

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 5th October, 2020**

+ **W.P.(C) No.4133/2020**

WG. CDR. PUNITA ASWAL **.... PETITIONER**

Through: Mr. Nikhil Palli, Adv.

Versus

UNION OF INDIA & ORS. **...RESPONDENTS**

Through: Mr. Harish Vaidyanathan Shankar,
CGSC with Ms. Kinjal Shrivastava &
Mr. Varun Kishore, Adv. for UOI.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the common order dated 20th February, 2020 of the Armed Forces Tribunal (AFT), Principal Bench, New Delhi in OA No.1500/2019 preferred by the petitioner as well as in OAs preferred by six others, upholding the preliminary objection of the respondents Indian Air Force (IAF) to the OA No.1500/2019 preferred by the petitioner as well as in OAs preferred by six others.

2. This petition came up first before this Court on 13th July, 2020 when it was adjourned to 31st July, 2020. However on 31st July, 2020, the petition could not be listed and was listed only on 22nd September, 2020, when after hearing the counsels, it was adjourned to today.

3. It is the case of the petitioner, that (i) the petitioner joined the respondents IAF, after being selected as a Short Service Commissioned

(SSC) officer, in the AE(L) branch, pursuant to the advertisements issued in October, 2005; (ii) the petitioner was finally commissioned on 3rd July, 2006, under the Rationalized Scheme of 10+4 years; (iii) initially, women were not recruited in IAF; IAF started commissioning women in different branches, in the years 1991 and 1992 and that too, on Short Service Commission, but did not consider them for permanent commission; (iv) various other women SSC officers approached this Court, seeking a direction to the respondents IAF to consider their case for grant of permanent commission, without any gender bias; (v) the aforesaid batch of petitions were allowed by this Court vide judgment dated 12th March, 2010 reported as ***Babita Puniya Vs. Secretary*** (2010) 168 DLT 115 (DB), holding that women SSC officers are entitled to permanent commission at par with male SSC officers, with all consequential benefits; (vi) the said judgment was upheld by the Supreme Court in judgment reported as ***The Secretary, Ministry of Defence Vs. Babita Puniya*** AIR 2020 SC 1000; (vii) after the aforesaid judgments, the petitioner, whose selection process had commissioned in October, 2005, was hopeful that she will be granted permanent commission on the same parameters on which male SSC officers in other branches had all along been granted permanent commission; (viii) the respondents IAF also issued a Policy dated 19th November, 2010, to grant permanent commission to all SSC women officers; (ix) the respondents IAF however, instead of considering the petitioner for permanent commission, after the petitioner had completed ten years as a SSC officer, vide signal dated 11th March, 2016 granted extension of four years to the petitioner even though the petitioner even then was willing for grant of permanent commission and was entitled thereto; (x) aggrieved therefrom the petitioner made a representation dated 20th January, 2017, but to no avail and

therefore the petitioner preferred OA No.990/2017 before the AFT, assailing the action of the respondents IAF, of not considering the petitioner for permanent commission, on the premise that the petitioner had been commissioned prior to 26th September, 2008; (xi) the aforesaid reasoning of the respondents IAF was erroneous as the petitioner had been recruited prior to 25th May, 2006 and was entitled to be considered for permanent commission in terms of judgment of this Court in ***Babita Puniya*** supra; (xii) during the pendency of OA No.990/2017, the respondents IAF issued a new Policy dated 16th January, 2019, and in view whereof the petitioner withdrew OA No.990/2017 with liberty to challenge the action of the respondents IAF by filing a fresh OA; (xiii) the petitioner thereafter preferred OA No.1500/2019, from which this petition arises, challenging the Policy dated 16th January, 2019 and seeking direction for her consideration for permanent commission; (xiv) the AFT, vide impugned interim order dated 20th February, 2020 in the OA No.1500/2019 preferred by the petitioner as well as in certain other OAs pending before the AFT, upheld the preliminary objection of the respondents IAF to the effect that the petitioner and others could only challenge the consideration as per Policy dated 16th January, 2019; (xv) the AFT, while passing the impugned order dated 20th February, 2020, did not notice that the petitioner, while withdrawing OA No.990/2017 had not given up her claim for being considered by the old Policy and the order dated 27th May, 2019 of the AFT permitting withdrawal of OA No.990/2017 itself recorded that the petitioner would be entitled to challenge the action of the respondents IAF; (xvi) it thus cannot be said that the petitioner had waived her right; (xvii) though OA No.1500/2019 is still pending before the AFT but since the petitioner was being released on

completion of 10+4 years of her SCC, with effect from 2nd July, 2020, without being granted the consideration for permanent commission, the petitioner approached the AFT vide MA No.756/2020 seeking stay of release of the petitioner; and, (xviii) the AFT however vide order dated 26th June, 2020 rejected the petitioners MA No.756/2020, holding that the petitioner cannot now claim to be entitled to be considered by the old Policy.

4. The impugned order dated 20th February, 2020 records / finds / reasons / holds (a) that it was the contention of the applicant / petitioner that in all the OAs, order wherein was being passed, that this Court vide **Babita Puniya** supra had directed permanent commission to be granted to all women officers who were recruited prior to 2006 and were in service on the date of passing of the judgment i.e. 12th March, 2010 and in accordance with the Policy that was existing prior to 25th May, 2006; (b) that the grievance of the applicants in the OAs before the AFT was that having been appointed prior to 25th May, 2006, they were entitled to the benefit of the law laid down in **Babita Puniya** supra and to grant of permanent commission in accordance with the Policy contemplated on 10th September, 2004 and amended on 19th November, 2010; it was their grievance that they were being considered for permanent commission, not in accordance with the Policy of 10th September, 2004 amended on 19th November, 2010 but under the Policy of 16th January, 2019; (c) per contra, it was the contention on behalf of the respondents IAF that the applicants had earlier approached the AFT by filing various OAs and during the pendency of which OAs, Policy of 2019 came into force and the OAs earlier preferred were withdrawn with liberty to seek consideration under the Policy of 16th January, 2019; (d) that the applicants were considered under the Policy of 16th January, 2019 and the applicants not

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selected, because they did not meet the criteria laid down in the Policy dated 16th January, 2019; accordingly, the respondents raised a preliminary objection with regard to the maintainability of the OAs filed by the applicants because once the applicants had shown willingness to have their cases considered as per the Policy of 16th January, 2019, after being found unsuitable thereunder, could not again claim consideration under the earlier Policy; (e) the applicants were thus not entitled to consideration under the earlier Policy, after having been unsuccessful in the consideration under the 16th January, 2019 Policy; and, (f) that the applicants were very well aware that there were two policies and the differences between the two policies; however the applicants on 14th March, 2019, willingly withdrew the OAs preferred by them, seeking a direction to the respondents to consider the claim of the applicants as per new Policy; thus the preliminary objection of the respondents IAF was upheld and the OAs directed to be listed for any other consideration.

5. On 22nd September, 2020, it was the contention of the counsel for the petitioner that though the petitioner was commissioned on 3rd July, 2006 but had applied in pursuance to advertisement of October, 2005 and the recruitment process was completed in May, 2006 and the petitioner was thus entitled to be considered at par with those recruited prior to 25th May, 2006 and who had been considered for grant of permanent commission under the Policy dated 19th November, 2010.

6. During the course of hearing, the counsel for the respondents IAF drew attention to the order dated 27th May, 2019 of the AFT in OA

No.990/2017 earlier preferred by the petitioner and which order reads as under:

“1. The Counsel for the Respondents has stated that the applicant has given consideration on the strength of her consent and in terms of Policy 01 of 2019 and she was not found to be up to the mark by the Board concerned. Accordingly, she has not been granted permanent commission.

2. The applicant who is appearing in person states that the policy on the strength of which she was given consideration was not fairly implemented inasmuch as she did not get three chances for consideration. Accordingly, she states that she may be permitted to withdraw this application with liberty to challenge the action of the respondents by way of a fresh application. The counsel for the respondents does not have any objection.

3. In view of the statement made by both the parties in the Tribunal, the OA is dismissed as withdrawn with liberty to the applicant as prayed for.”

7. On a reading of the aforesaid order, it appeared on 22nd September, 2020 that it was the contention of the petitioner, appearing in person before the AFT on 27th May, 2019, that the Policy was not fairly implemented inasmuch as the petitioner did not get three chances for consideration and be permitted to withdraw OA No.990/2017 with liberty to challenge the action of the respondents IAF by way of a fresh application and the counsel for the respondents IAF had no objection thereto and in pursuance where to the OA No.990/2017 was dismissed as withdrawn with liberty to the applicant as sought.

8. As distinct from the order dated 27th May, 2019 reproduced above in the earlier OA No.990/2017 filed by the petitioner, the order passed in the earlier OAs preferred by others, who had also filed fresh OAs and wherewith the fresh OA No.1500/2019 filed by the petitioner was clubbed and common

impugned order dated 20th February, 2020 passed, the order withdrawing the earlier OAs as set out by the AFT in the impugned order, was as under:

“1. Learned counsel for the applicants have in all fairness admitted that a new policy dated 16th January, 2019 has already been promulgated by the respondents and received by them for consideration of grant of Permanent Commission to serving Short Service Commissioned Officers of ground duty branches other than medical and dental officers.

2. It has been further stated by them that the Board is likely to meet in the month of March and they would like to be considered on the basis of a new policy for grant of Permanent Commission subject to their meeting the other conditions envisaged in the policy.

3. The respondents are directed to consider each of the individual applicant for grant of Permanent Commission, who has given his willingness to be considered on the strength of the policy dated 16th January, 2019 and if he is able to qualify the same, issue necessary orders to that effect.

4. List the matter for further proceedings on 11th April, 2019.

(emphasis supplied)”

and the subsequent order dated 27th May, 2019 in the earlier OAs filed by others was as under:

“1. Learned Counsel for the Applicants submit that since they get instruction from the respective applicants, they do not want to press the OAs and, therefore, request for permission to withdraw the OA with liberty to take legal remedy.

2. In view of the statement made by the learned counsels in the Tribunal, these Original Applications are dismissed as withdrawn with liberty as prayed for.”

9. On the basis of the aforesaid two orders in the earlier OAs filed by others, the AFT in the common impugned order concluded (i) that each of the applicants approached AFT in the year 2018 with the same prayer as

made in the new OAs filed by them; (ii) however during the pendency of the earlier OAs, new Policy for grant of permanent commission was issued on 16th January, 2019; (iii) the applicants made a statement before the AFT that their cases be considered as per the new Policy and the AFT so directed; (iv) the applicants were considered under the new Policy and the result was brought to the notice of the AFT; (v) the applicants then withdrew earlier OAs with liberty to take legal remedy; (vi) the question for consideration in the preliminary objection taken by the IAF to the new OAs was, whether the applicants in the new OAs were entitled to the benefit of law laid down in ***Babita Puniya*** supra and relief in which respect though claimed in the earlier OAs was given up; (vii) the contention of the applicants was that it was only an alternate submission, to take a chance to see if the applicants could be granted permanent commission under the new Policy and when they were not granted the benefit, they withdrew the earlier OAs to take recourse to the legal remedy which they were seeking in the new OA; (viii) this argument could not be accepted because the applicants, at the time of filing the earlier OAs were aware that certain legal rights had accrued to them by virtue of law laid down in ***Babita Puniya*** supra – they knew that their cases have to be considered as per the Policy which was existing prior to 25th May, 2006; this right was claimed in the earlier OAs; however during the pendency of the earlier OAs, the applicants on 14th March, 2019 made a statement that they would be satisfied if their cases are considered as per the new Policy; there was no mention that consideration under the new Policy was without surrendering the right to be considered as per the Policy prior to 2006; the rights thereunder were not kept intact and on the contrary the applicants willingly submitted to consideration under the new Policy; and, (ix) after

having failed in that consideration, they cannot turn around and say that their claim has not been considered as per the requirement of law.

10. As would immediately become clear, the order dated 27th May, 2019 in the earlier OA filed by the petitioner is different from the order dated 27th May, 2019 in the earlier OAs filed by others, clubbing the new OA filed by the petitioner wherewith, the common impugned order has been passed.

11. It was the contention of the counsel for the petitioner on 22nd September, 2020 that as per the statement made and liberty granted in the order in the earlier OA filed by the petitioner, the rights of the petitioner for consideration in terms of ***Babita Puniya*** supra remained intact.

12. We, on 22nd September, 2020 found merit in the aforesaid contention. It appeared that the AFT at the time of passing the impugned order dated 20th February, 2020 was swayed by the orders in the OAs of others along wherewith the impugned order in the OA No.1500/2019 preferred by the petitioner was made and did not have occasion to look into the order passed in the case of the petitioner and under which the petitioner had reserved her liberty to challenge her consideration under the old Policy.

13. However, since the aforesaid ground had not emerged in any of the earlier hearings, it was deemed apposite on 22nd September, 2020 to direct this petition to be listed today to enable the counsels to consider whether the petition should be allowed, setting aside the common impugned order dated 20th February, 2020 to the extent in OA No.1500/2019 preferred by the petitioner and by remanding the matter to the AFT for consideration afresh.

14. The counsel for the respondents IAF has today been unable to controvert what was found *prima facie* by us during the hearing on 22nd September, 2020. The counsel for the petitioner of course supports the same.

15. The petition is accordingly disposed of, by setting aside the order dated 20th February, 2020 of the AFT, Principal Bench, New Delhi insofar as in OA No.1500/2019 of the petitioner and the AFT is requested to consider OA No.1500/2019 of the petitioner afresh qua the preliminary objection of the respondents IAF, particularly in the light of the order dated 27th May, 2019 of withdrawal of earlier OA No.990/2017 as pointed out by us above and to pass appropriate order.

16. Needless to state that if the petitioner remains aggrieved, shall have her remedies.

17. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

OCTOBER 05, 2020

‘gsr’..