the Engineering branch inducted on SSCs. Regulation 124(2) contains a provision similar to Regulation 122(2) which restricts SSCs only to “unmarried males”. Section VI provides for SSCs in the Electrical branch. Regulation 126(2) contains a similar restriction of eligibility to “unmarried males”. Regulations 124(14) and 126 (14) contain provisions for the grant of PCs. D

19. Chapter IX of the Regulations is titled “Grant of Permanent Commission to Short Service Commission Officers”. Regulation 203 contains the following stipulation in regard to the grant of PCs : E

“203. Grant of Permanent Commission. – (1) Subject to the availability of vacancies in the stabilized cadre of the Navy, Permanent Commission may be granted from time to time to Short Service Commission Officers of the rank of Sub-Lieutenant and above who are considered suitable and are recommended by the Chief of the Naval Staff. F

(2) Officers granted Permanent Commission may be transferred with their existing rank and seniority. The retention of any acting rank held by an officer at the time of transfer to a Permanent Commission shall be governed by Regulation 202. G

(3) Short Service Commission Officers selected for the grant of Permanent Commission in the Navy shall conform to the medical standard laid down by the Chief of the Naval Staff from time to time.”

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- A 20. Regulation 203 (1) conditions the grant of PCs to three factors:
- (i) Availability of vacancies in the stabilised cadre;
 - (ii) Consideration of suitability; and
 - (iii) A recommendation of the Chief of Naval Staff.
- B Regulation 203 applies to SSC officers of the rank of Sub-lieutenant and above.
- C 21. A comparison may be made of the provisions of Regulation 122 (14) and Regulation 203. Regulation 122(14) stipulates that suitable officers may be considered for the grant of PC in the Navy after the successful completion of the period of probation, subject to the existence of vacancies and the regulations current at the time. Regulation 203 provides for the consideration of the grant of PCs from time to time to SSC officers of the rank of Sub-lieutenant and above subject to their suitability, availability of vacancies in the stabilized cadre of the Navy
- D and the recommendation of the Chief of Naval Staff. Regulation 122(14) applies to all officers in the Executive branch of SSC officers. Regulation 203 applies to all officers of the rank of Sub-lieutenant and above. The AFT observed that Regulation 203 would apply to the OAs before it since the applicants were recruited as SSC officers in the rank of Sub-lieutenant and were promoted thereafter.
- E 22. The Indian Navy consists of four branches – Executive, Electrical, Engineering and Education. On 9 October 1991, the Union Government, pursuant to the enabling power conferred by Section 9(2), issued a notification by which women were made eligible for appointment as officers of the Indian Navy in three cadres/branches which were:
- F (i) Logistics;
(ii) Law; and
(iii) Education.
- G The Law and Logistics cadres belong to the Executive branch of the Indian Navy.
- H 23. At the material time when the 1963 Regulations were notified, no notification had been issued in pursuance of the power conferred under Section 9(2) and no women were commissioned as SSC officers. Consequently, the regulations were restricted only to male officers. The

notification which was published in the Gazette of India on 9 October 1991 was to be in force for five years. The consequence of the issuance of this notification under Section 9(2) was that the restriction on the appointment or enrolment of women was lifted for specified cadres/branches of the Navy. Once the notification was issued under Section 9(2), the provisions in the 1963 Regulations restricting the grant of SSCs to males would stand lifted insofar as the cadres/branches where the entry of women was notified.

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24. On 20 December 1991, the Union Government in the MoD addressed a communication to the Chief of Naval Staff conveying the sanction of the President for the induction of SSC officers, including women in the Education branch of the Indian Navy and stipulating the terms and conditions of service. Para 2 of the letter stipulated the eligibility for appointment on SSCs thus:

"Eligibility. A candidate must be an unmarried male or female and must fulfill conditions regarding the nationality as laid down by the Government."

(Emphasis supplied)

Para 3 stipulated that candidates would be inducted on SSC for seven years and that the period could be extended with the consent of the officer for two years at a time. Para 4 contemplated that the policy in regard to the grant of PCs would be promulgated in 1997:

E

"Grant of Permanent Commission. The policy in this regard will be promulgated in 1997.”

Para 6 stipulated that the rules for entry and promotion would be those prescribed in Part III of the 1963 Regulations of the Navy, as sanctioned by the Union Government for the entry of male / PC officers in the Education branch except as specified therein. Para 15 stipulated that the induction of women under the scheme was to be initially for a period of five years, which would be reviewed thereafter.

F

25. The above notification dated 20 December 1991 had the following reference number:

G

“MP/0417/NHQ/1110/DO/D(N-IV)”

On the same day – 20 December 1991 - the Union Government in the MoD addressed another communication to the Chief of Naval

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- A Staff conveying the sanction of the President for the induction of SSC officers including women into the Law and Logistics cadres of the Executive branch of the Indian Navy and stipulating the terms and conditions of service therein. The letter stipulated that the terms and conditions of service would be those prescribed in Regulation 122 of the 1963 Regulations and in the Union Government's letter dated 20 December 1991 regarding the entry of SSC officers in the Education branch, except as set out in the notification. The reference number of this notification was:

“MP/0417/NHQ/1111/DO/D(N-IV)”

- C 26. On 1 July 1992, the Union Government in the MoD sanctioned the intake of thirty-five officers on SSCs for a period of five years in the ATC cadre. Paragraph 11 specified the policy for the grant of PC in the following terms:

“11. **Grant of Permanent Commission.** There will be no

- D provision for the grant of Permanent Commission.”

It was stipulated that no PCs would be granted (for both men and women) in the ATC cadre.

- E 27. The Southern Naval Command, by a letter dated 15 May 1998 made a reference to an earlier letter dated 20 April 1998 of the Naval Headquarters clarifying that the services of women SSC officers were extendable for a period of upto ten years with the consent of the officers, with each extension being of not more than two years.

- F 28. On 6 November 1998, the Union Government once again exercised its authority under Section 9(2) to make women eligible for appointment as officers in all the branches of the Indian Navy:

- (a) Executive;
- (b) Engineering;
- (c) Electrical; and
- (d) Education.

The earlier exercise of power under Section 9(2) had rendered women eligible for appointment as officers of the Indian Navy in the Logistics and Law cadres and the Education branch. The subsequent

- H

notification dated 6 November 1998¹³ extended the field of eligibility A
under Section 9(2) to all four branches in the Indian Navy.

29. On 25 February 1999, the Union Government in the MoD
issued a communication to the Chief Naval Staff. The contents of the
notification have a substantive bearing in the present case and are hence
extracted below:

“

No. MP/0417/1/NHQ/425D(N-II)
Government of India,
Ministry of Defence,
New Delhi, the 25th February, 1999 C

To

The Chief of the Naval Staff
(with 30 spare copies)

D

Subject : TERMS AND CONDITIONS OF SERVICE OF SSC
OFFICERS (INCLUDING WOMEN)

Sir,

E

I am directed to refer to GOI, MOD letters No MP/0417/NHQ/
1110/DO/D(N-IV) dated 20 Dec 1991 and MP/0417/1/NHQ/1111/
DO/D(N-IV) dated 20 Dec 1991 and convey the sanction of the
President for the following:-

F

- (a) Grant of Permanent Commission. The policy for grant of
Permanent Commission will be in accordance with Article 203,
Chapter IX of Regulations Navy Part III.
- (b) Employment/Sea Service. Women officers of all Branches/
cadres may also be directed to serve on board ships, during
training & subsequent employment should the exigencies of
Service so require.

G

¹³ Published in the Gazette of India on 28 November 1998

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- A 2. This issues with the concurrence of the Ministry of Defence (Finance/Navy) vide their ID No. 22/NA/S of 1999.

Yours faithfully,

- B
 (SN Gupta)
 Under Secretary to the Government of India

Copy to :-

- C The DA DS, New Delhi
 The DDADS, Mumbai
 The CGDA, New Delhi – 2 copies
 The CDA (N), Mumbai – 2 copies (one signed in ink)
 The DFA (N), New Delhi – 2 copies”
- D 30. The above communication contains a reference to the two earlier letters dated 20 December 1991, which we have noted above bearing the reference numbers MP/0417/NHQ/**1110**/DO/D(N-IV) and MP/0417/NHQ/**1111**/DO/D(N-IV).
- E 31. The two significant facets of the above communication dated 25 February 1999 are: first, the policy for the grant of PCs to women officers would be in accordance with the Regulation 203 of Chapter IX of the 1963 Regulations; and second, women officers of all branches and cadres may be directed to serve on board ships, both during training and subsequent employment in accordance with the exigencies of service.
- F 32. Subsequently, on 27 February 2002, the Union Government conveyed the sanction of the President to extend the tenure of SSC officers in the Navy to fourteen years.
- G 33. In July 2002, the Indian Navy issued an advertisement inviting applications from men and women for appointment as SSC officers in the ATC and Logistics cadres and the Education branch. While inviting applications, the advertisement specified that:

“ SHORT SERVICE COMMISSION

- H 5. Short Service Commission is granted for a term of 07 years, extendable to 10 years. On completion of tenure of SSC, officers are released with gratuity as admission under the rules. Based on

their performance and requirements of service, the deserving A officers may also be considered for Permanent Commission."

34. There was a specific representation that 'deserving officers' may be considered for PCs based on their performance and the requirements of service.

35. It is necessary to note at this juncture that the women SSC officers in **Annie Nagaraja's** case were inducted between 1992 and 2001 pursuant to the notifications dated 9 October 1991, 20 December 1991 and 1 July 1992. On the other hand, the women SSC officers in **Priya Khurana's** case were inducted as SSC officers pursuant to the advertisement issued in July 2002.

36. On 26 September 2008, the MoD issued a communication to the Chiefs of the Army, Naval and Air Staff regarding the grant of PCs to SSC women officers. The communication, which is the subject matter of the challenge in the present appeals, is extracted below:

" No. 12(1)/2004-D(AG). Pt II D

Government of India,
Ministry of Defence

New Delhi, the 26th September, 2008

To E

The Chief of the Army Staff

The Chief of the Naval Staff

The Chief of the Air Staff F

Subject: Permanent Commission to SSC Women Officers

I am directed to convey the sanction of the President to offer Permanent Commission prospectively to Short Service Commission (Women) Officers to be inducted in Judge Advocate General (JAG) Department and Army Education Corps (AEC) of Army and their corresponding Branch/Cadre in Navy and Air Force. Accounts Branch of the Air Force and Naval Constructor of the Navy in addition to current provision for Grant of PC to SSC (Men) Officers. G H

- A 2. Suitable administrative instruction in this regard will be issued by respective Service HQs.
 3. This issues with the concurrence of the MoD(Fin) vide their UO No. 552/AG/PA dated 26.9.2008.

- B (S.C. Barmma)
 Director (AG)

Copy to :- As per standard Distribution”

- C 37. The two significant facets of the above communication are: first, the grant of PC was made prospective to SSC women officers “to be inducted” in the specified cadres/branches. As a consequence, PCs were denied to women SSC officers who were already in service; and second, PCs were confined to specific cadres and branches in the case of SSC women officers in the Army, Navy and Air Force. Insofar as the
 D Navy is concerned, PCs were to be granted in the cadres/branches corresponding to the Judge Advocate General¹⁴ and Education branches of the Army in addition to the Naval Constructor cadre of the Navy. The communication dated 26 September 2008 contains no reference to the earlier policy communication dated 25 February 1999.
 E 38. On 3 December 2008, the Integrated Headquarters of the MoD (Navy) issued implementation guidelines for selecting SSC officers for the grant of PCs in the Navy from the following branches/cadres:

Srl	Branch/Cadre	Batch Commencing	Remarks
(a)	Education	Jun 09	Men and
F			Women officers
(b)	X/Law	When scheduled	
	(c) E/Naval Architecture		Jul 09

- G 39. The tabulation above indicates that the grant of PCs was envisaged only prospectively for batches inducted after January 2009 and in only three cadres/branches as noted above. This was in terms of the earlier decision dated 26 September 2008. Para 4 of the implementation guidelines provides for the constitution of a board for the selection of SSC officers for the grant of PCs:

H ¹⁴ “JAG”

“4. Constitution of Board. A Board will be constituted under the chairmanship of COP for selecting SSC officers of Branches/Cadres mentioned at Para 2 above for the grant of PC. The Board will be guided by Regulation 203 of Regulations for the Indian Navy Part III (Statutory).” A

40. Para 5 which deals with selection provides as follows: B

“5. Selection. The eligible officers are thereafter to be empaneled for grant of PC. The Branch/Cadre-wise selection would be based on *inter se* merit based on ACRs held on the officers under consideration and subject to availability of vacancies.”

41. Selection, in other words, of officers for the grant of PCs is to be based on *inter se* merit determined on the basis of the Annual Confidential Reports¹⁵ of the officers under consideration and subject to the availability of vacancies. C

42. The judgment of the Delhi High Court in **Babita Puniya** has been the subject matter of the recent decision rendered by this Court in **The Secretary, Ministry of Defence v Babita Puniya**¹⁶. This Court issued the following directions: D

“69. We accordingly take on record the statement of policy placed on the record in these proceedings by the Union Government in the form of the letter dated 25 February 2019 and issue the following directions: E

- (i) The policy decision which has been taken by the Union Government allowing for the grant of PCs to SSC women officers in all the ten streams where women have been granted SSC in the Indian Army is accepted subject to the following: F
- (a) All serving women officers on SSC shall be considered for the grant of PCs irrespective of any of them having crossed fourteen years or, as the case may be, twenty years of service; G
- (b) The option shall be granted to all women presently in service as SSC officers;

¹⁵ “ACRs”

¹⁶ 2020 (3) SCALE 712

- A (c) Women officers on SSC with more than fourteen years of service who do not opt for being considered for the grant of the PCs will be entitled to continue in service until they attain twenty years of pensionable service;
- B (d) As a one-time measure, the benefit of continuing in service until the attainment of pensionable service shall also apply to all the existing SSC officers with more than fourteen years of service who are not appointed on PC;
- C (e) The expression “in various staff appointments only” in para 5 and “on staff appointments only” in para 6 shall not be enforced;
- D (f) SSC women officers with over twenty years of service who are not granted PC shall retire on pension in terms of the policy decision; and
- D (g) At the stage of opting for the grant of PC, all the choices for specialisation shall be available to women officers on the same terms as for the male SSC officers. Women SSC officers shall be entitled to exercise their options for being considered for the grant of PCs on the same terms as their male counterparts.
- E (ii) We affirm the clarification which has been issued in sub-para (i) of paragraph 61 of the impugned judgment and order of the Delhi High Court; and
- F (iii) SSC women officers who are granted PC in pursuance of the above directions will be entitled to all consequential benefits including promotion and financial benefits. However, these benefits would be made available to those officers in service or those who had moved the Delhi High Court by filing the Writ Petitions and those who had retired during the course of the pendency of the proceedings.”
- G **C Submissions**
- H 43. Mr Sanjay Jain, learned Additional Solicitor General for India prefaced his submissions by urging:
 - (i) Sea-going duties in the Indian Navy unlike the Army or Air Force have a distinctive feature since there is no immediate return to base;

(ii) The policy has been to exclude women from sea-going branches with the exception of the Logistics cadre; A

(iii) There are practical difficulties in allowing the induction of women SSC officers on PCs: the Indian Navy substantially operates on vessels of a Russian origin in which there is an absence of toilet facilities for women; and B

(iv) There is a possibility of certain branches involving sea-going duties being opened up for women officers on PCs in the near future as new ships are introduced into the Naval fleet.

44. Mr Jain submitted that the Indian Navy does not discriminate between men and women. In 1991, SSCs were opened up in the Law and Logistics cadres and the Education branch on a uniform basis. To these branches were added ATC (1991), Naval Constructor (2001), Naval Armament Inspectorate (2017) and Observer Specialization (2018). As for PCs, as a result of the policy decision taken on 26 September 2008, Law and Naval Constructor cadres and the Education branch were opened up which was followed up in 2017 with the Naval Armament Inspectorate. Mr Jain submitted that the size of the Indian Navy is much smaller than the other Armed Forces, as a consequence of which, the pyramidal structure is saturated comparatively quicker than in the Army and the Air Force. Elaborating on his submissions, Mr Jain urged that:

(i) The decision of the Delhi High Court in **Babita Puniya** has been recently upheld by this Court; E

(ii) The provisions of Section 9(2) of the 1957 Act are not under challenge;

(iii) The avenues for women which have opened up in the Indian Navy stem from the exercise of power under Section 9(2); F

(iv) Direct entry through PCs is not a matter in issue in the present appeals; and

(v) The grant of PCs is not automatic but on the assessment of merit *inter se.* G

45. In defence of the policy decision taken by the Union Government on 26 September 2008 making the grant of PCs to SSC women officers prospective and in stipulated cadres/branches, Mr Jain submitted that while envisaging the grant of SSCs to women on 20 H

- A December 1991, it was contemplated that the policy for the grant of PCs would be promulgated in 1997. On 25 February 1999, the MoD while outlining the terms and conditions of service of SSC officers including women stipulated that the policy for the grant of PCs “will be in accordance with Regulation 203”. In his submission, the policy of 1999 was indicative of the fact that the Union Government wanted to frame a policy in the future. Such a policy, it was contended, was framed in 2008 on the basis of which the implementation guidelines were notified. Hence, he urged that in the case of the Indian Navy, no promise was held out to women officers recruited on SSCs of being granted PCs in the future. On this basis, it has been urged that no rights had accrued to
- B SSC women officers on the basis of the policy which was notified on 25 February 1999. Hence, the Union Government was justified in notifying a policy for the first time on 26 September 2008 making it prospective and confining its application to specified cadres/branches.

46. Resisting the above submissions, Mr CU Singh, learned Senior Counsel urged that:

- (i) The restraint which is imposed on the eligibility of women for appointment or enrolment in the Indian Navy is lifted upon the issuance of a notification by the Central Government under Section 9(2) of the 1957 Act;
- E (ii) Upon the issuance of the notifications under Section 9(2) on 9 October 1991 and 6 November 1998, the provisions contained in the 1963 Regulations for the grant of PCs would apply *proprio vigore*;
- F (iii) As a consequence, upon the issuance of a notification under Section 9(2), the restrictions imposed in Regulations 122(2), 124(2) and 126(2) confining eligibility only to male officers would not apply since the Regulations are subservient to the parent statute;
- G (iv) Regulation 203 of Chapter IX of the 1963 Regulations contains a specific provision for the grant of PCs subject to the availability of vacancies, consideration of suitability and the recommendation of the Chief of Naval Staff;
- (v) On 20 December 1991, the Union Government while opening up certain cadres/branches for the induction of

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Short Service Commissioned officers including women A contemplated that the policy for the grant of PCs would be promulgated in 1997. The policy which was issued on 25 February 1999 contained a specific reference to the two letters dated 20 December 1991 of the MoD and is hence referable to the earlier commitment;

- (vi) On 6 November 1998, a notification was issued under Section 9(2) opening up the appointment of women as officers in the Executive, Engineering, Electrical and Education branches. These four branches encompass nineteen sub-branches:

· Executive branch	-	13
· Engineering branch	-	2
· Electrical branch	-	2
· Education branch	-	2

- (vii) The policy communication dated 25 February 1999 stipulated that the policy for the grant of PCs will be in accordance with Regulation 203 and specifically permitted sea-service for women;

- (viii) The submission of the Union Government that the policy document of 25 February 1999 is only an intent to frame a policy in the future is belied by the express terms of the document as well as by the advertisement issued in July 2002 for SSC officers, which contemplated their consideration for the grant of PCs; and E F

- (ix) The policy issued on 26 September 2008 has justifiably been held to be arbitrary and invalid by the AFT. The policy contains no reference to the notifications issued in 1991 or to the Presidential sanction of 25 February 1999. On a review of the files, the AFT came to the conclusion that the sanction which was issued on 25 February 1999 was not placed before the Board which gave its sanction to the subsequent policy dated 26 September 2008. As a result of the policy document dated 26 September 2008, there would be a complete denial of PCs to those women officers recruited after 1991, including those recruited under the G H

- A advertisement issued in July 2002 which expressly stipulated that PCs may be granted in deserving cases.

On the above rationale, Mr CU Singh has urged that there is no merit in the appeals filed by the Union of India. Mr CU Singh stressed that according to a release of the Press Information Bureau, the B authorised strength of the Navy as on 1 July 2018 was 11,352. The held strength was 9,746, resulting in a shortage of 1,606 officers. As on 1 June 2019, the authorized strength is 11,567 while the held strength is 10,012, thus resulting in a shortage of 1,555 officers.

47. Mr Santosh Krishnan, learned counsel has urged:

- C (i) The policy letter dated 26 September 2008, in so far as it is prospective and has been restricted to certain cadres/branches, is liable to be set aside. In the Logistics cadre and the Education branch, male officers are inducted directly as PC officers. The absolute denial of consideration for the grant of PCs to SSC women officers is discriminatory in nature;
- (ii) The policy letter dated 26 September 2008 is *ultra vires* the policy letter dated 25 February 1999 and Regulation 203 of the 1963 Regulation. The findings of the AFT in this regard are to be upheld. Regulation 203, as subordinate legislation, outweighs executive instructions;
- (iii) The Union Government has challenged before this Court the judgment of the AFT only in one OA. Consequently, the Union Government is deemed to have accepted the judgment of the AFT qua the other women SSC officers who were inducted in pursuance of the advertisements issued in July 2002; and
- (iv) No stay was granted by this Court on the judgment of the AFT. It is the failure of the Union Government to implement the judgment of the AFT which has led to cascading litigation since 2016 by officers seeking similar protection. Around 160 men have been recruited as direct PC officers in the last ten years. This belies the contention urged on behalf of the Union Government that there is a ‘personnel saturation’ in the Logistics cadre. A saturation in the cadre, if any, is a result of the failure of the Union Government to implement

the judgment of the AFT. Women SSC officers have been kept out of the zone of consideration despite the binding directions in **Annie Nagaraja's** case and **Priya Khurana's** case. A

48. Ms Haripriya Padmanabhan, learned counsel appearing for the respondent nos. two to six in **Annie Nagaraja's** case urged: B

- (i) SSC male officers have been granted PCs in various departments of the Navy. The grant of PCs to SSC male officers in certain cadres was halted following the induction of women on SSCs in those cadres. PCs, being granted to male officers in these specified streams must also be extended to women officers inducted on SSCs; C
- (ii) The notifications issued by the Union Government in 1991 stipulated that the policy for the grant of PCs would be promulgated in 1997. Women officers, inducted on SSCs pursuant to these notifications, had a legitimate expectation that they would be considered for the grants of PCs; D
- (iii) The legitimate expectation of the women SSC officers crystallised into a right upon the issuance of the policy letter dated 25 February 1999, which states that the grant of PCs shall be in accordance with Regulation 203 of the 1963 Regulations; E
- (iv) The advertisements issued in July 2002 contained an express stipulation that deserving SSC officers may be considered for the grant of PCs; and F
- (v) The second to sixth respondents were commissioned as SSC officers in the Indian Navy between 1992 and 1994 and were among the first batches of women officers in the Navy. They completed their service and were released between 2006 and 2008 prior to the issuance of the policy letter dated 26 September 2008. Though the interim order of this Court dated 20 November 2015 protected only those women SSC officers in service on the date of the issuance of the policy, their right of being considered for the grant of PCs arose by virtue of the policy letter dated 25 February 1999. Though out of service for over twelve years, this G

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- A Court may consider their reinstatement and the grant of PCs.
49. Ms Aishwarya Bhati, learned Senior Counsel appearing on behalf of Commander Seema Chaudhary (JAG SSC officer) has canvassed submissions in line with those urged by Mr CU Singh, learned Senior Counsel and Mr Santosh Krishnan, learned counsel. In addition to these submissions, it was urged that facially neutral laws, as in the present case, have a discriminatory effect against women SSC officers. Male officers have, it was urged, always been afforded a choice between being inducted either as SSC officers or directly as PC officers. Despite the non-consideration of the grant of PCs to male SSC officers, PC avenues were in fact available to men. On the other hand, women SSC officers are neither recruited directly as PC officers nor are SSC women officers considered for the grant of PCs. This, it was urged, belies the submission of the Union Government that the non-consideration of both male and women SSC officers for the grant of PC is gender neutral and not discriminatory.

50. The rival submissions fall for consideration.

D Preliminary Objection

51. Before we deal with the rival submissions on merits, it is necessary to advert to a preliminary objection which was urged by Mr CU Singh, learned Senior Counsel to the maintainability of the appeal¹⁷ filed by the Union of India in **Priya Khurana's** case. Mr CU Singh urged that when the SSC women officers sought to challenge the judgment of the AFT, leave to appeal was separately sought and was granted by the AFT to move this Court. This led to the filing of six Civil Appeals by the officers¹⁸. However, the Union of India sought the leave of the AFT to file an appeal before this Court¹⁹ only in one OA. No leave was sought to appeal in the other OAs. Mr CU Singh urged that the AFT rendered one common judgment in six OAs. The Union of India having filed an appeal only in one of the cases arising from the AFT, it was urged that the common judgment binds the Union Government and operates as *res judicata* in the other five OAs. In this submission, the judgment of the AFT which held that the policy communication dated 26

¹⁷ Civil Appeal 3359 of 2011

¹⁸ Civil Appeal No. 10225-30 of 2016

H ¹⁹ Civil Appeal No. 3359 of 2017

September 2008 is *ultra vires* binds the Union of India in the five cases where no appeal has been filed. Hence, it was submitted that it is not open to the Union of India to file an appeal only in one of the six cases where a common judgment has been delivered on similar facts. In this context, reliance was placed on the decision of this Court in **Sri Gangai Vinayagar Temple v Meenakshi Anmal**²⁰.

52. Opposing the above submission, Mr Sanjay Jain, learned ASG submitted that the decision which was relied on by Mr CU Singh arose in the context of a civil suit while the scheme under the AFT Act 2007 is distinct.

53. Section 30(1) of the AFT Act 2007 provides as follows:

“30. Appeal to the Supreme Court. – (1) Subject to the provisions of Section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under Section 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order.

Provided further that there shall be no appeal against an interlocutory order of the Tribunal.”

Section 31 is in the following terms:

“31. Leave to appeal.—(1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

(2) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.

(3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted,

²⁰(2015) 3 SCC 624

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- A until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made within that time.”

The above provisions were interpreted by a Bench of two learned judges of this Court in **Union of India v Brigadier PS Gill**²¹. This Court held that there are two distinct routes for filing an appeal against a final order of the AFT (other than an order passed in the jurisdiction to punish for contempt). The first route is the grant of leave by the Tribunal to file an appeal before the Supreme Court under Section 31(1). The second route empowers this Court to permit the filing of an appeal against a final decision or order of the Tribunal if it appears to this Court that the point is one which ought to be considered by that Court. In this context, the Court held:

- D “8. Section 31 of the Act extracted above specifically provides for an appeal to the Supreme Court but stipulates two distinct routes for such an appeal. The first route to this Court is sanctioned by the Tribunal granting leave to file such an appeal. Section 31(1) in no uncertain terms forbids grant of leave to appeal to this Court unless the Tribunal certifies that a point of law of general public importance is involved in the decision. This implies that Section 31 does not create a vested, indefeasible or absolute right of filing an appeal to this Court against a final order or decision of the Tribunal to this Court. Such an appeal must be preceded by the leave of the Tribunal and such leave must in turn be preceded by a certificate by the Tribunal that a point of law of general public importance is involved in the appeal.
- F 9. The second and the only other route to access this Court is also found in Section 31(1) itself. The expression “or it appears to the Supreme Court that the point is one which ought to be considered by that Court” empowers this Court to permit the filing of an appeal against any such final decision or order of the Tribunal.
- G 10. A conjoint reading of Sections 30 and 31 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act. The only mode to bring up

the matter to this Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of this Court under Section 31 for filing an appeal depending upon whether this Court considers the point involved in the case to be one that ought to be considered by this Court.” A

54. The Court also dealt with the question whether an application for leave to appeal under Section 31 can be moved directly before the Supreme Court without first approaching the Tribunal for a certificate in terms of the first part of Section 31(1). The Court held that an aggrieved party cannot approach this Court directly for the grant of leave to file an appeal under Section 31(1) read with Section 31(2). The Court held: B

“14. The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before the aggrieved party can approach this Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself grants a certificate of fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach this Court for a leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression “an appeal shall lie to the Supreme Court”. That appears to us to be the true legal position on a plain reading of the provisions of Sections 30 and 31.” C D E

55. The learned ASG has urged that though the Union Government did not seek the grant of leave by the AFT for the companion five cases and as a matter of fact sought the grant of leave only in one case, they should not be foreclosed from challenging the judgment of the AFT. Mr Jain submitted that a common judgment has been delivered by the AFT dealing with issues of far-reaching importance bearing on legal questions involved and hence it would be desirable for the Court to consider the matter on merits. F

56. The learned Counsel appearing before this Court have addressed arguments on the merits of the issues raised in the judgments of the Delhi High Court and AFT. We are nevertheless required to adjudicate upon the validity and effect of the policy letter dated 26 September 2008 in the appeals filed by the SSC women officers in **Annie Nagaraja’s** and **Priya Khurana’s** case. In order to render a final G

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- A adjudication, we propose to deal with the appeals on merits. We leave open the question of law raised in the preliminary objection of Mr CU Singh to be considered in an appropriate case in future.

Validity of the policy letter dated 26 September 2008

- B 57. Article 33 of the Constitution entrusts to Parliament to determine, by law, the extent to which any of the rights conferred by Part III of the Constitution can be restricted or abrogated in their application to the members of the Armed Forces “so as to ensure the proper discharge of their duties and the maintenance of discipline among them”. Besides the requirement that a restriction must be determined by law, Article 33 postulates a nexus between the restriction or abrogation and the need for the proper discharge of duties and the maintenance of discipline among members of the Armed Forces.

- C 58. In **Lt. Col. Prithi Pal Singh Bedi v Union of India**,²² the legality of orders convening a General Court Martial and its composition was questioned. It was contended that trial by a Court Martial would result in the deprivation of personal liberty, which can only be done in consonance with Article 21 of the Constitution. It was contended that any restriction must be by procedure established by law and the law prescribing such procedure must satisfy the test prescribed by Articles 14 and 19 of the Constitution. Justice D A Desai, writing for a three judge Bench of this Court noted the competing interests that must be considered in matters concerning the Armed Forces in the following terms:

- D “14. While investigating and precisely ascertaining the limits of inroads or encroachments made by legislation enacted in exercise of power conferred by Article 33, on the guaranteed fundamental rights to all citizens of this country without distinction, in respect of armed personnel, the court should be vigilant to hold the balance between two conflicting public interests; namely necessity of discipline in armed personnel to preserve national security at any cost, because that itself would ensure enjoyment of fundamental rights by others, and the denial to those responsible for national security of these very fundamental rights which are inseparable adjuncts of civilised life...”

H ²²(1982) 3 SCC 140

The Court held that the public interest in the maintenance and preparedness of the Armed Forces of the nation has to be weighed with an equally compelling public interest in balancing the abrogation or restriction of fundamental rights of the officers in the Armed Forces. For this reason, Article 33 specifies that any restriction imposed must be by law and in order to ensure the proper discharge of their duties and the maintenance of discipline among them. The Court rejected the challenge and held:

“...Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin...it is not possible to accept the submission that the law prescribing procedure for trial of offences by court martial must satisfy the requirement of Article 21 because to the extent the procedure is prescribed by law and if it stands in derogation of Article 21, to that extent Article 21 in its application to the Armed Forces is modified by enactment of the procedure in the Army Act itself.”

59. In **R Viswan v Union of India**,²³ one of the issues concerned whether Section 21 of the Army Act, 1950 read with Chapter IV of the Army Rules, 1954 is within the scope and ambit of Article 33 of the Constitution. Section 21 empowers the Central Government by notification to make rules restricting “to such extent and in such manner as may be necessary” certain fundamental rights in their application to persons subject to the 1950 Act. Justice P N Bhagwati (as the learned Chief Justice then was), speaking for a Constitution Bench of this Court held:

“A plain reading thus would reveal that the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. **The Constitution-makers were**

²³(1983) 3 SCC 401

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- A **obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the armed force personnel and therefore Article 33 empowered Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution insofar as the armed force personnel are concerned.”**
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(Emphasis supplied)

- C The Court noted that restrictions imposed upon fundamental rights in exercise of the power conferred by Article 33 must be “absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline”. The Court held:

- D “...Parliament was therefore within its power under Article 33 to enact Section 21 laying down to what extent the Central Government may restrict the Fundamental Rights under clauses (a), (b) and (c) of Article 19 (1), of any person subject to the Army Act, 1950, every such person being clearly a member of the Armed Forces... The guideline for determining as to which restrictions should be considered necessary by the Central Government within the permissible extent determined by Parliament is provided in Article 33 itself, namely, that the restrictions should be such as are necessary for ensuring the proper discharge of their duties by the members of the Armed Forces and the maintenance of discipline among them. The Central Government has to keep this guideline before it in exercising the power of imposing restrictions under Section 21 ...”
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- G This Court, in upholding Section 21 of the 1950 Act, held that the exercise of such power must necessarily conform to the restrictions inherent in Article 33 of Constitution. The nexus requirement in Article 33 was affirmed by this Court in **Union of India v LD Balam Singh²⁴** and **Mohd. Yunus Khan v State of UP.²⁵**

60. Section 9(2) of the 1957 Act conditions the restriction on the appointment or enrolment of women in the Indian Navy by entrusting to the Union Government the authority to issue notifications allowing for

²⁴ (2002) 9 SCC 73

²⁵ (2010) 10 SCC 539

the engagement of women in departments, branches or bodies forming a part of or attached to the Navy or the Indian Naval Reserve Forces. Acting in exercise of this authority, the Union Government initially issued a notification on 9 October 1991 and thereafter on 6 November 1998. By the first of those notifications, women were made eligible for appointment as officers in the Indian Navy in the Law and Logistics cadres and the Education branch. The second notification dated 6 November 1998 broadened the scope of the permissible areas for the entry of women as officers in the Indian Navy by enabling their entry in all the four branches - Executive, Engineering, Electrical and Education. Significantly, neither of the notifications dated 9 October 1991 nor 6 November 1998 restrict the appointment or enrolment of women only on SSCs. Both notifications stipulate that women shall "be eligible for appointment as officers in the Indian Navy" in the branches specified. The consequence of the two notifications is to lift the bar envisaged in Section 9(2) and to allow for the induction of women as officers in the Indian Navy in the specified cadres/branches.

61. Close on the heels of the first notification dated 9 October 1991 issued under Section 9(2), the MoD issued two notifications on 20 December 1991 with successive numbers of reference providing for the terms and conditions of service of SSC officers, including women. The first letter (bearing reference No. 1110) concerned SSC officers in the Education branch. As we have noted, para 4 of the notification specifically contemplated that the policy in regard to the grant of PCs would be promulgated in 1997. The second letter (bearing reference No. 1111) concerned SSC officers in the Law and Logistics cadres and adopted the terms of the earlier letter, save to the extent specified therein. As there was no specific stipulation concerning the grant of PCs in the second letter, the stipulation in para 4 of the first notification (bearing reference No. 1110) applies to SSC officers inducted in the Law and Logistics cadres.

62. Hence from 20 December 1991, it was within the contemplation of the Union Government that the policy for the induction of SSC officers, including women, on PCs would be notified within a period of six years. This was because officers who were inducted on SSCs would have a tenure of seven years. The policy for the grant of PCs was hence envisaged to be notified before or around the expiry of the short service tenures notified in 1991. The stipulation on the tenure of seven years

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- A was subsequently extended to ten years in 1998 and to fourteen years in 2002.
63. It is in the above background, that the policy communication of the Union Government dated 25 February 1999 has to be understood. Regulation 203 of the 1963 Rules lays down the norms for the grant of PCs. The grant of PCs is made subject to:
- (i) The availability of vacancies in the stabilised cadre;
 - (ii) Suitability of the candidate; and
 - (iii) A recommendation by the Chief of Naval Staff.
- C 64. The policy communication dated 25 February 1999 was not anticipatory in nature. What the communication spelt out was that the grant of PCs to SSC officers would be in terms of Regulation 203. This would cover both men and women officers serving on SSCs. The expression “the policy for grant of Permanent Commission **will be**” in accordance with Regulation 203 cannot be construed to mean that the policy was yet to be framed or that until a future date when a policy would be notified, there was no entitlement to be considered for the grant of PCs. The import of the policy document dated 25 February 1999 was to bring the grant of PCs to all SSC officers including women in accordance with Regulation 203.
- E 65. The course of the evolution of policy from 9 October 1991 clearly indicates a legitimate expectation on part of the SSC officers (both men and women) of being governed by the provisions of Regulation 203 being considered for the grant of PCs. The Navy Regulations, when they were originally drafted in 1963, did not contemplate the induction of women. For this reason, Regulations 122(2), 124(2) and 126(2) spoke of only “unmarried males” being eligible for induction on SSCs. The Regulations being subservient to statute, incorporated restrictions which comported with the provisions of Section 9(2). However, what Section 9(2) envisages is that the restrictions on the enrolment or appointment of women in branches or departments of the Indian Navy would be lifted upon the issuance of a notification by the Union Government sanctioning the entry of women officers, subject to the conditions which may be specified. Both in the notifications dated 9 October 1991 and 6 November 1998, the Union Government lifted the statutory bar in exercise of its enabling power under Section 9(2) by allowing for the entry for women as officers in the Indian Navy in stipulated branches. Once the statutory

bar stood lifted, the appointment of SSC officers, both men and women on PCs would be governed uniformly by the provisions of Regulation 203. This was made abundantly clear by the policy letter dated 25 February 1999 which was issued in compliance with the legal regime. The grant of PCs to SSC men and women officers aligned with the provisions of Regulation 203 which plainly is a matter of law. Thus, the contention urged by Mr Sanjay Jain, learned Additional Solicitor General that the communication dated 25 February 1999 was merely anticipatory in nature and that the entitlement to be considered for the grant of PCs would have to await a further policy, which came into being on 26 September 2008 cannot be accepted. The communication dated 25 February 1999 of the MoD had the sanction of the President and consequently cannot be disregarded as suggested in the arguments urged by the Union of India in these proceedings.

66. In addition to the above observations, in **Priya Khurana's** case which concerned women officers of the 2002 batch, an advertisement had been issued by the authorities inviting applications from men and women for joining as SSC officers in the ATC and Logistics cadres and the Education branch. The advertisement clearly stipulated that based on their performance and the requirements of service, deserving officers "may also be considered for Permanent Commission." Subsequent employment notices issued in 2003-4 did not contain such a stipulation. The employment notice of July 2002 was not in conflict with the provisions contained in Regulations 203. Regulation 203 uses the phrase "from time to time", indicating thereby that it was open to the competent authority to determine the grant of PCs to the SSC officers based on the availability of vacancies, suitably and the recommendation of the Chief of the Naval Staff. Hence, in July 2002, when the Navy invited applications for SSCs in stipulated branches, it held out a clear representation that deserving cases may be considered for the grant of PCs.

67. The policy decision of the MoD dated 26 September 2008 governed the grant of PCs to SSC women officers in the Army, Navy and Air Force. The communication, by stipulating that it would apply to SSC women officers "to be inducted", purported to exclude women SSC officers in service from being considered for the grant of PCs. It also sought to restrict the cadres/branches in which PCs could be granted to women SSC officers. The AFT has noted after it had summoned the

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- A files, that the earlier policy decision of 25 February 1999 was not placed before the decision making authorities. The AFT concluded that while a policy framed by the government is amenable to change or alteration, decision making by the government is subject to the norms of reasonableness and a non-arbitrary exercise of power. The AFT noted:
- B "...the said record reveals that the Chairman of the COSC never recommended that the policy should apply to persons who have subsequently been recruited and shall not apply to in-service SSC Officers..."
 - C The aforesaid record pertaining to the policy-decision dated 26th September 2008 does not reveal consideration of the existing policy-decision dated 25 February 1999. No deliberation, as it appears from the aforesaid record, was made as to why the existing policy relating to the grant of PC to SSC officers, irrespective of the gender, as well as the branches/cadres requires modification/change.
 - D The said record reveals that even the Raksha Mantri was kept in the dark about the existing policy-decision dated 25 February 1999. Though the respondent-authorities are free to change their earlier policy, the reason for the change must be reflected on the record pertaining to such change, so also the consideration as well as the deliberation on the existing policy, which as discussed above, are absent in the case at hand"
 - E Evidently, in the view of the AFT, the decision which was arrived at on 26 September 2008 was not a conscious departure from the earlier policy of 25 February 1999. It could not have been a conscious departure for the simple reason that the earlier policy was not evaluated nor was there any basis formulated to justify a departure from it.
- F We must note at this stage that no submission has been urged on behalf of the Union of India by Mr Sanjay Jain, learned Additional Solicitor General controveering the above findings of the AFT. Quite apart from this however, there is a more fundamental reason why a finding in regard
- G to the invalidity of the policy letter dated 26 September 2008 in relation to the Navy rests on a sure foundation. The 1963 Regulations contain specific provisions in regard to the grant of SSCs and for the grant of PCs. As we have noted, Regulations 122, 124 and 126 govern the grant of SSCs, while Regulation 203 governs the grant of PCs. Regulation 203, in its own terms, is not restricted in its application to only male
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officers. Once the appointment of women officers in the Indian Navy was permitted in terms of the statutory notifications dated 9 October 1991 and 6 November 1998, the statutory bar under Section 9(2) stood lifted and women officers inducted on SSCs would be entitled to be governed by Regulation 203. Hence, the policy letter dated 26 September 2008 to the extent it seeks to restrict the grants of PCs to specified cadres/branches as well as only to women officers “to be inducted” is contrary to the notifications dated 9 October 1991 and 6 November 1998 and shall not be enforced. The policy letter dated 26 September 2008 was not in supersession of the statutory notifications dated 9 October 1991 and 6 November 1998. At the highest it may be construed as an administrative decision to implement the statutory notifications. Hence, it cannot be construed to be prospective in character as any other view to the contrary would be in violation of Section 9(2) of the Act. The conclusion which was arrived at by the High Court and by AFT is unimpeachable in its logical consistency and is in keeping with the legal regime envisaged by the 1957 Act, the 1963 Regulations and the notifications issued on 9 October 1991, 6 November 1998 and 25 February 1999.

F The stereotypical sailor

68. The battle for gender equality is about confronting the battles of the mind. History is replete with examples where women have been denied their just entitlements under law and the right to fair and equal treatment in the workplace. In the context of the Armed Forces, specious reasons have been advanced by decision makers and administrators. They range from physiology, motherhood and physical attributes to the male dominated hierarchies. A hundred and one excuses are no answer to the constitutional entitlement to dignity, which attaches to every individual irrespective of gender, to fair and equal conditions of work and to a level playing field. A level playing field ensures that women have the opportunity to overcome their histories of discrimination with the surest of responses based on their competence, ability and performance.

69. In the decision of this Court by the present Bench in **Babita Puniya**, this Court has dwelt on the need to change mind sets if equality for women is to be achieved in the Armed Forces. In **Babita Puniya**, this Court dealt with the submissions of the Union Government that women are ill-suited to assume command roles in the Indian Army. Male

- A officers, it was urged, would be averse to taking orders from women. Women, this Court was informed share an undue burden of marital obligations and the responsibilities of motherhood and child bearing. These arguments, based upon the physiological attributes of women, were employed to justify the unequal treatment of men and women officers.
- B 70. These submissions which are based on deeply entrenched stereotypes came to be rejected by this Court in emphatic terms:
- “The submissions advanced in the note tendered to this Court are based on sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women.
- C Underlying the statement that it is a “greater challenge” for women officers to meet the hazards of service “owing to their prolonged absence during pregnancy, motherhood and domestic obligations towards their children and families” is a strong stereotype which assumes that domestic obligations rest solely on women. Reliance on the “inherent physiological differences between men and women” rests in a deeply entrenched stereotypical and constitutionally flawed notion that women are the “weaker” sex and may not undertake tasks that are “too arduous” for them. Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers...
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- F Such a line of submission is disturbing as it ignores the solemn constitutional values which every institution in the nation is bound to uphold and facilitate... To cast aspersions on their abilities on the ground of gender is an affront not only to their dignity as women but to the dignity of the members of the Indian Army – men and women – who serve as equal citizens in a common mission.”
- G 71. The submissions which were urged before this Court on behalf of the Union of India in **Babita Puniya** which dealt with women SSC officers in the Army have found an echo in the present appeals which deal with SSC women officers in the Indian Navy. Originally, in the written submissions which were filed in these proceedings ('Brief note on behalf of the appellants'), it was urged that sailing in the Indian Navy is not a proper avocation for women. The written submissions contain
- H the following statement:

“There is also a strong contemporaneous rationale for not considering women as sailors in the Indian Navy as the Navy ships of today are not structured nor have the infrastructure to accommodate women sailors alongside men sailors. There is a common barrack and a common bathroom, built as such that no temporary arrangement is possible to be made as they are built on of Russian models where there is no provision made for women as sailors. Navy is endeavoring to create such infrastructure...it clearly emerges that women are kept away from sea-going duties purely on operational grounds and not on the grounds of gender discrimination.”

72. In the revised note of submissions which has been placed on the record, the above paragraph does not find a reference. Significantly however, the same submissions, though absent in the written note which was subsequently tendered before this Court, has been stressed at the forefront of the submissions which were made before this Court by the learned ASG. The submission was that:

- (i) Certain avenues such as sea-sailing duties are ill-suited for women officers as there is no return to the base, unlike in the Army and the Air Force; and
- (ii) In vessels of a Russian origin which are deployed by the Indian Navy, no provision has been made for women as sailors and there are no bathrooms to accommodate them.

73. The above reasons are illusory and without any foundation. Women officers have worked shoulder to shoulder with their men counterparts in every walk of service. The supposed explanations based on duties at sea or Russian vessels are devices adopted to justify an action which is not germane to the proper discharge of duties and the maintenance of discipline among members of the Armed Forces. These submissions which have been made by the ASG are plainly contrary to the policy letter dated 25 February 1999 issued by the MoD to the Chief of the Naval Staff. The policy letter emphatically stipulates that women officers of all branches/cadres could be directed to serve on board ships both during training and subsequent employment in accordance with the exigencies of service. In the face of this communication, it is impossible to countenance a submission that women cannot sail alongside men sailors.

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- A 74. Quite apart from the policy letter dated 25 February 1999, the contention that certain sea-going duties are ill-suited to women officers is premised on sex stereotypes that male officers are more suited to certain duties by virtue of the physiological characteristics. As this Court has noted in **Babita Puniya**, arguments founded on the physical strengths and weaknesses of men and women do not constitute a constitutionally valid basis for denying equal opportunity to women officers. To accept the contention urged by the ASG would be to approve the socially ascribed gender roles which a commitment to equal worth and dignity of every individual belies.
- C 75. In the compilation of documents which forms a part of the record, there is documentary evidence of the accolades which have been bestowed on women officers in the Indian Navy. In 1993, Commander Ruby Singh became the first Indian woman to lead a platoon in the contingent of the Indian Navy at Raj Path on Republic Day. INSV Tarini which circumnavigated the globe comprised of an all women crew.
- D Sub-lieutenant Shivangi became the first pilot for the Indian Navy. The achievements of some of the women officers of the Indian Navy have been set down in the form of a tabulated chart which we consider necessary to extract:

E	1	Lieutenant Sandhya Suri	Served on board the warship INS Jyoti
	2	Commander Reena Magdalene	Served onboard INS Sujatha (2002); She received the Chief of Naval Staff commendation and was awarded the Best Instructor award at INS Valsura (1998)
	3	Commander Suhas Patankar	Received CinC Commendation as well as the Best Instructor Award (INS Shivaji)
F	4	Commander Anuradha Kanchi and Commander Babita Rawat	Received the Chief of Naval Staff commendation.
	5	Commanders Shivani, Rajeshwari Kori and Bhawna Salaria	Received the Vice-Chief of Naval Staff commendation.
G	Naval officers Anuradha Chauhan, Anupama Chauhan, Pawan Preet Maan, Shilpa, Prabha Lal, Savitri Panwar, Pushpa Pandey and Rupali Rohatgi were all awarded the CinC Commendation.		

- H 76. Performance at work and dedication to the cause of the nation are the surest answers to prevailing gender stereotypes. To deprive serving women officers of the opportunity to work as equals with men

on PCs in the Indian Navy is plainly discriminatory. Furthermore, to contend that women officers are ill-suited to certain avocations which involve them being aboard ships is contrary to the equal worth of the women officers who dedicate their lives to serving in the cause of the nation.

G *Ex turpi causa non oritur actio*

77. The Delhi High Court and the AFT have differed on the nature of the reliefs which have been granted in the separate batch of cases adjudicated by them. The Delhi High Court has held that SSC officers of the Navy who had opted for but were not granted PCs and were instead granted an extension on SSC but had not retired at the time of the institution of the Writ Petitions should be offered PCs within a period of six weeks, though they had attained the age of retirement during the pendency of the petitions. They were held to be entitled to all consequential benefits such as promotions and other financial benefits subject to medical fitness. As regards those of the petitioners who had attained the age of superannuation prior to the filing of Writ Petitions, the High Court directed their reinstatement within six weeks subject to the decision of this Court in **Babita Puniya**. These petitioners, it was held, would be entitled to no benefits.

78. The AFT disagreed with the direction of the High Court for the grant of PCs and directed the authorities to consider the cases of the SSC officers for the grant of PCs. The AFT was of the view that as it does not possess the requisite expertise and necessary materials for determining whether PCs should be granted, such a decision must be left to the relevant authorities. However, the AFT directed that until such consideration was made and a decision was taken, the applicants before it would be allowed to continue as SSC officers on existing terms and conditions as applicable to them. The ultimate direction that was issued by the AFT is also the subject matter of the appeals by the SSC officers before this Court. According to them, the wider direction issued by the Delhi High Court for the grant of PCs should have been adopted by the AFT and the mere direction for consideration will not provide any substantial relief to the officers.

79. At this stage, it would be material to note that during the pendency of the appeal filed by the Union of India arising from the judgment of the Delhi High Court in **Annie Nagaraja's** case, an interim

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- A order was passed by this Court on 20 November 2015 while issuing notice by which (i) those of the petitioners before the High Court who were serving as SSC officers in the Navy on 26 September 2008 were allowed to continue on the terms and conditions applicable to them; and (ii) those who had been released from service after 26 September 2008 upon completion of SSC tenures would be allowed to rejoin in that capacity and to continue in service.
 - B 80. By this order, protection was restricted only to those officers before this Court who were in service on 26 September 2008. Respondent Nos 2 to 6 were commissioned as officers of the Indian Navy as SSC officers between 13 July 1992 and 12 August 1994 and were among the first batch of women officers in the Navy. They were released from service between 12 July 2006 and 11 August 2008²⁶. These officers were released before the issuance of the policy letter dated 26 September 2008. Consequently, the protection of the interim order of this Court was not extended to these officers.
 - C 81. The case of these officers is that the 1963 Regulations as well as the policy letter dated 25 February 1999 existed when they were in service which entitled them to be considered for the grant of PCs. Prior to their release from service, they had submitted several representations to the concerned authority requesting that they be considered for the grant of PCs. The applications, it was urged, were forwarded by their commanding officers recommending the grant of PCs which signifies their capabilities, merit and work to serve as PC officers in the Indian Navy. The grievance of these officers is that their request was not considered and that the Navy kept silent about the policy letter dated 25 February 1999 which, according to them, had come to light much later.
 - D 82. It was urged that the Air Force accepted the decision of the Delhi High Court in **Babita Puniya** and reinstated women officers who had retired. Similar steps, it was urged, ought to have been undertaken by the Army. However, as a result of the interim order of this Court, Respondent Nos 2 to 6 were not reinstated and have filed an application
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²⁶ Date of release are – Commander R Prasanna (R2 – 12 July 2006), Commander Puja Chhabra (R3 – 31 July 2006, Commander Saroj Kumari (R4 – 8 August 2007), Commander Sumita Balooni (R5 – 8 August 2008) and Commander E Prasanna (11 August 2008).

seeking a modification of the order²⁷. Respondent Nos 2 to 6 urged that they are entitled to be considered for the grant of PCs in view of the policy letter dated 25 February 1999. They claim to have been gravely prejudiced by the conduct of the Navy and the interim order of this Court. The principle of *actus curiae neminem gravabet* – an act of court should prejudice no one - has been pressed in aid of this submission. Though these respondents have been out of service for between twelve to fourteen years, it has been submitted that the work in their departments is of such a nature that being out of service should not stand in the way of their being reinstated. In support of this, it was urged that fresh persons are inducted with six months' training. Consequently, it was urged that the officers having served for fourteen years, there is no difficulty in the way of this Court passing an order for their reinstatement in service.

83. In the appeals arising out of the judgment of the AFT in **Priya Khurana's** case, an interim order was passed by this Court on 28 October 2016 directing the continuation in service of the SSC women officers in that capacity until further orders. There was no stay on the judgment of the AFT in **Priya Khurana's** case by this Court. In terms of the judgment, the Navy was required to consider the case of every officer in terms of Regulation 203 read with the policy dated 25 February 1999. As a result of the Navy not having implemented the judgment of the AFT since 2016, there has been a cascading effect and nearly thirty officers (this Court was informed during hearing) have filed cases before the AFT, the outcome of which depends on the judgment of this Court in these appeals.

84. Mr Santosh Krishnan, learned counsel submitted that if this Court were to accept the view of the AFT and direct the 'mere' consideration of the representations for the grant of PCs, a piquant situation would arise since any such consideration would be rendered futile at least in respect of one cadre, namely Logistics. The Logistics cadre is stated to be saturated or overborne as a result of the staffing practices which have been followed by the Navy in the interregnum. Furthermore, two Lieutenant Commanders (Lt. Commander Kaberi Kasturi and Lt. Commander Vijeta Yadav) were ordered to be released from service on the ground that the cadre is saturated. The submission which has been urged is that this excuse of the cadre being saturated has been improvised to prevent a judicial review of the systemic gender discrimination in the

²⁷ IA No 71158 of 2017

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- A recruitment and retention practices of the Navy. This is sought to be highlighted by the following submissions:
- (i) While serving women SSC officers are being denied extensions in their SSC tenure or the grant of PCs on the ground that the Logistics cadre is ‘overborne’, the Navy is recruiting fresh hands in the same cadre;
 - B (ii) Nearly 160 men were recruited in the Logistics cadre over the previous ten years directly on PCs, out of whom between 25 and 30 officers were recruited over the previous five years;
 - C (iii) The Navy has defended this recruitment by claiming that fresh recruits “maintain the youthful profile of the force”. This contention cannot be reconciled with the fact that the Navy is offering re-employment to superannuated male officers (aged 52 years and above) at the level of Commanders in the Logistics cadre on account of the shortage of personnel;
 - D (iv) Re-employment of such special duty officers is permissible only where there is a shortage of personnel in the cadre in question, which is evident from a policy letter dated 24 June 2013;
 - E (v) Though, there is no separate Logistics cadre for special duty officers, yet, an informal quota has been carved out for male officers to continue in service, even after superannuation;
 - F (vi) Since the special duty officers have risen from the ranks, they can tenant only certain billets within the Logistics cadre. In contrast, women officers in the Logistics cadre can tenant those billets as well as others, if required. They have been uniformly trained as officers and have passed various qualifying examinations during employment. Yet ironically, it is women officers who are required to exit as a result of the ‘cadre saturation’;
 - G (vii) Despite the Navy being required to consider all serving women SSC personnel for the grant of PC, not a single SSC woman officer in the Logistics cadre from any batch has been considered till date; and

- (viii) If the Navy had considered the application of every Logistics officer on their own merit, there would have been no organizational difficulty of saturation faced in any cadre. Yet, the Navy had continued to insist that it is only the policy letter dated 26 September 2008 which will govern all cases for the grant of PCs, though it was struck down by both the Delhi High Court as well as the AFT.

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In other words, it has been submitted that SSC women officers from the Logistics cadre have been driven to pursue their remedies in courts and are now confronted with the plea that the cadre is overborne. This, it is urged, is a travesty of justice.

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85. In order to present to this Court a complete picture of the impact of the decision in these cases, the status of the cases has been depicted as follows:

- (i) **Annie Nagaraja's** case involves seventeen officers. From the 2002-03 batch (**Priya Khurana's** case), there are seven officers before this Court who have secured protection against release. Altogether before this Court, there are twenty one serving officers including ten retired officers (including a few men) who are seeking relief;
- (ii) Of the serving officers in **Annie Nagaraja's** case, most have rendered services in excess of twenty years. Officers in **Priya Khurana's** case have rendered continuous service of eighteen years till date; and
- (iii) About thirty officers are involved in pending litigation before the AFT from batches subsequent to the officers in **Priya Khurana's** case. Of them, a few officers are moving the courts agitating their grievance in regard to the non-consideration of their entitlement for the grant of PCs.

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In these circumstances, it has been submitted that the Court may consider the issuance of directions *pari materia* to those which were issued by this Court in sub-paragraphs (a), (b), (c), (d) and (f) of paragraph 69 in **Babita Puniya's** case. This, it has been urged, would be appropriate since the same policy letter dated 26 September 2008 was the subject matter of the judgment of this Court in **Babita Puniya**.

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- A 86. Opposing the above submissions, Mr Sanjay Jain has placed on the record three charts. The first chart depicts the cadre strength in the Indian Navy:

CADRE STRENGTH IN THE INDIAN NAVY

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<u>Cadre/ Branch</u>	<u>Stabilised Cadre (a)</u>	<u>Temp Sanction (b)</u>	<u>Total Sanction (a) +(b)</u>	<u>Officers in-service</u>	<u>Cadre Status</u>	<u>Officers - Court Order</u>
Logistics	485	42	527	574	+ 57	31
Education	343	5	348	345	Minus 03	31
Naval Constructor	279	108	387	399	+11	11
ATC	88	0	88	110	+22	04

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87. The second chart presents a comparative analysis of inductions and retirements in the past three years:

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<u>Year</u>	<u>Inductions</u>	<u>Retirements</u>
2017	15	20 (13 PC + 07 SSC)
2018	12	24 (08 PC + 16 SSC)
2019	26	27 (05 PC + 22 SSC)
Total	53	71

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88. The third chart deals with the status of re-employment of Special Duty Commissioned Officers. These officers have been promoted from the other ranks (sailors) in the Indian Navy. They are being given re-employment in service because of a shortage against sanctioned strength. The sanctioned strength, it has been submitted, is not interchangeable with other Logistics officers. The third chart is reproduced below:

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<u>Cadre</u>	<u>Govt. Sanction</u>	<u>Held Strength</u>
SD (Stores)	28	27
SD (Writer)	44	38

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89. While considering the defence of the Union of India, urged by the ASG, that the cadres are “overborne” and “saturated”, the assessment of this Court must be based on the following position:

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- (i) Neither the judgment of the Delhi High Court nor the judgment of the AFT was stayed during the pendency of these appeals. The Union Government and the Naval

authorities could not have proceeded on the misconceived basis that the mere pendency of the present appeals was a license to not comply with the directions contained in the judgments of the High Court and the AFT. As a result of the failure of the authorities to consider the SSC officers for the grant of PCs, their status continued in a state of uncertainty, effectively depriving them not only of the benefits which would accrue to them in terms of career advancement but also the ability to occupy progressively higher positions in the hierarchy upon the grant of PCs;

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(ii) While the Union Government and the Naval authorities did not consider any SSC women officers for the grant of PCs, it has now claimed that the cadre is saturated. This position has transpired precisely as a result of the failure to implement the directions of the Delhi High Court and of the AFT, while at the same time continuing to make recruitments which is now held up as a ground for the cadres being saturated;

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(iii) The right to be considered for the grant of PCs arose under the policy dated 25 February 1999. The policy letter dated 26 September 2008 was issued oblivious to the earlier policy document and had the effect of denying benefits to SSC officers who were in saddle, besides restricting the cadres/ branches in which SSC officers could be granted PCs. Though the policy letter dated 26 September 2008 was declared to be invalid by the High Court and by the AFT, the authorities have relied upon either the absence of vacancies or the prospective application of the policy letter dated 26 September 2008 to deny relief to SSC officers; and

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(iv) If the Naval authorities had considered SSC officers for the grant of PCs in terms of the policy letter dated 25 February 1999, that would have obviated a situation of saturation of cadres with which the SSC officers are now sought to be confronted as a ground to deny them relief to which they were legitimately entitled in terms of the policy dated 25 February 1999;

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90. Taking into consideration the above, we find merit in the grievance which has been urged on behalf of the SSC officers that the

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- A present situation has arisen as a plain consequence of the actions of the Naval authorities in:
- (i) The failure to implement the statutory notifications under Section 9(2) dated 9 October 1991 and 6 November 1998;
 - (ii) The failure to abide by the policy letter dated 25 February 1999; and
 - (iii) The breach of the obligation to implement the judgments of the Delhi High Court and the AFT which had not been stayed and has resulted in the creation of an impasse for the SSC women officers.
- C 91. Once the policy decision of the Union Government was communicated on 25 February 1999, the authorities were bound to consider the claims of the SSC officers for the grant of PC in terms of Regulation 203. The naval authorities and the Union Government failed to do so, depriving them of the entitlement to be considered for the grant of PC. By the failure of the authorities to consider the SSC officers for PCs in terms of the policy communication of 25 February 1999, SSC officers lost out on the opportunity to be granted PCs and all the responsibilities and benefits attached to the grant of PC, including promotions and pensionable service. The situation which has come to pass is due to the failure of the authorities to implement statutory notifications issued under Section 9(2) the policy statement of 25 February 1999 by which they were bound and as the decisions of the Delhi High Court and the AFT. These SSC officers cannot be left in the lurch and the injustice meted to them by lost years of service and the deprivation of retiral entitlements must be rectified. The injustice is a direct consequence of the authorities having breached their duties under law, as explained above. To deny substantive relief to the SSC officers would result in a situation where a breach of duty on the part of the authorities to comply with binding legal norms would go unattended. This would result in a serious miscarriage of justice to the SSC officers who have served the nation and is unsustainable in law.
- H 92. The second to sixth respondents in **Annie Nagaraja's** case had retired upon the completion of fourteen years of service prior to the issuance of the policy letter dated 26 September 2008. Of these officers, three officers are from the Logistic cadre, one officer is from the Education branch and one officer is from the ATC cadre. The Delhi

High Court had issued directions for the reinstatement of the second to sixth respondents. These officers are: Commander R Prasanna, Commander Puja Chhabra, Commander Saroj Kumar, Commander Sumita Balooni and Commander E Prasanna. A

93. By virtue of the interim order of this Court dated 20 November 2015, protection was extended to only those SSC women officers who were in service on 26 November 2008. This cut-off date was evidently adopted with reference to the policy communication dated 26 September 2008. B

94. We have considered the case of these women officers who were denied being considered for the grant of PCs. The interim order of this Court was based on the policy dated 26 September 2008 which envisaged the grant of PCs on a prospective basis to officers “to be inducted” in the future. The prospective application of the policy dated 26 September 2008 has been held to be invalid. We cannot ignore the fact that it was because of a restricted interim order passed by this Court that the above five respondents were not reinstated during the pendency of the appeals. Had they been reinstated, as directed by the High Court, they would have been in service in the interregnum and would have been entitled to be considered for the grant of PCs together with all other consequential benefits. These officers must be provided restitution for the consequences suffered by them by the failure of the authorities to have considered them for the grant of PC, and despite of the order of the Delhi High Court which had directed their reinstatement. Where a situation which detrimentally affects the rights of citizens arises as a result of an order of the Court, it is the duty of the court to remedy the situation and to rectify the injustice to the extent that is possible. C D E F

95. As we have noted, the right of women SSC officers to be considered for the grant of PCs in the Logistics and Education cadres arose by virtue of the policy letter dated 25 February 1999. The non-consideration of the case of these five officers for the grant of PCs arose out of the actions of the Union Government in issuing a restricted policy dated 26 September 2008 which has caused serious prejudice to these women officers. These officers were among the first inductee batches of women SSC officers in the Navy and committed themselves to serving in the cause of the nation. G

The second to sixth respondents who had been released prior to 2008 have been out of service for twelve years and more. Consistent H

- A with the exigencies of service, it would not be appropriate to direct their reinstatement. However, following the logic of the directions of this Court in **Babita Puniya**, we are of the view that a one-time measure should be issued in exercise of the powers under Article 142 of the Constitution. These officers who were released prior to 2008 after completing their
- B engagement should be deemed to have completed substantive pensionable service and to have qualified for the grant of pension on the basis that they have fulfilled the minimum qualifying service in a substantive capacity. In addition to the grant of pensionary benefits, as a one-time measure, respondents two to six should be directed to be paid a lump sum amount of 25 lakhs each as compensatory measure for lost
- C years of service and the serious injustice which has been meted out to them. We clarify that our decision to award compensation is not a reflection of any malice on the part of the Naval authorities but a measure of compensation for the women officers who have been deprived of a valuable opportunity to render service and shoulder responsibilities.

D **H Directions**

96. We hold and direct that:

- (i) The statutory bar on the engagement or enrolment of women in the Indian Navy has been lifted to the extent envisaged in the notifications issued by the Union Government on 9 October 1991 and 6 November 1998 under Section 9(2) of the 1957 Act;
- (ii) By and as a result of the policy decision of the Union Government in the Ministry of Defence dated 25 February 1999, the terms and conditions of service of SSC officers, including women in regard to the grant of PCs are governed by Regulation 203, Chapter IX, Part III of the 1963 Regulations;
- (iii) The stipulation in the policy letter dated 26 September 2008 making it prospective and restricting its application to specified cadres/branches of the Indian Navy shall not be enforced;
- (iv) The provisions of the implementation guidelines dated 3 December 2008, to the extent that they are made prospective and restricted to specified cadres are quashed and set aside;

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- (v) All SSC officers in the Education, Law and Logistics cadres who are presently in service shall be considered for the grant of PCs. The right to be considered for the grant of PCs arises from the policy letter dated 25 February 1999 read with Regulation 203 of Chapter IX Part III of the 1963 Regulations. SSC women officers in the batch of cases before the High Court and the AFT, who are presently in service shall be considered for the grant of PCs on the basis of the vacancy position as on the date of judgments of the Delhi High Court and the AFT or as it presently stands, whichever is higher; A
- (vi) The period of service after which women SSC officers shall be entitled to submit applications for the grant of PCs shall be the same as their male counterparts; B
- (vii) The applications of the serving officers for the grant of PCs shall be considered on the basis of the norms contained in Regulation 203 namely: (i) availability of vacancies in the stabilised cadre at the material time; (ii) determination of suitability; and (iii) recommendation of the Chief of the Naval Staff. Their empanelment shall be based on *inter se* merit evaluated on the ACRs of the officers under consideration, subject to the availability of vacancies; C D E
- (viii) SSC officers who are found suitable for the grant of PC shall be entitled to all consequential benefits including arrears of pay, promotions and retiral benefits as and when due; F
- (ix) Women SSC officers of the ATC cadre in **Annie Nagaraja's** case are not entitled to consideration for the grant of PCs since neither men nor women SSC officers are considered for the grant of PCs and there is no direct induction of men officers to PCs. In exercise of the power conferred by Article 142 of the Constitution, we direct that as a one-time measure, SSC officers in the ATC cadre in **Annie Nagaraja's** case shall be entitled to pensionary benefits. SSC officers in the ATC cadre in **Priya Khurana's** case, being inducted in pursuance of the specific representation contained in the advertisements pursuant to which they were inducted, shall be considered for the grant of PCs in accordance with directions (v) and (vi) above; G H

- A (x) All SSC women officers who were denied consideration for the grant of PCs on the ground that they were inducted prior to the issuance of the letter dated 26 September 2008 and who are not presently in service shall be deemed, as a one-time measure, to have completed substantive pensionable service. Their pensionary benefits shall be computed and released on this basis. No arrears of salary shall be payable for the period after release from service;
- B (xi) As a one-time measure, all SSC women officers who were before the High Court and the AFT who are not granted PCs shall be deemed to have completed substantive qualifying service for the grant of pension and shall be entitled to all consequential benefits; and
- C (xii) Respondents two to six in the Civil Appeals arising out of Special Leave Petition (C) Nos 30791-96 of 2015, namely Commander R Prasanna, Commander Puja Chhabra, Commander Saroj Kumar, Commander Sumita Balooni and Commander E Prasanna shall be entitled, in addition to the grant of pensionary benefits, as a one-time measure, to compensation quantified at 25 lakhs each.
- E 97. We affirm the clarification which has been issued in sub-para (a) of paragraph 50 of the impugned judgment and order of the Delhi High Court.
- F 98. Compliance with the above directions shall be effected within three months from the date of this judgment. We accordingly dispose of the appeals.
- F 99. There shall be no order as to costs. Pending application(s), if any, stand disposed of.

Divya Pandey

Appeals disposed of.