2-Judge Bench 2020 Feb. 17

(2020) 7 Supreme Court Cases 469

(BEFORE DR D.Y. CHANDRACHUD AND AJAY RASTOGI, JJ.)

SECRETARY, MINISTRY OF DEFENCE .. Appellant;

Versus

BABITA PUNIYA AND OTHERS .. Respondents.

Civil Appeals Nos. 9367-69 of 2011† with Nos. 1127-28 of 2013 and 1210 of 2020, decided on February 17, 2020

A. **Armed Forces — Gender Equality/Equality of Opportunities — Claim for Permanent Commissions (PCs) by women officers engaged in Short Service Commissions (SSCs) — Entitlement to — Policy dt. 25-2-2019 granting SSC women officers entitlement to PCs in eight Arms/Services in addition to existing streams of JAG & AEC, all of which belonged to the two broad categories of services in the Army of (i) Combat Support Arms and (ii) Services (not including the third category of Combat Arms) — Applicability of — Policy decision dt. 25-2-2019, held, applicable to all women SSC officers currently in service irrespective of their length of service**

— In terms of S. 12 of the 1950 Act, eligibility of women for engagement or enrolment in regular Army is subject to provision being made by Central Government — Held, said Policy dt. 25-2-2019 recognises right of women officers to equality of opportunity and must be construed as a decision which enforces fundamental rights of women to seek access to public appointment and equality of opportunity in matters of engagement in Armed Forces — Further held, fact that it was intended to apply prospectively does not mean that it would apply only to women officers who have been appointed as SSC officers after the date of the policy decision — Army Act, 1950 — S. 12 — Constitution of India, Arts. 15(1) and 16(1)

B. **Armed Forces — Gender Equality/Equality of Opportunities — Entitlement of women officers to Permanent Commissions (PCs) in criteria and command appointments, and not just staff appointments — Right to equal consideration with men officers — Differentiation between men and women officers — Burden of proof to justify — Policy dt. 25-2-2019 extending grant of PCs to women officers in eight Arms/Services in addition to existing streams of JAG & AEC but restricting them to staff appointments only i.e. blanket restriction on criteria or command appointments imposed qua PCs in the eight new streams, whereas there was no such restriction qua the PCs in JAG & AEC streams — Invalidity of such absolute bar on entitlement of women officers to PCs in criteria and command appointments in the said eight new streams**

— Held, absolute bar on women seeking criteria or command appointments violates guarantee of equality under Art. 14 of the Constitution — Whether a particular candidate, both men and women should be granted criteria or command assignment is for competent authority to decide having regard to exigency of service, performance and organisational requirements — Blanket non-consideration of women for criteria or command appointment absent an individuated justification, held, is unsustainable — Thus, directed that

† Arising from the Judgment and Order in *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115 [Delhi High Court, WP (C) No. 1597 of 2003, dt. 12-3-2010]

expression "in various staff appointments only" in Para 5 and that "on staff appointments only" in Para 6 of Pollicy dt. 25-2-2019 shall not be enforced

— Implicit in guarantee of equality is that any differentiation must be reasonable and rational since right to equality is right to rationality — Where Army, as instrumentality of State seeks to differentiate between men and women officers, burden falls squarely on Army to justify it — Absolute prohibition of women officers, to obtain only staff appointments does not fulfil purpose of granting PCs as a means of career advancement in Army — Constitution of India, Arts. 14, 15(1) and 16(1)

C. **Armed Forces — Army Act, 1950 — S. 12 — Exercise of power under, by Central Government — Scope of judicial review — Non-engagement of women officers in Combat Arms, while permitting the same in the remaining two broad categories of services in the Army: (i) Combat Support Arms and (ii) Services — Held, issues of national security and matters related to Armed Forces are amenable only to limited judicial review — Hence, policy decision not to engage women officers in Combat Arms not interfered with**

— However, considering policy decision dt. 25-2-2019 of Union Government granting PCs in eight streams plus the two existing streams of the Army to all women SSC officers pertaining to services in the Combat Support Arms and Services, as well as situation which had arisen because of non-implementation of High Court as well as Supreme Court order, non-intervention would amount to travesty of justice — Directions issued accordingly (*see* Shortnotes *A*, *B*, *D*, *E* and *F*)

D. **Armed Forces — Gender Equality/Equality of Opportunities — Grant of Permanent Commissions (PCs) to women Short Service Commission (SSC) Officers — Proposal submitted by Government distinguishing between women officers who were in service for less than 14 yrs and those beyond, envisaging that only those women officers with less than 14 yrs of service should be considered for grant of PCs — Untenability of**

— Held, there is fundamental fallacy in distinction sought to be drawn since it was failure of Union Government to enforce judgment of High Court rendered almost a decade back, which was not stayed by Supreme Court, which resulted in some women officers rendering more than 14 yrs' service — No reason or justification to deprive women SSC officers of grant of PCs on ground that they had completed 14 yrs of service — Thus, SSC women officers, irrespective of their length of service, entitled to consideration for grant of PCs

E. **Armed Forces — Gender Equality/Equality of Opportunities — Claim for Permanent Commissions (PCs) by women Short Service Commission (SSC) Officers — Denial of — Submissions based on stereotypes premised on assumptions about socially ascribed roles of gender discrimination against women — Deprecated — Need for change in attitudes and mindsets to recognise commitment to constitutional values, emphasised**

— More so, since it was undisputed that women officers had brought laurels to Army — Casting aspersions on their abilities on ground of gender, affront not only to their dignity as women but to dignity of Indian Army both men and women who serve as equal citizens in common missions — Time to realise that

women officers in Army are not adjuncts to male dominated establishments whose presence must be "tolerated" within narrow confines — Policy decision of Union Government dt. 25-2-2019 granting PCs to SSC women officers in eight Arms/Services, in addition to existing streams of JAG & AEC, making it a total of ten streams is a step towards realising fundamental constitutional commitment to equality and dignity of women — Ignorance of State of said policy decision while making submissions seriously noted — Constitution of India, Arts. 15(1) and 16(1)

F. **Armed Forces — Gender Equality/Equality of Opportunities — Claim for Permanent Commissions (PCs) by women officers engaged in Short Service Commissions (SSCs) — High Court by impugned judgment directing grant of PCs to all women SSC officers on a par with their male counterparts with all consequential benefits — Judgment of High Court not stayed by Supreme Court though it was directed that no coercive steps should be initiated — Effect of**

— Held, direction not to initiate coercive steps is distinct from stay of operation of judgment — Fact that Union Government failed to act upon directions issued by High Court, which were not stayed by Supreme Court, for nearly nine years strongly deprecated — Practice and Procedure — Interim/Interlocutory Order/Injunction/Stay/Interim Relief — Stay of judgment distinguished from direction not to initiate coercive steps — Constitution of India, Arts. 136 and 226

G. **Constitution of India — Art. 33 — Power of Parliament to modify fundamental rights in their application to Armed Forces — Held, Art. 33 empowers Parliament to determine by law extent to which fundamental rights shall be restricted/abrogated in their application inter alia to members of Armed Forces so as to ensure proper discharge of their duties and maintenance of discipline — Army Act, 1950, S. 12**

H. **Armed Forces — Gender Equality/Equality of Opportunities — Engagement of women officers in Army — Traced**

A PIL was filed in the High Court for grant of Permanent Commissions ("PCs") to women Short Service Commissions ("SSCs") officers in the Army.

During the course of the proceedings, two circulars were issued on 20-7-2006 granting SSCs both on the technical and non-technical side to women officers. The circulars had comprehensive provisions pertaining among other things, tenure, substantive promotions and adjustment of seniority. Serving Women Special Entry Scheme ("WSES") officers were given option either to move to new SSC scheme or to continue under the erstwhile WSES.

A writ petition was filed challenging the terms and conditions of service imposed by the Circulars dated 20-7-2006 and for grant of PCs to women officers.

On 26-9-2008, the Ministry of Defence ("MoD") issued a circular granting PCs prospectively to SSC women officers in the Judge Advocate General Department ("JAG") and the Army Education Corps ("AEC"). The Circular was challenged on the ground that it granted PCs only prospectively and only to specified cadres.

The writ petitions were heard together. The High Court by the impugned judgment inter alia issued following directions:

(*1*) The claim of absorption in areas of operation not open for recruitment of women officers was rejected being a policy decision.

(*2*) Women officers of the Air Force and Army on SSC who had opted for grant of PC but were not granted that status were held entitled to PC on a par with SSC male officers with all consequential benefits. However, this benefit was only limited to women officers who had instituted proceedings before the High Court and had retired during pendency of the writ petitions. Hence, the instant appeals.

Disposing of the appeals, the Supreme Court

Held :

During the pendency of the appeals, the Union Government in the MoD issued a communication dated 25-2-2019 for the grant of PCs to SSC women officers in eight arms or services of the Army, in addition the JAG and AEC. (Paras 28 to 30)

Article 33 of the Constitution empowers Parliament to determine by law extent to which the rights conferred by Part III of the Constitution shall be restricted, abrogated in their application inter alia to the members of the Armed Forces so as to ensure proper discharge of their duties and maintenance of discipline (Paras 56 to 62)

Ram Sarup v. *Union of India*, (1964) 5 SCR 931 : AIR 1965 SC 247 : (1965) 1 Cri LJ 236; *Prithi Pal Singh Bedi* v. *Union of India*, (1982) 3 SCC 140 : 1982 SCC (Cri) 642; *R. Viswan* v. *Union of India*, (1983) 3 SCC 401 : 1983 SCC (L&S) 405, *considered*

Section 12 of the Army Act, 1950 embodies the principle that a woman would be eligible for enrolment or employment only in such corps, departments, branches or bodies forming part of or attached to the regular Army upon and to the extent notified by the Central Government. In other words, the eligibility of women for enrolment or engagement in the regular Army is conditional on a provision being made by the Central Government in terms of the enabling provision of Section 12. (Para 64)

The engagement of women officers in the Army has been an evolutionary process. The women officers were initially inducted in the year 1992 under the WSES, for a period of five years. This was extended for a further period of five years. On the incorporation of a provision for SSCs for women officers, options were granted to those amongst them who had been engaged under the earlier scheme to become SSC officers. As a part of the pool of officers engaged as SSC officers, the tenure was extended to fourteen years with a provision for due promotions while in service. Following the judgment of the High Court, the Union Government was under a mandate to grant PCs to women officers, to the exclusion of the Combat Arms, and on a par with the grant of PCs to their male counterparts. Significantly, the judgment of the Delhi High Court was not stayed by the Supreme Court at any stage, though there was a direction that no coercive steps would be initiated on the basis of the judgment. A direction by the Supreme Court not to initiate coercive steps is distinct from a stay on the operation of the judgment. There was no reason or justification for the Union Government not to act upon the directions that were issued by the High Court, particularly, in the absence of a stay on the operation and enforcement of the judgment. Eventually, nearly nine

years after the judgment, the Union Government communicated a policy circular dated 25-2-2019 by which a decision was taken to grant women officers PC in eight Arms/Services, in addition to the existing streams of JAG and AEC. Thus, as a matter of policy, the Union Government has taken a decision to allow for the grant of PCs in all the ten streams in which women officers were currently being commissioned as SSC officers. (Para 65)

Babita Puniya v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115, *considered*

The decision of the Union Government to allow PCs to women officers in all the ten streams where they were being inducted as SSC officers substantially renders redundant the submission based on the provisions of Section 12 of the Army Act. Section 12 contemplates that women will be eligible for enrolment only in those segments of the Army where the Union Government has, by notification, permitted their enrolment and engagement. Even on a textual interpretation of Section 12 as it stands, it is evident that the policy decision dated 25-2-2019 of the Union Government has allowed for the grant of consideration of PCs to commissioned women officers in all the ten streams which have been notified. (Para 66)

The policy decision of the Union Government is a recognition of the right of women officers to equality of opportunity. One facet of that right is the principle of non-discrimination on the ground of sex which is embodied in Article 15(1) of the Constitution. The second facet of the right is equality of opportunity for all citizens in matters of public employment under Article 16(1) of the Constitution. The policy statement of the Union Government must therefore be construed as a decision which enforces the fundamental right of women to seek access to public appointment and to equality of opportunity in matters of engagement relating to the Army. The fundamental right is recognised in the specified streams where women are permitted to seek engagement as equal members of the Armed Forces that the Indian Army represents. With the Union Government having recognised the induction of permanently commissioned women officers in its policy decision dated 25-2-2019, the submissions which have been made by the Union of India betray a lack of understanding of the plain consequences of the decision. The decision of the Union Government to extend the grant of PC to other corps in the support arms and services recognises that the physiological features of a woman have no significance to her equal entitlements under the Constitution. (Para 67)

Seventy years after the birth of a post-colonial independent State, there is still a need for change in attitudes and mindsets to recognise the commitment to the values of the Constitution. The submissions advanced in the note tendered to the Supreme Court are based on sex stereotypes premised on assumptions about socially ascribed roles of gender which discriminate against women. 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. To deny the grant of PCs to women officers on the ground that this would upset the "peculiar dynamics" in a unit casts an undue burden on women officers which has been claimed as a ground for excluding women. The written note also relies on the "minimal facilities for habitat and hygiene" as a ground for suggesting that women officers in the services must not be deployed in conflict zones. The respondents have placed on record that 30% of the total women officers are in fact deputed to conflict areas. (Paras 68 and 69)

The requirement for change in mindsets to bring about true equality in Army needs to be emphasised. The counter-affidavit contains a detailed elaboration of the service rendered by women SSC officers to the cause of nation, working shoulder to shoulder with their male counterparts. Women officers of the Indian Army have brought laurels to the Force which have not been controverted. To cast aspersion 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. (Paras 70 to 73)

Courts are indeed conscious of the limitations which issues of national security and policy impose on the judicial evolution of doctrine in matters relating to the Armed Forces. For this reason, the engagement of women in the Combat Arms has been specifically held to be a matter of policy by the judgment of the High Court and which is not in question in the present appeals. The time has come for a realisation that women officers in the Army are not adjuncts to a male dominated establishment whose presence must be "tolerated" within narrow confines. The salient decision of the Union Government to extend PCs to women SSC officers in all ten streams in which they are commissioned is a step forward in recognising and realising the right of women to equality of opportunity in the Army. This marks a step towards realising the fundamental constitutional commitment to the equality and dignity of women. (Para 74)

The proposal which has been submitted before the Supreme Court by the Union Government involves a three-stage assessment of women SSC officers for the grant of PCs. A distinction has been made in the proposal between women officers who have been in service for a period of less than fourteen years and those beyond. The proposal envisages that only those women officers with less than fourteen years of service would be considered for the grant of PCs. Under the terms of this proposal, women officers with more than fourteen years of service but less than twenty years of service would continue until they attain pensionable service of twenty years, without the grant of PCs. Women officers who have crossed twenty years' service would be discharged from service immediately subject to receipt of pension. The proposal is commended for acceptance on the ground that it allows women officers who have crossed fourteen years of service to receive pensionary benefits, where such benefit would otherwise not be available to them. (Para 75)

There is however, a fundamental fallacy in the distinction which has been sought to be drawn between women officers with less than fourteen years of service with those with service between fourteen and twenty years and above twenty years. The judgment of the High Court was rendered on 12-3-2010. Nearly a decade has elapsed since the date of the decision. The Union Government was duty-bound to enforce the judgment of the High Court, the judgment not having been stayed during the pendency of these appeals. However, it failed to do so despite the categoric assertion by the Supreme Court in its order dated 2-9-2011 that what was stayed as an interim measure is the action for contempt and not the operation

of the judgment. Having failed to enforce the judgment, the Union Government has now informed the Court that it would not consider women officers who have crossed the age of fourteen years in service as SSC officers for the grant of PCs. This situation of women officers with service above fourteen years has come into existence because of the failure of the Union Government to comply not only with the directions of the High Court but also those which were issued by the Supreme Court on 2-9-2011. In this view of the matter, there is no reason or justification to deprive SSC women officers of the grant of PCs on the ground that they have crossed fourteen years of service. The SSC women officers, both within the period of fourteen years' service and beyond, should equally be entitled to consideration for the grant of PCs. (Paras 76 and 77)

The policy decision which has been taken by the Union Government on 25-2-2019 indicates that it is to apply prospectively. It is necessary to clarify that the prospective application of the decision does not mean that it would apply to women officers who have been appointed as SSCs officers after the date of the decision. The Union Government has not applied it in such a manner, which is evident from the fact that the decision contemplates that women officers already in service but with less than fourteen years would be entitled to be considered. It is clarified that the policy decision will apply to all women SSC officers who are currently in service irrespective of the length of service which has been rendered by them. (Para 78)

Relying on *P.K. Choudhary*, (2016) 4 SCC 236 it was contended that the scope of judicial review in matters of command/tenure is limited. The courts are conscious of the limitations which questions of policy impose on judicial intervention in matters relating to the Armed Forces. At the same time, faced with a salient decision of the Union Government to extend to all women SSC officers the option for the grant of PCs as well as the situation which has come to pass due to the non-implementation of the binding directions of the High Court as well as the Supreme Court, non-intervention in the present matter would be nothing short of a travesty of justice. (Paras 79 to 84)

Union of India v. *P.K. Choudhary*, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640, *explained*

The next aspect of the policy decision relates to the restriction which has been imposed on women officers being granted PCs save and except for staff appointments. Such a restriction was not imposed when the JAG and AEC branches were opened up for the grants of PCs for women SSC officers in the past. The consequence of this, is an implicit acceptance by the Army that women can, in certain situations, receive criteria or command appointments. An absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14 of the Constitution. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner. In this sense, even at its bare minimum, the right to equality is a right to rationality. Where the State, and in this case the Army as an instrumentality of the State, differentiates between women and men, the burden falls squarely on the Army to justify such differentiation with reason. (Para 85)

An absolute prohibition of women SSC officers to obtain anything but staff appointments evidently does not fulfil the purpose of granting PCs as a means of career advancement in the Army. Whether a particular candidate should or should not be granted a criteria or command assignment is a matter for the competent

authority to consider having regard to all the exigencies of service, performance and organisational requirements. In the present case the Army has provided no justification in discharging its burden as to why women across the board should not be considered for any criteria or command appointments. Command assignments are not automatic for men SSC officers who are granted PC and would not be automatic for women either. (Para 85)

The absolute exclusion of women from all others except staff assignments is indefensible. If the Army has cogent reasons for excluding women from a particular criteria or command appointment, it may provide them to the relevant authorities and if necessary, to future courts. However, such a justification must take place on a case-to-case basis, in light of the requirements and exigencies of a particular appointment. The blanket non-consideration of women for criteria or command appointments absent an individuated justification by the Army cannot be sustained in law. The expression "in various staff appointments only" in Para 5 and that "on staff appointments only" in Para 6 of the communication dated 25-2-2019 shall not be enforced. (Paras 85 and 86)

The Policy dated 25-2-2019 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:

(*i*) 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.

(*ii*) The option shall be granted to all women presently in service as SSC officers.

(*iii*) 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.

(*iv*) 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.

(*v*) SSC women officers with over twenty years of service who are not granted PC shall retire on pension in terms of the policy decision.

(*vi*) 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.

(*vii*) 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 High Court by filing the writ petitions and those who had retired during the course of the pendency of the proceedings. (Para 87)

Babita Puniya v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115, *affirmed* and *modified*

Ministry of Defence v. *Babita Puniya*, 2010 SCC OnLine SC 77; *Ministry of Defence* v. *Babita Puniya*, 2010 SCC OnLine SC 78; *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine

SC 86; *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine SC 87; *Ministry of Defence* v. *Babita Puniya*, 2012 SCC OnLine SC 1213; *Ministry of Defence* v. *Babita Puniya*, 2013 SCC OnLine SC 1440; *Sanjeev Sharma* v. *Union of India*, 2018 SCC OnLine SC 3532, *referred to*

P-D/63826/CL

Advocates who appeared in this case :

Tushar Mehta, Solicitor General, Sanjay Jain, Additional Solicitor General, R. Balasubramanian, Ms Aishwarya Bhati, P.S. Narasimha and C.U. Singh, Senior Advocates [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, Mohd. Ali, Nikhil Goel, Ms Naveen Goel, Dushyant Sarna, Vinay Mathew (for Santosh Krishnan), Ms Arunima Dwivedi, Arvind Kr. Sharma, Harish Pandey, Mukesh Kr. Maroria, Sudhanshu Shekhar Pandey, Gaichangpou Gangmei, Abhishek R. Shukla, Arjun D. Singh, Anant Vijay Palli, Ms Garima Sachdeva, Nikhil Palli, Deepak Goel, Anil Kr. Bakshi, Ms Meenakshi Lekhi, Harish Pandey, Jitender Kr. Tripathi, Alok Kr. Pandey, Sanchar Anand, Anant K. Vatsya, Devendra Singh, Vivek Narayan Sharma, Jasdeep Singh, Pragyan Mishra, Shubham Awasthi, Akash Sharma, Rajeev Kr. Jha, Ms Suman Rani, Santosh Krishnan, B.V. Balaram Das, Ms Pooja Dhar, Ms Haripriya 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 Kr. Sharma, Akhileshwar Jha and Ms Beendu Singh, Advocates], for the appearing parties.

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The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.—

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A. *Background of the dispute*

1. A quest for equality of opportunity for women seeking Permanent Commissions ("PCs") in the Indian Army forms the basis of these appeals. The lead appeal originated in a batch of writ petitions which were instituted before the High Court of Delhi in 2003 and 2006.

2. A decade and more spent in litigation, women engaged on Short Service Commissions ("SSCs") in the Army seek parity with their male counterparts in obtaining PCs. The entry of women in the Army has a chequered history. Section 12 of the Army Act, 1950 ("the 1950 Act") contains, insofar as it is material, the following provisions:

> "**12.** ***Ineligibility of females for enrolment or employment.***—No female shall be eligible for enrolment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may, by notification in the Official Gazette, specify in this behalf."

3. Pursuant to the power conferred by Section 12, the Union Government issued a Notification[1] dated 30-1-1992 making women eligible for appointment as officers in the specific branches/cadres of the Army. These were:

> "(*i*) Army Postal Service;
>
> (*ii*) Judge Advocate General's Department;
>
> (*iii*) Army Education Corps;
>
> (*iv*) Army Ordinance Corps (Central Ammunition Depots and Material Management); and
>
> (*v*) Army Service Corps (Food Scientists and Catering Officers)."

[1] SRO-11.

This notification was to remain in force for a period of five years from the date on which it was published in the Official Gazette. SRO-11 was published in the Gazette on 15-2-1992.

4. By a Notification[2] dated 31-12-1992, women became eligible for enrolment in the following corps/departments of the regular Army:

"(*i*) Corps of Signals,
(*ii*) Intelligence Corps,
(*iii*) Corps of Engineers,
(*iv*) Corps of Electrical and Mechanical Engineering,
(*v*) Regiment of Artillery."

5. The provision for the induction of women for an initial period of five years was extended by a Notification[3] dated 12-12-1996 issued by the Ministry of Defence ("MoD"). The notification deleted Para 2 of SRO-11 under which enrolment was to be for a period of five years.

6. On 28-10-2005, a notification[4] was issued by the MoD by which the Union Government extended the validity "of the scheme of appointment of women as officers in the Indian Army". To facilitate this, four amendments were made to the earlier Notification dated 15-2-1992:

6.1. The tenure of women officers inducted under the Women Special Entry Scheme (Officers) ("WSES") under the Notifications dated 15-2-1992, 23-1-1993 and 12-12-1996 was extended by five years from 1997.

6.2. The tenure of SSC male officers and WSES officers was extended up to fourteen years.

6.3. The WSES was to cease to apply as a consequence of which women officers were to be inducted through SSC in the corps/services notified by the Notifications dated 15-2-1992, 23-1-1993 and 12-12-1996.

6.4. Substantive promotions were to be extended both to men and women SSC officers "as applicable to PC officers".

7. Initially, when the WSES was notified under an Army Instruction[5], it was governed by the Terms of Engagement ("ToE"). Para 1 of the ToE stipulated that commission would be for a period of five years in the Army Service Corps, Army Ordinance Corps, Army Education Corps ("AEC") and Judge Advocate General's Department ("JAG"). Para 12 contemplated that on the successful completion of pre-commission training, "lady cadets" would be granted PCs in the rank of Second Lieutenant, but they would be placed junior to other

2 SRO-1, published in the Gazette on 23-1-1993.
3 SRO-10(E).
4 SRO-121, published in the Gazette on 19-11-2005.
5 SAI NO/1/5/92.

candidates passing out from the Indian Military Academy and would be granted regular commission from the same date.

8. Para 19 of ToE contemplated that:

> "**19.** ***Disposal on expiry of Commission***.—On expiry of contractual period of commission i.e. five years' commissioned service from the date of grant of commission, they will be released from the service. The officers granted commission under this Army Instruction will not be granted permanent commission or any extension beyond five years of commissioned service."

9. The original ToE provided for a contractual period of five years after which the officers were to be released from service. The officers who were granted commission under the Army Instruction were not entitled to PC or to any extension beyond five years of commissioned service.

10. On 1-8-1996, an amendment was issued to the WSES, under which the commission for an initial period of five years was made further extendable by five years in the Regiment of Artillery, Corps of Engineers, Corps of Signals, Army Service Corps, Army Ordinance Corps, Corps of Electrical and Mechanical Engineers, AEC, Intelligence Corps and JAG Department. Women who had been granted commission for an initial period of five years were required to furnish an option for extension by five years or for release. A provision was made for promotion on a substantive basis to the rank of a Lieutenant after two years and to the rank of Captain after five years. The provision contained in Para 19 of the earlier Army Instruction[5] for the release from service on the completion of the contractual period of five years was substituted by the following provision:

> "**19.** ***Disposal on expiry of Commission***.—On expiry of contractual period of commission i.e. five years/ten years from the date of grant of commission as the case may be, they will be released from the service. The officers granted commission under these Army Instruction will not be granted permanent commission."

11. The position that emerges from the above narration is that when the induction of women in the Army was envisaged with effect from 15-2-1992 in stipulated branches and cadres, the tenure of engagement was five years. The above stipulation of five years was deleted on 12-12-1996. On 19-11-2005, the MoD provided that the tenure of WSES officers would be extended up to fourteen years. The Army Instruction broadly followed the same course, as a consequence of which a cap on the length of service was introduced. The initial process of induction under the WSES was replaced by SSCs with an outer period of fourteen years.

5 SAI NO/1/5/92.

12. The contesting respondents (other than the first respondent, who is not an Army Officer) were selected in the Army as SSC officers commencing from 1995-96.

13. In February 2003, Babita Puniya, an advocate instituted a writ petition[6] in the nature of a public interest litigation ("PIL") before the Delhi High Court for the grant of PC to women SSC officers in the Army.

14. During the course of the proceedings, two circulars were issued on 20-7-2006, conveying the sanction of the President of India regarding the grant of SSCs both on the technical and non-technical side to women officers. The period of training was stipulated at forty-nine weeks on a par with male SSC officers. The circulars had comprehensive provisions pertaining among other things, tenure, substantive promotions and adjustment of seniority. Serving WSES officers were given an option to move to the new SSC scheme or to continue under the erstwhile WSES.

15. The first batch of women officers under the new scheme entered the Army in 2008. Among the terms and conditions, Para 1(*a*) provided for tenure in the following terms:

> "(*a*) ***Tenure of Short Service Commission***.—Short Service Commission (SSC) Technical in the Regular Army will be granted for 14 years i.e. for an initial period of ten years extendable by a further of four years."

16. Para 1(*c*) enabled newly inducted women officers other than those with a specialised course to leave service after completing five years of service. Substantive promotions were provided in Para (*e*) in the following terms:

> "(*e*) ***Substantive Promotion***.—Women granted Short Service Commission under these rules will be eligible for substantive promotion as under:
>
> (*i*) To the rank of Capt. — On completion of 2 years' reckonable commissioned service.
>
> (*ii*) To the rank of Maj. — On completion of 6 years' reckonable commissioned service.
>
> (*iii*) To the rank of Lt. Col. — On completion of 13 years' reckonable commissioned service."

17. Para 1(*g*) provided for the adjustment of seniority:

> "(*g*) ***Adjustment of seniority***.—To make adjustment for shorter training of SSC Women Officers vis-à-vis PC officers, the seniority of SSC Women Officers will be depressed by the period corresponding to the

6 WP (C) No. 1597 of 2003.

difference in training period between the SSC course under consideration and the training period of its equivalent PC course. This adjustment of seniority will be carried out at the time of grant of first substantive rank of Captain. The revised seniority will have no effect on the pay and allowance granted in the rank of Capt., Major and Lt Col."

18. Para 2-A allowed serving officers under the WSES to exercise an option to opt for the SSC scheme within six months failing which, they would be treated to have exercised the option to continue under the erstwhile scheme. Para 4 contained the following stipulation:

"**4.** All other provisions of AI 1/93 except Para 18 and SAI 1/S/92 as amended will be applicable, mutatis mutandis, to women granted SSC subject to issue of separate AI for SSC (Women) (Tech)."

Consequently, all other provisions contained in SAI-1/S/1992 were to apply mutatis mutandis to women who were granted SSCs.

19. Apart from the PIL which was instituted before the High Court of Delhi, a writ petition[7] was filed by Major Leena Gurav on 16-10-2006 primarily to challenge the terms and conditions of service imposed by the Circulars dated 20-7-2006 and for seeking the grant of PCs for women officers.

20. On 26-9-2008, the MoD issued a circular envisaging the grant of PCs prospectively to SSC women officers in the JAG Department and the AEC. The circular was challenged before the Delhi High Court by Major Sandhya Yadav and others on the ground that it granted PCs only prospectively and only to certain specified cadres.

21. The writ petitions were heard together by the Division Bench of the Delhi High Court. By a judgment dated 12-3-2010[8], the High Court issued the following directions: (*Babita Puniya case*[8], SCC OnLine Del para 62)

"*62.* * * *

(*i*) The claim of absorption in areas of operation not open for recruitment of women officers cannot be sustained being a policy decision.

(*ii*) The policy decision not to offer PC to Short Service Commissioned officers across the board for men and women being on parity and as part of manpower management exercises is a policy decision which is not required to be interfered with.

(*iii*) The Short Service Commissioned women officers of the Air Force who had opted for PC and were not granted PC but granted extension of SSCs and of the Army are entitled to PC on a par with male Short Service Commissioned officers with all consequential benefits. This benefit would be conferred to women officers recruited prior to

7 WP (C) No. 16010 of 2006.

8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

change of policy as (*ii*) aforesaid. The Permanent Commission shall be offered to them after completion of five years. They would also be entitled to all consequential benefits such as promotion and other financial benefits. However, the aforesaid benefits are to be made available only to women officers in service or who have approached this Court by filing these petitions and have retired during the course of pendency of the petitions.

(*iv*) It is made clear that those women officers who have not attained the age of retirement available for the Permanent Commissioned officers shall, however, be reinstated in service and shall be granted all consequential benefits including promotion, etc. except for the pay and allowance for the period they have not been in service.

(*v*) The necessary steps including release of financial benefits shall be done by the authorities within two (2) months of passing of this order."

22. At this stage, it would be appropriate to briefly dwell on the above directions.

23. Direction (*i*) envisages that "areas of operation" of the Armed Forces where recruitment of women officers is not open was excluded from the purview of the judgment[8] of the High Court on the ground that it is a matter of policy. Women have been excluded from combat operations. This exclusion which has not been interfered with in Direction (*i*) above on the ground that it is a matter of policy is not the subject-matter of contest in the present appeals. Direction (*ii*) envisages that where a policy decision has been taken not to offer PC to SSC officers — both men and women without distinction as a part of manpower management, such a policy decision was not be interfered with. Direction (*iii*) envisages that women officers of the Air Force and Army on SSC who had opted for the grant of PC but were not granted that status would be entitled to PC on a par with male SSC officers with all consequential benefits. PC was to be offered to them after the completion of five years together with consequential benefits of promotion and other financial benefits. However, this benefit was only available to women officers in service who had instituted proceedings before the High Court and had retired during the pendency of the writ petitions. By Direction (*iv*), it was envisaged that women officers who had not attained the age of superannuation for PC officers would be reinstated with all consequential benefits.

24. Assailing the judgment[8] of the High Court, the Union of India is in appeal. The present batch of appeals relates to the Indian Army. The directions issued by the High Court in regard to the Indian Air Force are not the subject of contest in these appeals.

8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

25. Contempt proceedings were initiated by the respondents against the Union of India alleging non-compliance with the judgment[8] of the Delhi High Court. On 2-8-2010, the Solicitor General of India made a statement before this Court that "women SSC officers in service would be considered for grant of Permanent Commission in JAG and Education Branch of the Army within two months …" In view of the statement made before this Court, the contempt proceedings were stayed[9]. By an order dated 4-10-2010[10], time for compliance with the order dated 2-8-2010[9] was extended until 1-12-2010.

26. On 11-1-2011[11], this Court, while issuing notice, acceded to the prayer of the Additional Solicitor General of India for an adjournment of six weeks to enable a "high-powered committee" constituted by the Union Government to consider the question pertaining to the grant of PCs to SCC women officers and to enable the Chief of Staffs' Committee and the MoD to consider the report. During the pendency of the proceedings, applications for impleadment were allowed on 4-3-2011 and the operation of release orders passed by the Union of India on 19-1-2011 was stayed.

27. On 2-9-2011[12], this Court dealt with an application filed by eleven applicants for reinstatement in the Army in terms of the judgment[8] of the Delhi High Court. Dealing with the application, this Court observed that: (*Babita Puniya case*[12], SCC OnLine SC para 2)

> "2. …What is stayed as interim measure by this Court is action of contempt initiated by the original writ petitioners against the petitioners in special leave petitions. *The operation of the impugned judgment*[8] *is not stayed at all*." (emphasis supplied)

It was explicitly clarified that no stay had been issued on the judgment of the Delhi High Court. Hence, the eleven applicants were allowed to be reinstated in terms of the judgment[8] of the Delhi High Court subject to the outcome the appeal. Eventually, leave was granted on 2-9-2011[12]. During the pendency of the appeal, on 24-4-2012[13], this Court allowed impleadment applications and stayed a release order 10-4-2012. As a consequence, the applicants were held to be entitled to regular salary and other emoluments in the ranks which they were presently holding. Similar orders were passed by the Court on 12-7-2013[14].

8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115
9 *Ministry of Defence* v. *Babita Puniya*, 2010 SCC OnLine SC 77
10 *Ministry of Defence* v. *Babita Puniya*, 2010 SCC OnLine SC 78
11 *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine SC 86
12 *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine SC 87
13 *Ministry of Defence* v. *Babita Puniya*, 2012 SCC OnLine SC 1213
14 *Ministry of Defence* v. *Babita Puniya*, 2013 SCC OnLine SC 1440

B. ***Proposal of the Union of India***

28. During the pendency of this appeal, the Union Government in the MoD issued a communication dated 25-2-2019 for the grant of PCs to SSC women officers in eight arms or services of the Army, in addition to the JAG and AEC which had been opened up earlier for PC. The communication stipulates that:

> "The sanction of the President is hereby conveyed for consideration of grant of Permanent Commission to SSC Women Officers in the eight arms/services in Indian Army viz. Signals, Engineers, Army Aviation, Army Air Defence, Electronics and Mechanical Engineers (EME), Army Service Corps, Army Ordinance Corps and Intelligence in addition to the existing two streams of Judge Advocate General (JAG) and Army Education Corps (AEC). Thus women will be considered for grant of PC in all the ten streams in which they are currently being commissioned as SSC Officers."

29. The communication further stipulates that:

29.1. Women officers will continue to be commissioned in the abovementioned ten arms/services as earlier with no change in their tenure of SSC engagement.

29.2. On the completion of three years and before completing four years of commissioned service, they will be required to exercise an option for the grant of PC and the choice of specialisation.

29.3. SSC women officers will be considered for the grant of PC based on the availability of vacancies and subject to willingness, suitability, performance, medical fitness and competitive merit.

29.4. On the grant of PC, women officers will be employed "in various staff appointments only" in accordance with their qualifications, professional experience, specialisation, if any, and organisational requirements.

29.5. While women officers who are granted PCs will continue to be a part of their parent Army/service, "they would serve on staff appointments only" both within the parent Army/service and in other fields of specialisation.

29.6. Further career progression in selected ranks will be within the existing authorised strength of officers in the Army and no additional select rank vacancies will be created.

29.7. Women officers who fail to exercise the option for PC will be governed by the terms and conditions under which they were commissioned.

29.8. The policy would come into effect prospectively from the date of the issuance of the letter.

30. The communication dated 25-2-2019 is reproduced below:

"**Policy Letter dated 25-2-2019**

F. No. 14(01)/2018-D(AG)

Government of India

Ministry of Defence

New Delhi,
Dated 25-2-2019

To

The Chief of Army Staff,
New Delhi

Subject: Permanent Commission to Short Service Commission (SSC) Women Officers in Indian Army

This is in continuation of MoD Letter No. 12(01)/2004-D(AG) Pt. II dated 26-9-2008 and Letter No. 671/2009-(AG) dated 11-11-2011 regarding induction of women in Armed Forces and grant of Permanent Commission (PC) to Short Service Commission (SSC) Women Officers.

2. The sanction of the President is hereby conveyed for consideration of grant of Permanent Commission to SSC Women Officers in the eight arms/services in Indian Army viz. Signals, Engineers, Army Aviation, Army Air Defence, Electronics and Mechanical Engineers (EME), Army Service Corps, Army Ordnance Corps and Intelligence in addition to the existing two streams of Judge Advocate General (JAG) and Army Education Corps (AEC). Thus women will be considered for grant of PC in all the ten streams in which they are currently being commissioned as SSC Officers.

3. Women Officers will continue to be commissioned into the abovementioned ten Arms and Services hithertofore, with no change in their tenure of Short Service engagement.

4. On completion of three years of commissioned service and before completion of four years of commissioned service, they will be required to exercise option for grant of PC and their choices for specialisation.

5. SSC Women Officers will be considered for grant of PC based on the availability of vacancies and subject to willingness, suitability, performance, medical fitness and competitive merit. On grant of permanent commission, these women officers will be employed in various staff appointments only as per their qualification, professional experience, specialisation if any and organisational requirement.

6. Women Officers granted PC will continue to be part of their parent arm/service. However, they would serve on staff appointments only, both within their parent arm/service and in other fields of their specialisation.

7. Their further career progression in select ranks will be within the existing authorised strength of officers in Indian Army in accordance with Para 6 above and no additional select rank vacancies will be created for this purpose.

8. Women Officers who fail to exercise option for permanent commission or do not opt for permanent commission will be governed by terms and conditions under which they were commissioned.

9. This policy will come into effect prospectively from the date of issue of this letter.

10. Necessary administrative instructions in this regard will be issued by Army HQ.

11. This issues with the concurrence of MoD (Finance) vide their ID No. 2(12)/2019(50-PA) dated 22-2-2019.

(Poornima Rajendran)
Deputy Secretary
Tel: 23011593

Copy to: As per standard distribution"

31. During the course of hearing, Mr R. Balasubramanian, learned Senior Counsel appearing on behalf of the Union of India has tendered a proposal which envisages that:

31.1. Women officers of up to fourteen years of service would be considered for the grant of PC with further career progression only in staff appointments in terms of the Union Government's communication dated 25-2-2019. Since women officers above four years of service have missed the cut-off stipulated in the communication for exercising their choice to opt for the grant of PC and specialisation, the provisions would be modified for the benefit of such officers.

31.2. Women officers with more than fourteen years of service would be permitted to serve for up to twenty years without being considered for the grant of PC and would be then released with pensionary benefits subject to meeting disciplinary and medical criteria.

31.3. Women officers with more than twenty years of service would be released with pensionary benefits immediately upon the conclusion of the present appeal.

32. The rationale for the above classification is explained in the following terms:

32.1. In 1992, the Army introduced the WSES in the Army Service Corps, Army Ordinance Corps, AEC and the JAG branches. The training period was twenty-four weeks and the tenure of service was five years.

32.2. In 1996, the tenure was extended by five years in Corps of Engineers, Signals and Electrical and Mechanical Engineering branches.

32.3. In 2004, the tenure was extended from ten years to fourteen years (5+5+4). Women officers who have rendered more than fourteen years of service belonged to the erstwhile WSES whose ToE were initially for a period of five years, extended in two spells, thereafter to fourteen years (5+5+4). Since their employment was for a limited period, they were imparted shorter pre-commission training of twenty-four weeks as against forty-nine weeks for male officers. These officers have limited exposure and responsibility and many in the technical arms are not qualified.

33. In pursuance of an order dated 23-7-2018[15] of this Court in the present appeal, the Union of India in the MoD filed an affidavit dated 4-5-2018. The Union of India states that the services in the Army are classified into three broad categories: (*i*) Combat Arms; (*ii*) Combat Support Arms; and (*iii*) Services. SSC for women was available only in Combat Support Arms and Services. Combat Arms have been excluded for SSC appointments for women in the Army. The judgment[8] of the Delhi High Court has also affirmed this position. In 2008, the benefit of PC was extended to SSC women officers in the JAG and AEC which belonged to the Services stream. As a consequence of the judgment[8] of the Delhi High Court, it has been held that in all streams where the Army has provided the option for SSC women officers, there should be no impediment for extending the option for the conferment of PCs. The effect of the judgment is that all SCC women officers in different disciplines in the Combat Support Arms and in the Services category to whom the judgment applies have continued in service beyond the maximum permissible term of fourteen years as SSC officers.

34. Women SSC officers commissioned before 2008 who were parties before the High Court but had been discharged from service secured the benefit of being reinstated in service as a consequence of the judgment[8] of the Delhi High Court. As a result, they have continued after the expiry of the term of fourteen years. The Union of India contends that restrictions on the employability of women in the Army "is inescapable due to the peculiar operational compulsions of the Army". According to the Union Government, measures to eradicate the divide between men and women officers in as many streams as possible are being adopted in an incremental manner.

C. *Submissions*

Submissions of the Union Government

35. Challenging the judgment[8] of the Delhi High Court, the following submissions have been urged on behalf of Union of India.

(a) Grant of PC

36. Prior to the communication dated 25-2-2019, the engagement of SSC women officers was governed by gazette notifications as amended from time to time. The ToE of WSES officers, later replaced by SSC service was tenure based with a clear stipulation for exit on the completion of fourteen years of service. The grant of PCs was specifically not envisaged. None of these notifications or Army instructions were challenged before the High Court:

36.1. The judgment of the Delhi High Court has failed to take notice of the relevant statutory provisions and orders of the Government of India.

36.2. Under Section 10 of the 1950 Act, the grant of commission is at the discretion of the President of India. The absence of a fundamental right to claim PC is reinforced by Section 12 of the 1950 Act by reason of which, no woman is eligible for employment except in such corps and departments as the

15 *Sanjeev Sharma* v. *Union of India*, 2018 SCC OnLine SC 3532
8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

Government of India may determine. The power to grant commission belongs to the President and no mandamus can be claimed from a court.

36.3. The communication dated 25-2-2019 which has been placed on record has been taken after due deliberation and is issued in national interest. It stipulates that the order applies prospectively.

36.4. The policy decision communicated on 25-2-2019, envisages that the skills of SSC women officers can be utilised by training them in specialised fields such as language interpreters, imagery interpreters and cyber and information technology. In these specialisations, unrestricted employment including career progression to higher ranks can be ensured.

36.5. The new policy is in organisational interest. The benefits envisaged in the policy cannot be granted to women officers who have crossed fourteen years since they will be left with little time to be trained. It would not be possible to gainfully employ them, as they would have limited years of service left.

(b) Pensionary benefits

37. The policy decision dated 15-2-2019 communicated by the Union of India provides that the offer of PCs would be restricted to SSC women officers who have not completed fourteen years of service. Those who have completed fourteen years but have not attained the pensionable service of twenty years would be permitted to continue without any scrutiny as a one-time measure to qualify for the grant of pensionary benefits. Women officers who have crossed twenty years of pensionable service would be discharged from service immediately and would receive pension. Thus, the substantial benefit of pensionable service has been provided to women officers who have continued beyond fourteen years of service under interim orders.

(c) Policy considerations

38. The Union of India has submitted that:

38.1. Fortified by Section 12 of the 1950 Act and Article 33[16] of the Constitution, questions relating to constitution, recruitment, posts, categories, cadres and criteria for the grant of PCs constitute policy decisions and lie exclusively in the domain of executive functions.

---

16 "**33. *Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.*** —Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to—

(*a*) the members of the Armed Forces; or

(*b*) the members of the Forces charged with the maintenance of public order; or

(*c*) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(*d*) persons employed in, or in connection with, the telecommunications systems set up for the purposes of any Force, bureau or organisation referred to in clause (*a*) to (*c*),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

38.2. The provisions of the 1950 Act, insofar as they infringe or affect fundamental rights, are protected by Article 33.

38.3. The Union Government is entitled to frame a policy regarding the grant of PCs to women officers after accounting for the need for a balanced approach involving military services and national security. The Union Government is entitled to take into account the inherent dangers involved in serving in the Army, adverse conditions of service which include an absence of privacy in field and insurgency areas, maternity issues and childcare. These considerations are not open to judicial review.

38.4. The scope of judicial review in matters of command/tenure is limited as held by this Court in *Union of India* v. *P.K. Choudhary*[17] ("*P.K. Choudhary*").

(d) Occupational hazards

39. According to the Union of India, women are not employed on duties which are hazardous in nature unlike their male counterparts in the same Arm/Service who are liable to be employed in combat duties. For instance, a male officer in Army Service Corps undergoes infantry attachment in field areas upon commissioning and may be posted later to Rashtriya Rifles/Assam Rifles for counter-insurgency/counter-terrorist operations. The personnel below officer ranks are similarly engaged in combat roles. A male officer in the engineering branch would undergo a tenure in the Rashtriya Riffle/ Assam Rifles while women officers are not employed due to the "inherent risks".

(e) Discrimination

40. There is no discrimination between men and women SSC officers. For example, male SSC officers are not eligible to opt for an MTech course. Women SSC officers in the JAG branch may avail 180 days of child care leave, while PC women officers are entitled to avail 360 days owing to the long period of service expected from them. The Union Government has submitted that the Army faces a huge management challenge "*to manage WOs in soft postings with required infrastructure, not involving hazardous duties with the regular posts with the other women in the station*". The Army has to cater for spouse postings, "*long absence on account of maternity leave, child care leave*" as a result of which "the legitimate dues of male officers have to be compromised".

(f) Ajay Vikram Singh Committee Report: SSC as a support cadre

41. The Ajay Vikram Singh Committee (2003-2004) constituted by the Union Government to enquire into cadre issues in the Armed Forces favoured a lean permanent cadre of officers, supplemented by an enhanced support cadre in the ratio 1:1.1 in view of the pyramidical structure of the Indian Army. However, the ratio between the PC cadre vis-à-vis the SSC cadre is currently skewed at 3.98:1. Hence, further induction into the PC cadre through the SSC cadre will upset the organisational structure of the Army.

17 (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640

(g) Employment in staff appointments

42. Since 1992, the Union Government has restricted the eligibility of women officers to select appointments, as decided from time to time by Army headquarters. These orders have not been subjected to challenge or been invalidated. The issue of command appointments was not a lis in the writ petitions before the Delhi High Court. Considering matters of organisational requirement, suitability and performance, women officers granted PC would be recommended only for staff appointments.

43. Finally, it has been urged by the Union of India that it has reinstated all women officers covered by the judgment[8] of the Delhi High Court insofar as it relates to the Army. Those who are not in service either did not join their posts or had sought release despite the grant of an extension in service. Hence, women officers who are out of service or are not covered by the judgment[8] of the High Court cannot seek the benefit of the policy decision dated 25-2-2019. Any extension of the benefit to a woman officer outside the scope of the policy decision would (it is urged) "open floodgates for litigation creating serious administrative issues of cadre management".

44. In emphasising these submissions of behalf of the Union of India, Mr R. Balasubramanian, learned Senior Counsel has in his written note stressed upon two facets:

(*i*) The need to protect national security and operational effectiveness; and

(*ii*) Non-linear battlefield scenarios in future wars.

45. At this stage, it would be necessary to extract from the written note which has been submitted on behalf of the Union of India. While we will express our views on the content of the note at a later stage, it is necessary here to extract certain portions, as they stand:

45.1. Under the head of "Exigencies of Service", the written note of submissions states:

> "The profession of arms is not only a profession but a '*way of life*', which often requires sacrifices and commitment *beyond the call of duty* by the entire family of service personnel involving separation, frequent transfers affecting education of children and career prospects of the spouse. As a consequence, it is a greater challenge for WOs to meet these hazards of service, owing to their prolonged absence during pregnancy, motherhood and domestic obligations towards their children and families, especially when both husband and wife happen to be service officers."

45.2. Under the head of "Physical Capabilities", the written note states:

> "A soldier relies heavily on his physical prowess to engage in combat. The officers are expected to lead their men '*from the front*' and need to be in prime physical condition to undertake combat tasks. Inherent physiological differences (*reference Annexure A*) between men and women preclude equal physical performances resulting in lower physical standards

8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

(*reference Annexure B*) and hence the physical capacity of WOs in the IA remain a challenge for command of units."

45.3. Under the head of "Composition of Rank and File", the written note states:

"Most of the countries whose armies have women as officers also have women in their rank and file with the exception of India, Pakistan and Turkey. This results in a unique '*all male*' environment in a unit where presence of WOs requires moderated behaviour in their presence. Posting of WOs in all male units thus has its *own peculiar dynamics*."

45.4. Under the head of "Infrastructure", the written note states:

"Infrastructure in forward/border areas is very basic with *minimal facilities for habitat and hygiene*. Officers and men have to make do with primitive/makeshift arrangements. Manning forward posts and small detachments with restricted communication facilities leads to a feeling of isolation. Deployment of WOs in such situations or places in the current circumstances is not advisable."

46. The submission note of the Union of India has spoken of "physiological limitation" on the employability of women officers "accentuated by the challenges of confinement, motherhood and childcare". Finally, the note portends the dangers of a woman officer being captured by the enemy and becoming a prisoner of war.

Submissions of the respondents

47. Assailing the above submissions, and in a serious critique of the submissions adopted by the Union of India and the MoD in their perception of women officers, Ms Meenakshi Lekhi, learned counsel and Ms Aishwarya Bhati, learned Senior Counsel have joined issue. The attention of the Court has been drawn to the total strength of and shortage of officers in the Army on date, as reflected in the following table:

Details of Officers in Indian Army		
Auth Officers	*Held Officers*	*Shortage*
50,266	40,825 including 1653 Women Officers	*9441*

Besides, 157 male officers between the age group of fifty-four and fifty-eight years have been re-employed after their retirement. The cadre structure of women officers serving in the Indian Army is indicated in the following table:

Details of Women Officers in Indian Army			
Present Holding	*Above 20 Yrs*	*Between 14-20 Yrs*	*Fate Undecided*
1653	*77*	*255*	*332*

48. Women officers form a miniscule four per cent of the total strength of commissioned officers in the Army. Ms Lekhi submitted that the Union Government instituted the present proceedings under Article 136 of the

Constitution in 2010 and in spite of there being no stay on the implementation of the judgment[8] of the Delhi High Court, no steps were taken to grant PCs to women officers in the Army in compliance with the judgment[8] of the Delhi High Court. Ms Lekhi submitted that this is based on the predominant fear of male officers representing ninety-six per cent of the overall strength that four per cent of the officers who are women would "eat away vacancies" in the higher ranks. However, it has been submitted that the reality is different since higher rank vacancies genuinely due to the 322 competent women officers have been taken away for promoting male officers. Ms Lekhi has addressed this Court about the conventional bias against the women officers in the Army. Women officers have served the organisation for almost twenty-five years and the battle is against mindsets.

49. Dealing with the factors which have been stressed by the Union of India, the written note submitted by Ms Lekhi contains the following explanations:

49.1. *Battlefield scenario*: The Army considers women officers as an effective workforce until they complete fourteen years of service. The nature of duties is similar to male officers. Having served shoulder to shoulder with male officers for twenty-five years, the contention advanced by the Union of India with respect to battlefield scenarios lacks substance.

49.2. *Unit cohesion*: The Union of India has alleged that the presence of women has a negative impact on unit cohesion. It is time that the organisation starts accepting women as equal colleagues.

49.3. *National security*: Despite the present batch of appeals being sub judice for ten years, women officers of all ages and service profiles are still being posted to sensitive places, field areas, force headquarters and units without being commissioned into combat arms.

50. Ms Lekhi urged that women officers on SSC have suffered from serious discrimination comprising of:

(*i*) Lack of opportunity for professional growth;

(*ii*) Absence of job security due to the ambiguous status of the cadre; and

(*iii*) Rendering service under Junior Officers due to the lack of a uniform and equal promotion policy.

51. In other words, women officers have been left in the lurch without pensionary and promotional benefits on a par with their male counterparts despite having dedicated prime years of their lives to the service of the nation.

Submissions based on the Policy Letter dated 25-2-2019

52. Ms Meenakshi Lekhi and Ms Aishwarya Bhati have highlighted, during the course of their submissions, the following aspects of the Policy Letter dated 25-2-2019 which are discriminatory:

52.1. *In response to Para 4*: Male SSC officers are required to exercise their option for the grant of PC prior to the completion of ten years of service.

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SSC women officers are required to exercise their option on the completion of three years of service and prior to the completion of four years of service. With comparatively lesser experience at the stage when they are required to exercise an option, women officers lack adequate experience to take a considered decision and the possibility of being granted PC is comparatively lower.

52.2. *In response to Para 6*: Restricting SSC women officers only to staff appointments is to prevent their career growth by restraining them within vacancy restrictions, promotions and placements.

52.3. *In response to Para 9*: Application of the policy prospectively is designed to keep away senior women officers outside the ambit of PC. The Army is misconstruing the prospective application of the policy to give the benefit to women officers inducted after the date of the policy. On the other hand, for the JAG and AEC officers, the prospective application has been interpreted by the Army to grant benefit to officers who were in service on the date of the issuance of the policy.

53. It was further contended that posting women officers in staff appointments in the select rank of Colonel under the aegis of MS-1 and MS-3 will equate them with re-employed, low medical category and non-empanelled male officers. Refuting the argument on command appointments, it has been submitted that there are several command roles that do not require any special training including:

(*i*) NCC Battalions (there are more than 100 girl battalions which are currently being commanded by male officers);

(*ii*) Record officers;

(*iii*) Training regiments;

(*iv*) Commandants of Sainik schools and Military schools; and

(*v*) Provost unit commanding officers as provosts are pioneering the induction of women combatants.

54. Meeting the submissions advanced by the Union Government, the respondents have filed a counter-affidavit contending that:

54.1. Services in which women officers have been inducted as SSC women officers are not combative in nature. The job profile includes supporting the combat arms segment and assisting in providing, maintaining and repairing the logistic support. The respondents were inducted in the Army against specified appointments with specific eligibility qualifications such as food scientists, material managers, software engineers and linguistic officers. These postings cannot be compared with the combat arms of the Army. The present case has not been instituted seeking either recruitment or commission into combat arms as this is a conscious decision of the Union Government and is a matter of policy.

54.2. The nature of duty which a commissioned officer is required to perform while serving in the Corps is defined in the Army Manuals of these services. Both women and male officers who were commissioned in these services perform similar duties, undergo similar professional courses and training and are posted to all field/peace postings according to their

profiles. There is no separate charter of duties for women officers or SSC commissioned male officers and PC male officers. Women officers commissioned in various corps are assigned duties similar to male officers (SSC or PC) and commissioned into the same corps.

54.3. The claim of the appellant that there is a probability of women officers being exposed to a hostile environment where there is a grave danger of their coming in contact with the enemy is discriminatory and without any basis. The women officers have been and are regularly being posted by the Indian Army to all possible field units (combat zones) where male officers from the same corps are also serving. Consequently, the Army follows a policy of non-discrimination when it comes to postings but does not follow the same when it comes to granting PC to its women officers. Thirty per cent of all women officers are posted in the field (combat zones).

54.4. Based on the response to a question raised in the Lok Sabha, as on 16-8-2010, there is an acute shortage of 11,500 officers in the Indian Army out of which approximately 5115 officers are deficient in the support services in which women officers have been commissioned. Despite the deficiency of officers in the support services, the Indian Army is letting go of trained women officers due to gender discrimination and not granting PCs to women officers. To overcome the shortage of officers, the Army has given re-employment to retired male officers of the rank of Colonel or below at the age of superannuation (54-58 years) for a period of four years. The vacancies in the Indian Army can be easily handled by women officers.

54.5. Women officers undergo training for all mandatory courses which other SSC male officers also undertake. However, only male officers are eligible to seek PCs. Women officers also undergo the Junior Command Course which is mandatory to train Army officers to discharge their responsibilities as Lieutenant Colonels.

54.6. No rule of the Indian Army prescribes that officers seeking PC have to compulsorily be given command of troops. A command position is given only to those officers who clear their promotion Board based on an efficiency metric. Male officers (SSC or PC) who are not found fit for promotion to the rank of Colonel are accommodated in the staff appointments. Similarly, if women officers are found fit and deserving for the rank of Colonel, they may be promoted to the next rank or be allowed to continue in the manner other non-empanelled PC male officers are presently allowed.

54.7. The willingness of the Indian Army to grant PC to women officers of only AEC and JAG branches, stating that these are non-combative roles is not true as these two corps do not have a "unit" like organisational structure and both men and women officers are not offered command positions.

54.8. In addition to the discriminatory nature of the policy with respect to the grant of PC, the policies for women officers in the Army also lowers their status to that of a jawan/JCO. A woman officer working for fourteen years is neither given pension nor retirement benefits. Details of the treatment meted

out to women officers in the Army in comparison with PC, SSC male officers/ jawans and JCOs is tabulated as follows:

	"*Pension*	*Ex-Servicemen status*	*Ex-Servicemen Contributory Health Scheme*	*Re-employment*	*Encashment of leave*
PC Male Officers	Pensionable after 20 years	Yes	Yes	Yes	Paid for 300 days' encashed leave
Jawan/JCO	Pensionable after 15 years	Yes	Yes	Yes	Paid for 300 days' encashed leave
SSC Women Officers	No pension	No ESM status	No ECHS facility	No provision of re-employment	Paid only for 90 days' encashed leave
SSC Male Officers	SSC Gentlemen officers are all together in a different category, as they are allowed to opt for permanent commission after 5/10 years of service and once they get permanent commission, they are authorised for all benefits of permanent commission officers."				

55. The rival submissions fall for consideration.

D. ***Consequence of the Policy Letter dated 25-2-2019***

56. Article 33 of the Constitution empowers Parliament to determine by law the extent to which the rights conferred by Part III of the Constitution shall be restricted/abrogated in their application inter alia to the members of the Armed Forces so as to ensure the proper discharge of their duties and the maintenance of discipline among them. The impact of Article 33 is to enable Parliament to limit or abrogate the fundamental rights in their application to the members of the Armed Forces. But such a restriction or abrogation *must be* by law. Moreover, the restriction or abrogation must be enacted to ensure the proper discharge of duties and the maintenance of discipline.

57. Several decisions of this Court have dealt with Article 33 of the Constitution in relation to the Armed Forces. In *Ram Sarup* v. *Union of India*[18], the petitioner, a sepoy in 131 Platoon DSC, was charged under Section 69 of the 1950 Act read with Section 302 of the Penal Code, 1860. A sentence of death was awarded by the General Court Martial which was confirmed by the Union Government. A number of contentions were raised for challenging the provisions of the 1950 Act as well as the method in which the trial was conducted. A Constitution Bench of this Court rejected the challenge and upheld the sentence. In the course of the judgment, Raghubar Dayal, J. writing for the Bench, held: (AIR p. 251, para 16)

18 (1964) 5 SCR 931 : AIR 1965 SC 247 : (1965) 1 Cri LJ 236

"*16.* … The learned Attorney General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act are not consistent with the provisions of any of the articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however of opinion that the provisions of Section 125 of the Act are not discriminatory and do not infringe the provisions of Article 14 of the Constitution."

58. This Court in *Ram Sarup case*[18] held that the 1950 Act was enacted in pursuance of the enabling power conferred upon Parliament by Article 33 of the Constitution and is entitled to protection despite the restrictions imposed by its provisions on the fundamental rights guaranteed by the Constitution. The Court held that the provisions of the 1950 Act formed an inherent part of the legislation and having been enacted in pursuance of the power conferred by Article 33, they would not be declared void to the extent they restricted or abrogated the guarantee of fundamental rights to members of the Armed Forces.

59. In *Prithi Pal Singh Bedi* v. *Union of India*[19], 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. D.A. Desai, J. 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: (SCC pp. 155-56, para 14)

"*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."

18 *Ram Sarup* v. *Union of India*, (1964) 5 SCR 931 : AIR 1965 SC 247 : (1965) 1 Cri LJ 236
19 (1982) 3 SCC 140 : 1982 SCC (Cri) 642

60. The Court in *Prithi Pal Singh case*[19] 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: (*Prithi Pal Singh Bedi case*[19], SCC pp. 156-57, para 15)

> "*15.* … 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."

61. In *R. Viswan* v. *Union of India*[20], 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. P.N. Bhagwati, J. (as the learned Chief Justice then was), speaking for a Constitution Bench of this Court held: (*R. Viswan case*[20], SCC p. 418, para 7)

> "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 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.*" (emphasis supplied)

19 *Prithi Pal Singh Bedi* v. *Union of India*, (1982) 3 SCC 140 : 1982 SCC (Cri) 642
20 (1983) 3 SCC 401 : 1983 SCC (L&S) 405

62. The Court in *Viswan case*[20] 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: (*R. Viswan case*[20], SCC pp. 418-19, para 7)

> "*7.* … 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…."

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 the Constitution.

63. None of the above cases were rendered in the context of Section 12 of the 1950 Act. The present case requires an assessment of the implication of a specific provision restricting the entry of women into the Armed Forces on one hand and the steps taken by the Union Government to grant PCs to women SSC officers in streams in which they have been commissioned.

64. Section 12 of the 1950 Act embodies the principle that a woman would be eligible for enrolment or employment only in such corps, departments, branches or bodies forming part of or attached to the regular Army upon and to the extent notified by the Central Government. In other words, the eligibility of women for enrolment or engagement in the regular Army is conditional on a provision being made by the Central Government in terms of the enabling provision of Section 12.

65. The engagement of women officers in the Army has been an evolutionary process. As we have seen, women officers were initially inducted in the year 1992 under the WSES, for a period of five years. This was extended for a further period of five years. On the incorporation of a provision for SSCs for women officers, options were granted to those amongst them who had been engaged under the earlier scheme to become SSC officers. As a part of the pool of officers engaged as SSC officers, the tenure was extended to fourteen years with a provision for due promotions while in service. Following the judgment[8] of the Delhi High Court, the Union Government was under a mandate to grant PCs to women officers, to the exclusion of the Combat Arms, and on a par with the grant of PCs to their male counterparts. Significantly, the judgment[8] of the

20 *R. Viswan* v. *Union of India*, (1983) 3 SCC 401 : 1983 SCC (L&S) 405
8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

Delhi High Court was not stayed by this Court at any stage, though there was a direction that no coercive steps would be initiated on the basis of the judgment in appeal. A direction by this Court not to initiate coercive steps is distinct from a stay on the operation of the judgment. There was no reason or justification for the Union Government not to act upon the directions that were issued by the Delhi High Court, particularly, in the absence of a stay on the operation and enforcement of the judgment. The Union Government continued to thwart implementation despite the order of this Court dated 2-9-2011[12] clarifying that "*the operation of the impugned judgment*[8] *is not stayed at all*". Scant regard has been paid to the Delhi High Court and to this Court as well. Eventually, nearly nine years after the judgment, the Union Government has communicated a Policy Circular dated 25-2-2019 by which a decision has been taken to grant women officers PC in eight Arms/Services, in addition to the existing streams of JAG and AEC. Thus, as a matter of policy, the Union Government has taken a decision to allow for the grant of PCs in all the ten streams in which women officers were currently being commissioned as SSC officers.

66. The decision of the Union Government to allow PCs to women officers in all the ten streams where they are being inducted as SSC officers substantially renders redundant the submission of Mr Balasubramanian, learned Senior Counsel, based on the provisions of Section 12 of the Army Act. Section 12 contemplates that women will be eligible for enrolment only in those segments of the Army where the Union Government has, by notification, permitted their enrolment and engagement. Even on a textual interpretation of Section 12 as it stands, it is evident that the policy decision dated 25-2-2019 of the Union Government has allowed for the grant of consideration of PCs to commissioned women officers in all the ten streams which have been notified.

67. The policy decision of the Union Government is a recognition of the right of women officers to equality of opportunity. One facet of that right is the principle of non-discrimination on the ground of sex which is embodied in Article 15(1) of the Constitution. The second facet of the right is equality of opportunity for all citizens in matters of public employment under Article 16(1). The policy statement of the Union Government must therefore be construed as a decision which enforces the fundamental right of women to seek access to public appointment and to equality of opportunity in matters of engagement relating to the Army. The fundamental right is recognised in the specified streams where women are permitted to seek engagement as equal members of the Armed Force that the Indian Army represents. With the Union Government having recognised the induction of permanently commissioned women officers in its policy decision dated 25-2-2019, we are of the opinion that the submissions which have been made by the Union of India betray a lack of understanding of the plain consequences of the decision. The decision of the Union Government to extend the grant of PC to other corps in the support arms and services recognises that the physiological features of a woman have no significance to her equal entitlements under the Constitution.

12 *Ministry of Defence* v. *Babita Puniya*, 2011 SCC OnLine SC 87
8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115

E. ***Stereotypes and women in the Armed Forces***

68. Seventy years after the birth of a post-colonial independent State, there is still a need for change in attitudes and mindsets to recognise the commitment to the values of the Constitution. This is evident from the submissions which were placed as a part of the record of this Court. Repeatedly, in the course of the submissions, this Court has been informed that:

68.1. The profession of Arms is a way of life which requires sacrifice and commitment beyond the call of duty.

68.2. Women officers must deal with pregnancy, motherhood and domestic obligations towards their children and families and may not be well-suited to the life of a soldier in the Armed Forces.

68.3. A soldier must have the physical capability to engage in combat and inherent in the physiological differences between men and women is the lowering of standards applicable to women.

68.4. An all-male environment in a unit would require "moderated behaviour" in the presence of women officers.

68.5. The "physiological limitations" of women officers are accentuated by challenges of confinement, motherhood and child care.

68.6. The deployment of women officers is not advisable in areas where members of the Armed Forces are confronted with "minimal facility for habitat and hygiene".

69. 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. 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. To deny the grant of PCs to women officers on the ground that this would upset the "peculiar dynamics" in a unit casts an undue burden on women officers which has been claimed as a ground for excluding women. The written note also relies on the "minimal facilities for habitat and hygiene" as a ground for suggesting that women officers in the services must not be deployed in conflict zones. The respondents have placed on record that 30% of the total women officers are in fact deputed to conflict areas.

70. These assertions which we have extracted bodily from the written submissions which have been tendered before this Court only go to emphasise the need for change in mindsets to bring about true equality in the Army.

If society holds strong beliefs about gender roles — that men are socially dominant, physically powerful and the breadwinners of the family and that women are weak and physically submissive, and primarily caretakers confined to a domestic atmosphere — it is unlikely that there would be a change in mindsets. Confronted on the one hand with a solemn policy decision taken by the Union Government allowing for the grant of PC to women SSC officers in ten streams, we have yet on the other hand a whole baseless line of submissions solemnly made to this Court to detract from the vital role that has been played by women SSC officers in the line of duty.

71. The counter-affidavit contains a detailed elaboration of the service which has been rendered by women SSC officers to the cause of the nation, working shoulder to shoulder with their male counterparts. Yet, that role is sought to be diluted by the repeated pleas made before this Court that women, by the nature of their biological composition and social milieu have a less important role to play than their male counterparts. 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.

72. Women officers of the Indian Army have brought laurels to the Force. These are documented in the course of proceedings and have not been controverted in the submissions. Some of the distinctions which women officers have achieved are catalogued below:

72.1. Lieutenant Colonel Sophia Qureshi (Army Signal Corps) is the first woman to lead an Indian Army contingent at a multi-national military exercise named "Exercise Force 18" which is the largest ever foreign military exercise hosted by India. She has served in the United Nations Peacekeeping Operation in Congo in 2006 where she, along with others, was in charge of monitoring ceasefires in those countries and aiding in humanitarian activities. Her job included ensuring peace in conflict affected areas.

72.2. Lieutenant Colonel Anuvandana Jaggi served as the Women's Team Leader of the United Nations Military Observers' Team in the UN mission in Burundi. She was awarded the United Nations Force Commander's Commendation and an Appreciation Epistle from the Chief of Army Staff for her commendable effort.

72.3. Major Madhumita (Army Education Corps) is the first woman officer in the country to receive the Gallantry Award (Sena Medal) for fighting Taliban terrorists in Afghanistan. Despite adversity, she continued and her speedy rescue and evacuation efforts saved many lives.

72.4. Lieutenant Bhavana Kasturi recently led a contingent of the Indian Army Service Corps, becoming the first woman to lead an all-men Army contingent in the history of India. Similarly, Captain Tania Shergill recently became first Indian woman Parade Adjutant to lead an all-men contingent in New Delhi on 15-1-2020.

72.5. In September 2010, the Sword of Honour in the Officers Training Academy, Chennai (the only training centre for SSC male and female officers)

was given to Lieutenant A. Divya amongst 170 male officers and 57 women officers.

72.6. By a letter[21] dated 8-9-2009, women officers were also made part of the Quick Reaction Teams, where women and male officers perform similar duties.

72.7. The Indian Army entrusts women officers with complex tasks of transporting convoys of between thirty to fifty vehicles in militant prone areas in Leh, Srinagar, Udhampur and the North-East. An example was provided of the movement order from Leh to Pathankot dated 15-9-2010 issued to one of the respondents, Major Gopika Bhatti who, in the role of a convoy commander, handled junior commissioned officers, jawans (drivers and supporting staff), vehicles (filled with logistics, arms and ammunitions) and other military equipment.

72.8. Major Gopika Ajitsingh Pawar was awarded the United Nations Peacekeeping Medal by the Secretary General of the United Nations in recognition of her role as a military member of the United Nations Interim Force in Lebanon.

72.9. Major Madhu Rana, Preeti Singh and Anuja Yadav were awarded the United Nations Medal completing the qualifying service as military members of the United Nations Mission in the Democratic Republic of Congo.

72.10. Captain Ashwini Pawar (Army Ordinance Corps) and Captain Shipra Majumdar (Army Engineer Corps) were awarded the Sewa Medal by the President of India in 2007.

72.11. Women officers from the Indian Army have been participating in the UN Peacekeeping Force since 2004 and have been deployed in active combat scenarios in Syria, Lebanon, Ethiopia and Israel.

73. Numerous other commendation certificates and laurels achieved by women officers have been placed on record. Their track record of service to the nation is beyond reproach. To cast aspersion 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.

74. Courts are indeed conscious of the limitations which issues of national security and policy impose on the judicial evolution of doctrine in matters relating to the Armed Forces. For this reason, we have noticed that the engagement of women in the Combat Arms has been specifically held to be a matter of policy by the judgment[8] of the Delhi High Court and which is not in question in the present appeals. At the same time, we have adverted in some detail to the line of submissions urged before this Court. These submissions detract from the significant role which has been played by women SSC commissioned officers since their induction in 1992. The time has come for a realisation that women officers in the Army are not adjuncts to a

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male dominated establishment whose presence must be "tolerated" within narrow confines. That in our view is not the manner in which the steps taken progressively by the Union Government to bring women into the mainstream of the Army (except the Combat Arms) can be viewed. The salient decision of the Union Government to extend PCs to women SSC officers in all ten streams in which they are commissioned is a step forward in recognising and realising the right of women to equality of opportunity in the Army. This marks a step towards realising the fundamental constitutional commitment to the equality and dignity of women.

F. ***Consequence of non-compliance***

75. The proposal which has been submitted before this Court by the Union Government involves a three-stage assessment of women SSC officers for the grant of PCs. A distinction has been made in the proposal between women officers who have been in service for a period of less than fourteen years and those beyond. The proposal envisages that only those women officers with less than fourteen years of service would be considered for the grant of PCs. Under the terms of this proposal, women officers with more than fourteen years of service but less than twenty years of service would continue until they attain pensionable service of twenty years, without the grant of PCs. Women officers who have crossed twenty years' service would be discharged from service immediately subject to receipt of pension. The proposal has been commended for acceptance to this Court on the ground that it allows women officers who have crossed fourteen years of service to receive pensionary benefits, where such benefit would otherwise not be available to them.

76. There is fundamental fallacy in the distinction which has been sought to be drawn between women officers with less than fourteen years of service with those with service between fourteen and twenty years and above twenty years. The judgment of the Delhi High Court was rendered on 12-3-2010[8]. Nearly a decade has elapsed since the date of the decision. The Union Government was duty-bound to enforce the judgment[8] of the Delhi High Court, the judgment not having been stayed during the pendency of these appeals. However, it failed to do so despite the categoric assertion by this Court in its order dated 2-9-2011[12] that what was stayed as an interim measure is the action for contempt and not the operation of the judgment. Having failed to enforce the judgment, the Union Government has now informed the Court that it would not consider women officers who have crossed the age of fourteen years in service as SSC officers for the grant of PCs. This situation of women officers with service above fourteen years has come to pass plainly as a consequence of the failure of the Union Government to comply not only with the directions of the Delhi High Court but also those which were issued by this Court on 2-9-2011[12]. In this view of the matter, we see no reason or justification to deprive SSC women officers of the grant of PCs on the ground that they have crossed fourteen years of service.

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77. The failure of the Government to implement the judgment[8] of the Delhi High Court has caused irreparable prejudice to the women officers. Over the chequered history of the litigation of the past decade, they have lost the benefit of promotions and the assumption of higher responsibilities as members of the Armed Forces. To turn around now and inform them that they will lose the entitlement of being considered for the grant of PCs would be a travesty of justice. We are accordingly of the view that SSC women officers, both within the period of fourteen years' service and beyond, should equally be entitled to consideration for the grant of PCs.

78. The policy decision which has been taken by the Union Government on 25-2-2019 indicates that it is to apply prospectively. It is necessary for this Court to clarify that the prospective application of the decision does not mean that it would apply to women officers who have been appointed as SSC officers after the date of the decision. The Union Government has not applied it in such a manner, which is evident from the fact that the decision contemplates that women officers already in service but with less than fourteen years would be entitled to be considered. We therefore clarify that the policy decision will apply to all women SSC officers who are currently in service irrespective of the length of service which has been rendered by them.

79. Mr R. Balasubramanian, learned Senior Counsel relied on the judgment of this Court in *P.K. Choudhary*[17] to contend that the scope of judicial review in matters of command/tenure is limited. In that case, pursuant to the suggestions of the Ajay Vikram Singh Committee ("AVS Committee") to lower of the age profile of officers in the Indian Army and create 1484 additional vacancies in the rank of Colonel, the Union Government sanctioned an additional 1484 vacancies which were to be allocated in two separate phases. In the first phase, 750 vacancies were sanctioned by the upgradation of appointments in the rank of Lieutenant Colonel to Colonel which were to be distributed across the three service branches of the Army — Combat, Combat Support and Services. However, in the second phase, the Union Government sanctioned the remaining 734 vacancies to be allocated on a "Command Exit Model" which was claimed to be in consonance with the functional and operational requirements of the Army. Aggrieved by the denial of a pro rata share of the vacancies sanctioned in the second phase, the respondents, who were inducted in the Services Corps, challenged the action of the Union Government.

80. The Union Government contended that the recommendations of the AVS Committee were limited to officers in the Combat and Combat Support Arms only and did not extend to the Services' Arms. It was further contended that the "Command Exit Model" for allocation of vacancies was neither discriminatory nor arbitrary, but in accordance with the recommendations of the Committee. A two-Judge Bench of this Court rejected the claim of the respondents. Mr R. Balasubramanian sought to rely on the judgment to contend

8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115
17 *Union of India* v. *P.K. Choudhary*, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640

that courts must refrain from questions concerning the Armed Forces as they constitute matters of policy in which courts cannot interfere.

81. It is necessary to observe the rationale underlying the judgment in *P.K. Choudhary*[17]. The Court noted that the AVS Committee did not take into account vacancies for Colonels in the Corps of Services. The Court concluded that the Committee did not recommend a reduction in the age profile of Unit Commanders in Army Signal Corps, Army Ordinance Corps and other Minor Corps. Thus, the argument urged by the respondents that the recommendations of the Committee to create vacancies was for the benefit of officers serving in all streams, was rejected. The Court further noted that the recommendation of AVS Committee to adopt the "Command Exit Model" was accepted by the Government. Consequently, merely because the earlier allocation was not reversed, this would not affect the binding nature of the Government's decision to allocate vacancies on the basis of the "Command Exit Model". The Court held: (SCC p. 255, para 28)

> "*28.* … If the Army Headquarters committed a mistake in allocating vacancies on a pro rata basis contrary to the recommendations and the decision of the Government, any such error cannot adversely affect officers serving in Arms and Arms Support who may have been entitled to a higher number of vacancies in the second tranche but who were deprived of such allocation on account of the error in the previous allocation made on pro rata basis."

82. This apart, the Court rejected a claim of legitimate expectation by the respondents in the following terms: (*P.K. Choudhary case*[17], SCC p. 268, para 58)

> "*58.* … There is nothing perverse, unreasonable or unfair about the policy that the age of officers serving in Combat Arms and Combat Arms Support will be lowered by creating additional vacancies to be allotted on Command Exit Model. In the absence of any perversity, unreasonableness or unfairness in the policy so introduced, there is no reason to allow the argument based on legitimate expectation to unsettle or undo the policy which is otherwise laudable…."

83. The judgment of this Court in *P.K. Choudhary*[17] was based on the specific recommendations of the AVS Committee as well as the actions of the Union Government in committing to a course of action for the allocation of vacancies. This Court observed that the first phase of allocation was clearly contrary to both the recommendations of the AVS Committee as well as the method of allocation adopted by the Union Government. The Court additionally observed that the method of allocation in the second phase did not suffer from any perversity, unreasonableness or unfairness.

84. As we have noted before, courts are conscious of the limitations which questions of policy impose on judicial intervention in matters relating to the Armed Forces. At the same time, faced with a salient decision of the Union

17 *Union of India* v. *P.K. Choudhary*, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640

Government to extend to all women SSC officers the option for the grant of PCs as well as the situation which has come to pass due to the non-implementation of the binding directions of the Delhi High Court as well as this Court, non-intervention in the present matter would be nothing short of a travesty of justice.

G. *Blanket restriction on criteria appointments*

85. The next aspect of the policy decision relates to the restriction which has been imposed on women officers being granted PCs save and except for staff appointments. Such a restriction was not imposed when the JAG and AEC branches were opened up for the grants of PCs for women SSC officers in the past. The consequence of this, is an implicit acceptance by the Army that women can, in certain situations, receive criteria or command appointments. An absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner. In this sense, even at its bare minimum, the right to equality is a right to rationality. Where the State, and in this case the Army as an instrumentality of the State, differentiates between women and men, the burden falls squarely on the Army to justify such differentiation with reason. An absolute prohibition of women SSC officers to obtain anything but staff appointments evidently does not fulfil the purpose of granting PCs as a means of career advancement in the Army. Whether a particular candidate should or should not be granted a criteria or command assignment is a matter for the competent authority to consider having regard to all the exigencies of service, performance and organisational requirements. In the present case the Army has provided no justification in discharging its burden as to why women across the board should not be considered for any criteria or command appointments. Command assignments are not automatic for men SSC officers who are granted PC and would not be automatic for women either. The absolute exclusion of women from all others except staff assignments is indefensible. If the Army has cogent reasons for excluding women from a particular criteria or command appointment, it may provide them to the relevant authorities and if necessary, to future courts. However, such a justification must take place on a case-to-case basis, in light of the requirements and exigencies of a particular appointment. The blanket non-consideration of women for criteria or command appointments absent an individuated justification by the Army cannot be sustained in law.

86. We therefore hold that the expression "in various staff appointments only" in Para 5 and that "on staff appointments only" in Para 6 of the communication dated 25-2-2019 shall not be enforced. We have already adverted to the submission which was urged on behalf of the women officers by Ms Lekhi that there are various command assignments in which there would be no reason or justification for excluding women. This is a matter for the determination of the relevant authority.

H. ***Directions***

87. 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 25-2-2019 and issue the following directions:

87.1. 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:

87.1.1. 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.

87.1.2. The option shall be granted to all women presently in service as SSC officers.

87.1.3. 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.

87.1.4. 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.

87.1.5. The expression "in various staff appointments only" in Para 5 and "on staff appointments only" in Para 6 shall not be enforced.

87.1.6. SSC women officers with over twenty years of service who are not granted PC shall retire on pension in terms of the policy decision.

87.1.7. 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.

87.2. We affirm the clarification which has been issued in sub-para (*i*) of Para 61 of the impugned judgment[8] and order of the Delhi High Court.

87.3. 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.

88. Necessary steps for compliance with this judgment shall be taken within three months from the date of this judgment.

89. We accordingly dispose of the appeals. However, there shall be no order as to costs.

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8 *Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115