LT. COL. NITISHA & ORS. A

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No 1109 of 2020)

MARCH 25, 2021 B

[DR. DHANANJAYA Y CHANDRACHUD AND M. R. SHAH, JJ.]

Armed Forces:Permanent Commission (PC) – Claim of women engaged on Short Service Commission (SSC) in the Indian Army – Said claim held to be justified by this Court in Babita Puniya's *case – Thereafter, issuance of directions to the Union Government to grant of PCs to Women SSC Officers in armed services – Petitioners aggrieved by the steps taken by the Union Government to implement* Babita Puniya's *case-conduct of special selection procedure to screen WSSCOs for grant of PC on the same terms as their male counterparts; SHAPE-1 Medical criteria; performance in the fifth year of their service; 60 per cent cut-off grade and an annual cap of 250 – Writ petition u/Art. 32 challenging the modalities followed in assessing the 615 WSSCOs for grant of PC after* Babita Puniya*'s case – Held: Evaluation criteria set by the Army constituted systemic discrimination against the petitioners – Evaluation pattern disproportionately affects women – This disproportionate impact is attributable to the structural discrimination against women – Facially neutral criteria of selective (Annual Confidential Reports) evaluation and fulfilling the medical criteria to be in SHAPE-1 at a belated stage, to secure PC disproportionately impacts them vis-à-vis their male counterparts – Exclusion of subsequent achievements of the petitioners and casual grading and skewed incentive structures resulted in indirect and systemic discrimination – This discrimination has caused an economic and psychological harm and an affront to their dignity – Issuance of directions that requirement of benchmarking women officers with officers lowest in merit in corresponding male batch is arbitrary and irrational and would not be enforced while implementing* Babita Puniya*'s case; that officers who have fulfilled the cut-off grade of 60 per cent in Special selection Board entitled to grant of PC; that medical criterion to be applied at the time of 5th year/10th year of their service; that* C D E F G H

A *WSSCOs not considered to be eligible for grant of PC, to be extended one-time benefit; and that all consequential benefits including the grant of time scale promotions to be granted – Constitution of India – Arts. 32, 14, 15(1).*

Permanent Commission – Claim of women – Medical criteria
B *prescribed by the Army – Judicial review of – Held: Physical fitness is crucial for securing a place in the Army – While exercising judicial review, the Court must be circumspect on dealing with policies prescribed for the Armed Forces personnel on physical and mental fitness – There can be no judicial review of the medical standards*
C *adopted by the Army, unless they are manifestly arbitrary and bear no rational nexus to the objects of the organization – SHAPE criterion is per se not arbitrary – Constitution of India.*

Constitution of India : Art. 14 – Right to equality – Equal opportunity in public employment and gender equality – Held: Since
D *independence there is continuous endeavor to achieve equal opportunity in public employment and gender equality – Structures of the society have been created by males and for males – Facially equal application of laws to unequal parties is a farce, when the law is structured to cater to a male standpoint – Thus, adjustments, both in thought and letter, necessary to rebuild the structures of an*
E *equal society – These adjustments and amendments are not concessions being granted to a set of persons, but are the wrongs being remedied to obliterate years of suppression of opportunities which should have been granted to women – It cannot be said that the women officers are allowed to serve the Armed Forces, when the true picture of their service conditions is totally different –*
F *Superficial sense of equality is not in the true spirit of the Constitution and attempts to make equality only symbolic.*

Gender justice:

Antidiscrimination law – Concept of – Formal versus
G *substantive equality – Held: Under the formal and symmetric conception of antidiscrimination law, the law requires is that likes be treated alike – It is premised on the notion that fairness demands consistency in treatment – The fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice, makes no difference – On the other*
H *hand, under a substantive approach, the anti discrimination*

guarantee pursues more ambitious objectives – This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo – Constitution of India – Art. 14 and 15(1).

Indirect discrimination – Doctrine of – Held: Is closely tied to the substantive conception of equality – Use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is as real as any other form of discrimination – Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion – In evaluating direct and indirect discrimination, it is important to underscore that these tests, when applied in strict disjunction from one another, may end up producing narrow conceptions of equality which may not account for systemic flaws that embody discrimination – Doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible.

Indirect and direct discrimination – Difference between – Held: As long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, it is the area of direct discrimination – However, when the focus switches to the effects of the concerned action, it is indirect discrimination – An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences – In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place – In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs.

Systemic Discrimination – Explanation of – Systemic discrimination as antithetical to substantive equality – Held: Emphasis on intent alone as the key to unlocking discrimination has resulted in several practices, under the veneer of objectivity and equal application to all persons, to fall through the cracks of our equality jurisprudence – Indirect discrimination as a tool of jurisprudential analysis, can result in the redressal of several inequities – In order to conceptualize substantive equality, it would

A *be apposite to conduct a systemic analysis of discrimination that combines tools of direct and indirect discrimination – Particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate – Exclusive reliance on tools of direct or indirect discrimination may also not effectively account for multiple axles of discrimination – Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction – Duty of constitutional courts, when confronted with such a scheme, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social re-distribution by providing for positive entitlements that aim to negate the scope of future harm – An analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving the constitutional vision of equality and antidiscrimination.*

Doctrine of indirect discrimination – Comparative study – Position in India, United States, United Kingdom, South Africa, Canada – Discussed.

Indirect discrimination in India – Analytical framework for – Explained.

Disposing of the writ petitions, the Court

HELD: 1. The evaluation criteria set by the Army constituted systemic discrimination against the petitioners. The pattern of evaluation deployed by the Army, to implement the decision in *Babita Puniya's* case disproportionately affects women. This disproportionate impact is attributable to the structural discrimination against women, by dint of which the facially neutral criteria of selective ACR evaluation and fulfilling the medical criteria to be in SHAPE-1 at a belated stage, to secure Permanent Commission (PC) disproportionately impacts them vis-à-vis their male counterparts. The pattern of evaluation, by excluding subsequent achievements of the petitioners and failing to account for the inherent patterns of discrimination that were produced as a consequence of casual grading and skewed incentive structures,

has resulted in indirect and systemic discrimination. This discrimination has caused an economic and psychological harm and an affront to their dignity. [Para 119][768-D-G]

1.2 The following directions are issued that:

(i) The administrative requirement imposed by the Army authorities while considering the case of the women Short Service Commission Officers (SSCOs) for the grant of PC, of benchmarking these officers with the officers lowest in merit in the corresponding male batch is held to be arbitrary and irrational and shall not be enforced while implementing the decision of this Court in *Babita Puniya's* case;

(ii) All women officers who have fulfilled the cut-off grade of 60 per cent in the Special No 5 Selection Board held in September 2020 shall be entitled to the grant of PC, subject to their meeting the medical criteria prescribed by the General Instructions dated 1 August 2020 (as explained in (iii) below) and receiving disciplinary and vigilance clearance;

(iii) For the purpose of determining the fulfillment of direction (ii), the medical criteria stipulated in the General Instructions dated 1 August 2020 shall be applied at the following points of time: at the time of the 5th year of service; or at the time of the 10th year of service, as the case maybe. In case the officer has failed to meet the medical criterion for the grant of PC at any of these points in time, the WSSCO would not be entitled to the grant of PC. It is clarified that a WSSCO who was in the Temporary Low Medical Category (TLMC) in the 5th/10th year of service and subsequently met the SHAPE-1 criterion after the one year period of stabilization, would also be eligible for grant of PC. Other than officers who are "non-optees", the cases of all WSSCOs, including the petitioners who have been rejected on medical grounds, should be reconsidered within a period of one month and orders for the grant of PC shall in terms of the above directions be issued within a period of two months;

(iv) The grant of PC to the WSSCOs who have already been granted PC shall not be disturbed;

(v) The WSSCOs belonging to WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 who are not considered to be eligible for

grant of PC after the above exercise, would be extended the one-time benefit of direction (c) and (d) in *Babita Puniya's* case;

(vi) All consequential benefits including the grant of time scale promotions shall necessarily follow as a result of the directions contained in the judgment in *Babita Puniya's* case and the present judgment and steps to do so shall be completed within a period of three months from the date of the judgment;

(vii) The candidature of petitioner No. 3 in Writ Petition (C) 1109 of 2020, would be reconsidered for grant of PC in terms of the above directions. In case the officer is not granted PC, she would be allowed to complete her M.Tech degree course for which she has been enrolled at the College of Military Engineering, Pune and shall not be required to pay or reimburse any amount towards the course;

(viii) In accordance with pre-existing policies of the respondents, the method of evaluation of ACRs and the cut-off must be reviewed for future batches, in order to examine for a disproportionate impact on WSSCOs who became eligible for the grant of PC in the subsequent years of their service; and

(ix) During the pendency of the proceedings, the ASG had assured the Court that all the serving WSSCOs would be continued in service, since the Court was in seisin of the proceedings. There shall be a direction that this position shall continue until the above directions of the Court are implemented and hence the serving WSSCOs shall be entitled to the payment of their salaries and to all other service benefits. [Para 120] [768-G-H; 769-A-H; 770-A-F]

2.1 This Court is presented with the opportunity to choose one of two competing visions of the antidiscrimination guarantee embodied in Article 14 and 15(1) of the Constitution: formal versus substantive equality. Under the formal and symmetric conception of antidiscrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment. Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its

practice, makes no difference. On the other hand, under a substantive approach, the antidiscrimination guarantee pursues more ambitious objectives. The model of substantive equality developed by Professor Sandra Fredman views the aim of antidiscrimination law as being to pursue four overlapping objectives. Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo. [Paras 42- 44][695-E-H; 696-B-C, E-F]

2.2 Indirect discrimination is closely tied to the substantive conception of equality. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The jurisprudence relating to indirect discrimination in India is still at a nascent stage. Indirect discrimination has also been recognized by the High Courts in India.The use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion. [Paras 45-48][696-F-G; 697-C; 698-B; 699-C]

2.3 In evaluating direct and indirect discrimination, it is important to underscore that these tests, when applied in strict disjunction from one another, may end up producing narrow conceptions of equality which may not account for systemic flaws that embody discrimination. Therefore, this Section will be concluded with an understanding of a systemic frame of analysis, in order to adequately redress the full extent of harm that certain groups suffer, merely on account of them possessing characteristics that are prohibited axles of discrimination. [Para 50][699-F-G]

2.4 As long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, it is the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter

the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible. [Para 53] [700-F-G; 701-A-B]

2.5 A study of the cases and scholarly works in the *United States, United Kingdom, South Africa and Canada* gives rise to the following key learnings.

(i) First, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust status quo. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited. [Para 66][709-E-G]

(ii) Second, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact that the former cannot be justified, while the latter can (UK). The intention versus effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This is for the reason that the most compelling feature of indirect discrimination, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect. Requiring proof of intention to establish discrimination puts an "insuperable barrier in the way of a complainant seeking a remedy. It is this barrier that a robust conception of indirect discrimination can enable us to counteract. [Para 67][709-G-H; 710-A-C]

(iii) Third, on the nature of evidence required to prove indirect discrimination, statistical evidence that can establish how the impugned provision, criteria or practice is the cause for the disproportionately disadvantageous outcome can be one of the ways to establish the play of indirect discrimination. As Professor Sandra Fredman notes, "Aptitude tests, interview and selection processes, and other apparently scientific and neutral measures might never invite scrutiny unless data is available to dislodge these assumptions." Consistent with the said approach in *Fraser's* case, it would not be wise to lay down any quantitative thresholds for the nature of statistical disparity that must be established for a claimant to succeed. Equally, an absolutist position cannot be adopted as to the nature of evidence that must be brought forth to succeed in a case of indirect discrimination. The absence of any statistical evidence or inability to statistically demonstrate exclusion cannot be the sole ground for debunking claims of indirect discrimination. Therefore, statistical evidence demonstrating patterns of exclusion, can be one of the ways to prove indirect discrimination. [Para 68][710-C-G]

(iv) Fourth, insofar as the fashion in which the indirect discrimination enquiry must be conducted, the two-stage test laid down by the Canadian Supreme Court in *Fraser's* case offers a well-structured framework of analysis as it accounts for both the disproportionate impact of the impugned provision, criteria or practice on the relevant group, as well as the harm caused by such impact. It foregrounds an examination of the ills that indirect discrimination seeks to remedy. [Para 69][710-G; 711-A]

(v) Fifth and finally, while assessing the justifiability of measures that are alleged to have the effect of indirect discrimination, the Court needs to return a finding on whether the narrow provision, criteria or practice is necessary for successful job performance. In this regard, some amount of deference to the employer/defendant's view is warranted. Equally, the Court must resist the temptation to accept generalizations by defendants under the garb of deference and must closely scrutinize the proffered justification. Further, the Court must also examine if it is possible to substitute the measures with less discriminatory alternatives. Only by exercising such close scrutiny

and exhibiting attentiveness to the possibility of alternatives can a Court ensure that the full potential of the doctrine of indirect discrimination is realized and not lost in its application. [Para 70][711-B-D]

Anuj Garg v. Hotel Association of India **(2008) 3 SCC 1 : [2007] 12 SCR 991;** *National Legal Services Authority v. Union of India* **(2014) 5 SCC 438 : [2014] 5 SCR 119;** *Jeeja Ghosh v. Union of India* **(2016) 7 SCC 761 : [2016] 4 SCR 638;** *Vikash Kumar v. Union Public Service Commission* **2021 SCC OnLine SC 84;** *Navtej Singh Johar v. Union of India* **(2018) 10 SCC 1 : [2018] 7 SCR 379;** *Naz Foundation v. Government of NCT of Delhi* **(2009) 111 DRJ 1 (DB);** *Indian Young Lawyers Assn. v. State of Kerala* **2018 SCC OnLine SC 1690;** *Joseph Shine v. Union of India* **2018 SC OnLine SC 1676;** *Patel Suleman Gaibi v. State of Maharashtra* **2014 SCC OnLine Bom 4639;** *Inspector (Mahila) Ravina v. Union of India* **Writ Petition (C) 4525 of 2014, Delhi High Court;** *Madhu v. Northern Railways* **2018 SCC OnLine Del 6660;** *Dr. Jacqueline Jacinta Dias & Ors. v. Union of India& Ors*., **(2018) SCC OnLine Del 12426 – referred to.**

Washington v. Davis **426 U.S. 229 (1976);** *Coleman v. Attridge Law* **[2008] IRLR 722;** *Griggs v. Duke Power* **Co 401 US 424, 431 (1971);** *Smith v. City of Jackson* **544 US 228 (2005);** *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc* **135 S Ct 2411 [2015];** R (on the application of E) v. **JFS Governing Body [2009] UKSC 15;** *Essop v. Home Office (UK Border Agency)* **[2017] UKSC 27;** *City Council of Pretoria v. Walker* **(1998) 3 BCLR 257;** *Mahlangu and Another v. Minister of Labour* **[2020] ZACC 24;** *Ontario Human Rights Commission v. Simpsons-Sears ,* **[1985] 2 SCR 53;** *Fraser v. Canada (Attorney General)* **2020 SCC 28;** *Orsus and others v. Croatia*, **[2010] ECHR 337 – referred to.**

Anatole France, *THE RED LILY* (1898); Sandra Fredman, *DISCRIMINATION LAW* **(Oxford University Press, 2nd**

edition) 2011 at p.8 ("Sandra Fredman, Discrimination Law"); *FOUNDATIONS OF INDIRECT DISCRIMINATION LAW* **(Hugh Collins and Tarunabh Khaitan (eds), Hart Publishing) 2018 at p.1 - referred to.**

2.6 The emphasis on intent alone as the key to unlocking discrimination has resulted in several practices, under the veneer of objectivity and "equal" application to all persons, to fall through the cracks of our equality jurisprudence. Indirect discrimination as a tool of jurisprudential analysis, can result in the redressal of several inequities by probing provisions, criteria or practice that have a disproportionate and adverse impact on members of groups who belong to groups that are constitutionally protected from discrimination under Article 15(1). However, it needs to be emphasized that a strict emphasis on using only one of the two tools (between direct and indirect discrimination) to establish and redress discrimination may often result in patterns and structures of discrimination remaining unaddressed. [Para 71][711-E-F]

2.7 In order to conceptualize substantive equality, it would be apposite to conduct a systemic analysis of discrimination that combines tools of direct and indirect discrimination. A particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate. Exclusive reliance on tools of direct or indirect discrimination may also not effectively account for patterns arising out of multiple axles of discrimination. Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-to- day interaction and decision-making. The duty of constitutional courts, when confronted with such a scheme of things, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social re-distribution by providing for positive entitlements that aim to negate the scope of future harm. [Paras 72-73][711-G; 712-B-E]

2.8 An analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving the constitutional vision of equality and antidiscrimination. Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure. In propounding this analysis, this Court is conscious of the practical limitations of every framework to understanding workforces, considering the bulk of litigation against systemic discrimination, would be from members of an organized and formal workforce who would have the wherewithal and evidence of patterns or practices to bolster their claims. For the laboring class in India, which is predominantly constituted by members facing multiple axels of marginalization, litigating their right to work with equality and dignity may be a distant dream. However, it is the earnest hope, that a vision of systemic discrimination, would aid members of even informal workforces who, in addition to battling precarity at their places of work, would be able to assert a right to equality and dignity. A framework that would situate their discrimination, against systemic societal patterns of discrimination that are constituted and compounded by social and economic structures, would help in addressing several fractures that are contributing to inequality in our society. [Para 77][716-D-G]

Action Travail des Femmes v. Canadian National Railway Company **[1987] 1 S.C.R. 1114;** *National Capital Alliance on Race Relations v. Canada (Health and Welfare*) **1997 28 C.H.R.R.D/179;** *International Brotherhood of Teamsters v. United States*, **431 U.S. 324 (1977) – referred to.**

Marie Mercat-Bruns, *Systemic discrimination: Rethinking the Tools of Gender Equality*, **EUROPEAN EQUALITY LAW REVIEW, Vol. 2 (European Commission, 2018) at p.5-6; Tristin K. Green,** *The Future of Systemic Disparate Treatment Law*, BERKELEY JOURNAL OF EMPLOYMENT AND LABOUR LAW, **Vol. 32(2), 2011, 400-454;** The Stephen Lawrence Inquiry: Report

of an Inquiry by Sir William Macpherson of Cluny (February 1999) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.p df#page=375 - **referred to.**

3.1 There is a fundamental fallacy in the entire line of reasoning which has been advanced by the Army authorities both in the counter affidavit as well as in the written submissions of the ASG. The Policy Letter dated 15 January 1991 indicates that a maximum of 250 SSCOs will be granted PC annually; a minimum cut-off grade 60 per cent is fixed, which is reviewable every two years; in case more than 250 officers fulfill the cut-off grade of 60 per cent, only 250 would be granted PC on competitive merit; and other than non-optees and those unfit for retention, all others would be granted an extension of 5 years.The clear intent of the policy letter is that the issue of applying competitive merit arises only if more than 250 officers fulfill the cut-off grade annually. If the number of officers who achieved the 60 per cent cut-off is less than 250, then evidently there is no requirement of assessing inter se competitive merit among the officers who meet the minimum threshold. [Paras 83, 84][723-C-G]

3.2 The chart as regards details of permanent Commission granted to Male Officers, however, suppresses an important feature which is the number of officers who had not opted for being considered for PC (described in the parlance as 'non-optees"). In other words, the percentage of male officers granted PC has been computed in the chart without disclosing the factual details of the number of male officers who had not opted for PC. Only when the number of "optees" is considered against the "non-optees", can the percentage of male officers who were successfully granted PC be accurately determined. This is a significant omission on the part of the Army authorities from which an adverse interference must be drawn. However, there is another and more fundamental aspect which emerges from the disclosure which has been made in the above chart by the Army authorities. The chart indicates the number of officers who were granted PC during the course of the selections which took place twice every year. A close reading of the data would show that in a number of years, the male officers who were granted PC was far lower than the

ceiling of 250 vacancies prescribed by the policy letter of the MoD dated 15.01.1991. [Para 87][725-C-G]

3.3 The statistics advanced by the Army authorities disclose two things, firstly, in a number of years between 1994 and 2010, the ceiling limit of 250 had not been crossed. If the ceiling limit of 250 had not been crossed, the justification which has been offered for benchmarking women officers against the lowest male officers of the corresponding batch turns out to be specious and a red-herring. Evidently, in their anxiety to rebut the submission of the petitioners in regard to the disparity in the percentage of male and female officers granted PC, the statistics which have been placed on the record, completely demolish the case for benchmarking. It is also necessary to understand is that in many years the ceiling of 250 officers was not met and the number of officers that were granted PC were below 250, the question of evaluating officers on the basis of inter se competitive merit did not arise. The second important aspect is that in certain years such as 1999, 2000, 2001, 2004, 2005, 2006 and 2007, the ceiling of 250 was crossed for the male officers. This again belies the claim that benchmarking is crucial to maintain the integrity of competitive merit for grant of PC, as envisaged by the Policy Letter dated 15 January 1991. The data, in fact, shows that in several years, the ceiling was crossed, which is an indicator of the fact that it has not been applied as a rigid norm. [Para 88][726-F-H; 727-A-C]

3.4 The submission of the ASG that for the present year, while implementing the judgment of this Court in *Babita Puniya's* case the ceiling of 250 vacancies was not applied as a one-time measure, demolishes the so-called rationale for benchmarking which has been offered by the ASG. There can be no manner of doubt whatsoever that the attempt to apply the benchmark of the lowest selected male officer is a ruse to deviate from the judgment of the Court and to bypass the legitimate claim of the WSSCOs. This benchmarking becomes particularly problematic, when coupled with the manner in which the reliance on ACRs was made. [Para 89][727-C-D]

3.5 The process by which WSSCOs, were evaluated for the grant of PC was by a belated application of a general policy that did not redress the harms of gendered discrimination that were

identified by this Court in *Babita Puniya's* case. Additionally, its belated and formal application causes an effect of indirect discrimination. The petitioners submitted that Special No. 5 Selection Board appears to have been more a Board for rejection of candidates, than for selection. Some of the finest women officers who have served the Indian Army and brought distinction by their performance and achievements have been excluded by refusing to consider their achievements on the specious ground that these were after the 5th/10th year of service. They have been asked to benchmark with the last male counterparts from the corresponding batches. The benchmarking criterion plainly ignores that in terms of the MoD Policy Letter dated 15 January 1991 a cut-off of 60 per cent was prescribed and a cap of 250 officers who would be granted PC annually was laid down. Competitive merit was required to be assessed only where the number of eligible officers exceeds the ceiling of 250. As the figures which have been disclosed by the Union of India indicate, for the period from 1994-2010, there were years when the ceiling of 250 officers had not been reached. Then there are other years where the total number of male officers granted PC was well in excess of 250. For years during which the ceiling of 250 had not been reached, there is absolutely no justification to exclude the WSSCOs who had fulfilled the cut-off grade on the basis of the benchmarking criteria. Moreover, it is evident that the ceiling of 250 was not regarded as an absolute or rigid criterion. [Para 94][753-F-H; 754-A-C]

3.6 The evaluation process which has been followed in the case of the WSSCOs has clearly ignored that the writing of their ACRs was fundamentally influenced by the circumstance that at the relevant time an option of PC was not available for women. Even as late as October 2020, the authorities have emphasized the need to duly fill in a recommendation on whether or not WSSCOs should be granted PC. The manner of allocating 20 marks or 5 marks as the case may be, in the subjective assessment has been found to be flawed since male counterparts of the WSSCOs were assessed by an entirely distinct Special No. 5 Selection Board. To make a comparison in regard to the award of subjective marks ranging between 5 and 20 by different sets of boards would be completely unfair and arbitrary. It does not fulfill

the avowed purpose of benchmarking which was to compare like with like. [Para 95][754-C-F]

3.7 The impact caused by the evaluation of ACRs, particularly on the marks for performance of courses is a stark representation of the systemic discrimination that pervaded the structures of the Army. A formalistic application of pre-existing policies while granting PC is a continuation of these systemic discriminatory practices. WSSCOs were continued in service with a clear message that their advancement would never be equal to their male counterparts. Their ACR evaluations made no difference to their careers, until PC was granted by a court mandate in *Babita Puniya'* case. Accordingly, some women's failure to opt for courses in the past that would strengthen their chances and reflect positively on their ACRs is not a vacuous exercise of choice but a consequence of a discriminatory incentive structure. [Para 96][755-C-E]

3.8 There has been a flawed attempt to peg the achievements of the WSSCOs at the 5th/10th years of service thereby ignoring the mandate that the last ACR ought to be considered and the quantitative performance for the entire record of service must be assessed. Considering the ACRs as on the 5th or 10th year of service for grant of PC would have been appropriate, if the WSCCOs were being considered for PC at that point of time. However, the delayed implementation of the grant of PC to WSSCOs by the Army and considering of ACRs only till the 5th/10th year of service has led to a situation where, in effect, the Army has obliviated the years of service, hard work and honours received by WSSCOs beyond their 5th/10th year of service and relegated them back to a position they held, in some cases, more than 10 years ago. The lack of consideration given to the recent performance of WSSCOs for grant of PC is a disservice not just to these officers who have served the nation, but also to the Indian Army, which on one hand salutes these officers by awarding them honours and decorations, and on the other hand, fails to assess the true value of these honours when it matters the most - at the time of standing for the cause of the WSSCOs to realise their rights under the Constitution and be treated on an equal footing as male officers who are granted PC. [Para 97][755-E-H; 756-A-B]

3.9 While implementing the judgment in *Babita Puniya's* case, the Army authorities attempted to demonstrate the application of a facially neutral standard as between WSSCOs and their male counterparts.The fact that there was no pre-planning to exclude women from the grant of PC is irrelevant under an indirect discrimination analysis. The Court has to look at the effect of the concerned criteria, not at the intent underlying its adoption. In light of the fact that the pattern of evaluation will in effect lead to women being excluded from the grant of PC on grounds beyond their control, it is indirectly discriminatory against WSSCOs. [Paras 98, 99][756-B, F-G]

3.10 The structures of the society have been created by males and for males. As a result, certain structures that may seem to be the "norm" and may appear to be harmless, are a reflection of the insidious patriarchal system. At the time of Independence, the Constitution sought to achieve a transformation in our society by envisaging equal opportunity in public employment and gender equality. Since then, there is continuous endeavor to achieve the guarantee of equality enshrined in our Constitution. A facially equal application of laws to unequal parties is a farce, when the law is structured to cater to a male standpoint. Presently, adjustments, both in thought and letter, are necessary to rebuild the structures of an equal society. These adjustments and amendments however, are not concessions being granted to a set of persons, but instead are the wrongs being remedied to obliterate years of suppression of opportunities which should have been granted to women. It is not enough to proudly state that women officers are allowed to serve the nation in the Armed Forces, when the true picture of their service conditions tells a different story. A superficial sense of equality is not in the true spirit of the Constitution and attempts to make equality only symbolic. [Para 100][756-G-H; 757-A-C]

Catharine A. MacKinnon, *TOWARDS A FEMINIST THEORY OF STATE* **(Harvard University Press 1989) at p.220**

3.11 The respondents must remove the requirement of benchmarking the WSSCOs with the last male officer who had received PC in their corresponding batches and all WSSCOs

meeting the 60% cut-off must be granted PC. Additionally, the calculation of the cut-off at 60%, which must by army orders and instructions be reviewed every 2 years, must be re-assessed to determine if the casual completion of their ACRs is disproportionately impacting the WSSCOs ability to qualify for PC even at that threshold. In light of the systemic discrimination that women have faced in the Army over a period of time, to call for the adoption of a pattern of evaluation that accounts and compensates for this harsh reality is not to ask for 'special and unjustified treatment'. Rather, it is the only pathway for the attainment of substantive equality. To adopt a symmetrical concept of equality, is to empty the antidiscrimination guarantee under Article 15, of all meaning. [Para 101][757-D-F]

4.1 The medical criteria for assessing officers for the grant of PC have been specified in Army instructions and Army Orders. While dealing with the application of the criteria to the WSSCOs in pursuance of the judgment in *Babita Puniya's* case, the salient features are revisited. [Para 102][757-G]

4.2 The singular aspect of the medical requirements that must be noticed at the outset is that there is a broad consistency of policy on the norms, which have to be fulfilled in order for an officer to qualify for the grant of PC. Another important facet which needs to be emphasized is that SHAPE-1 has a specific meaning which is assigned to it under AO 9/2011. 'S' donates the physiological features including cognitive function abnormalities, 'H' stands for hearing, 'A' for appendages, 'P' for physical capacity and 'E' for eye-sight. The requirement of being in grade-1 in each of the five factors of SHAPE is subject to relaxation in terms of exceptions which are clearly spelt out. The policy provides a concession to such candidates who may not have suffered injury on the line of duty as a result of which their medical categorization has been lowered. But this should not be lower than S1 or H2 or A3 or P2 or E2 or A2E2 or H2A3 or H2P2 or E2A3 or E2P2. The exception which has been provided is available if an injury (as distinct from a disease) has been suffered while on the line of duty, irrespective of whether it has been incurred during peace time or in field operations. Officers in the PLMC who fulfill the terms of the exception are granted PC, if they are otherwise found

fit on merits. The requirement of fulfilling the SHAPE criteria is a pre-requisite even in such arms or services where both men and women join up to the age of 45 years, as in the case of the Army Medical Corps. The Army follows and adopts the TLMC norm which allows an officer placed in that category to return to SHAPE 1 within the stabilization period of one year. By this, an opportunity is granted to the officer to return to the SHAPE-1 category within one year. [Para 104][759-F-H; 760-A-D]

4.3 Physical fitness is crucial for securing a place in the Army. While exercising judicial review, the Court must be circumspect on dealing with policies prescribed for the Armed Forces personnel in attaining norms associated with physical and mental fitness. In the instant case, out of the initial 87 petitioners contesting the proceedings in 7 writ petitions, 55 are SHAPE 1 going up to the age of 52 years, 23 have been assigned to PMLC, while 9 are placed in TLMC. The material which has been placed on record in the form of AO 9/2011 indicates a classification range of minimum and maximum permissible parameters for each of the five factors comprised within the SHAPE norm. The submission of the respondents is that these parameters have been fixed, keeping in mind the inevitable advancement of age of both men and women officers. Moreover, in refusing to consider the SSC extensions as sufficient evidence of fitness, it has been submitted that an unsaid concession is made in terms of medical requirements where an officer has been considered for extension as opposed to when they are considered for grant of PC. Another important aspect which has been emphasized is that out of 615 WSSCOs officers, 422 were found fit on merits for PC subject to fulfillment of medical and discipline parameters. Out of these 422, 57 were non-optees. From the remaining 365, 277 women officers were found fit on merits as well on medical parameters and have been granted PCs. Of the remaining 88, 42 are TLMC and have the opportunity to upgrade this to the required medical parameters within one year. Out of the remaining 46, only 35 were found not to meet the medical criteria. These 35 officers constitute less than ten per cent of the 365 who had opted for the grant of PC and were found fit on merits. Even in the remaining 193 officers (615 minus 422 found fit) that were not considered fit for PC, it was submitted that 164 of these officers fulfilled the SHAPE-1

criterion. This tabulation indicates a significant proportion of WSSCOs, irrespective of their belated consideration, are able to presently meet the prescribed criteria. With respect to the medical criteria prescribed by the Army, there can be no judicial review of the standards adopted by the Army, unless they are manifestly arbitrary and bear no rational nexus to the objects of the organization. The SHAPE criterion is per se not arbitrary. [Para 105][760-D-H; 761-A-C]

4.4 Having come to the conclusion that the medical criterion is per se not arbitrary, it is the Court's responsibility to examine whether it has been equally applied. This Court cannot eschew the fact that these 615 WSSCOs are being subjected to a rigorous medical standard at an advanced stage of their careers, merely on account of the fact that the Army did not consider them for granting them PC, unlike their male counterparts. By the judgment of the High Court, specific directions were issued for considering the women SSC officers for the grant of PC. This was a decade ago. During the pendency of the appeal from the judgment of the High Court before this Court, there was no stay on the application of the judgment of the High Court. This was specifically clarified by the order of this Court on 2 September 2011. The intent of the clarification was that implementation of the directions of the High court must proceed. The WSSCOs have submitted with justification that had they been considered for the grant of PC then, as the respondents were directed to do by the decision of the High Court, they would have met the norms of eligibility in terms of medical parameters. Their male counterparts who were considered for and granted PC at that time are not required to maintain SHAPE 1 fitness to be continued in service. Serious hardship has been caused by the Army not considering the cases of these WSSCOs for the grant of PC at the relevant time, despite the express clarification by this Court. Though the contempt proceedings against the respondents were stayed, this did not obviate the obligation to comply with the mandate of the judgment of the High Court especially after a specific clarification that no stay had been granted. Consideration for PC was not just a legitimate expectation on the part of the WSSCOs but a right which had accrued in their favour after the directions of the High Court, which were issued about a decade

ago. The WSSCOs who have been excluded on medical grounds in November 2020 have a legitimate grievance that whether they fulfilled the SHAPE 1 criterion has to be determined from their medical status on the date when they were entitled to be considered, following the decision of the High Court. Such of them who fulfilled the criterion at the material time are entitled to PC and can continue in service so long as they continue to meet the medical standards prescribed for continuance in the Army. In other words, there is no challenge to the criteria for medical fitness prescribed. These WSSCOs do not seek a special dispensation or exemption for themselves, as women. The essence of the dispute is when the SHAPE 1 criterion has to be applied in the peculiar circumstances. [Para 106][761-C-H; 762-A-C]

4.5 SHAPE-1 is not a requirement for continuation in service. The ASG had sought to bolster his submission of SHAPE-1 as a threshold requirement for PC, by relying on the recruitment process for the Army Medical Corps, where even a 45 year old person seeking recruitment, must comply with SHAPE-1 medical criteria. However, a critical assumption that undergirds the grant of PC is the approximate age of persons who would be under consideration. The WSSCOs in this case are not fresh recruits who are due to be considered in their 5th or 10th year of service, nor are they seeking exceptional favors on account of their sex. [Para 108][762-G-H; 763-A]

4.6 On one hand, the Army authorities are insistent on relying on the medical criteria as a filtering mechanism for grant of PC to WSSCOs. On the other hand, WSSCOs who have legally fought for their rights and are additionally suffering due to the untimely implementation of their hard-won rights. The Army authorities have stated that the medical criterion has been sufficiently adjusted to take into account age related factors. However, the Army authorities are insistent to apply the medical criteria as of today, while simultaneously attempting to freeze the ACRs of the WSSCOs at the 5th or 10th year of service. Indirect discrimination coupled with an exclusionary approach inheres in this application. An enhancement in the qualifications of WSSCOs from their 5th/10th year of service till today, as would

be reflected in their recent ACRs, would demonstrate them as an experienced pool of human resource for the Indian Army. However, a reduction of medical fitness below the SHAPE 1 norm at present as a consequence of age or the tribulations of service is not a necessary detriment to the Army when similarly aged male officers with PC (invariably granted in the 5th or 10th year of their service) no longer have to meet these rigorous medical standards for continuing in service. This is further bolstered by the fact that the WSSCOs who are no longer in SHAPE-1, have been meaningfully continuing in service, even after 14 years of service, till the declaration of results of the PC in November 2020. [Para 109][763-B-F]

4.7 Anguish is expressed at the respondents' failure to implement the judgment rendered by the High Court in 2010, whose operation was specifically not stayed by this Court in 2011. The conundrum on the applicability of the medical criterion to WSSCOs who are 40-50 years old, has arisen only because of the Army not having implemented its decision in time, despite the course correction prescribed by the High Court in 2010. The WSSCOs, a few of whom are petitioners, have persevered for over a decade to gain the same dignity of an equal opportunity at PC. The fact that only around 35 women who are otherwise fit for PC, and 31 women who do not qualify in addition to not meeting the medical criteria, is irrelevant in determining whether each of these women is entitled to equality of opportunity in matters of public employment under Article 16(1) and (2). "The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment." Similarly, the percentage of women who have suffered as a consequence of the belated application of rigorous medical criteria is irrelevant to the determination of whether it is a violation of Articles 14, 15 and 16 of the Constitution. [Para 110][763-F-H; 764-A-C]

Justice KS Puttaswamy v. Union of India **(2017) 10 SCC 1 : [2017] 10 SCR 569 – relied on.**

4.8 In rendering the decision in *Babita Puniya's* case, this Court was mindful of the insidious impact on the generations of women who must have given up on their dreams to serve in the

Armed Forces owing to the gendered roadblock on their aspirations, and of the women who must have chosen to opt out of availing an extension to their SSC terms on similar grounds. It must not be forgotten that those women officers who have remained in service are those with the tenacity to hold on and to meet the exacting standards of performance of which the Indian Army has made her citizens proud. A career in the Army comes with a serious set of trials and tribulations of a transferable service with postings in difficult terrains, even in times of peace. This is rendered infinitely more difficult when society relegates functions of domestic labour, care-giving and childcare exclusively on the shoulders of women. The WSSCOs are not just women who have dedicated their lives to the service of the Army, but are women who have persevered through difficult conditions as they trudged along a lengthy litigation to avail the simplest of equality with their male counterparts. They do not come to the Court seeking charity or favour. They implore for a restoration of their dignity, when even strongly worded directions by the Court in *Babita Puniya's* case have not trickled down into a basic assessment of not subjecting unequals to supposedly "neutral parameters". [Para 111][764-C-G]

4.9 The submission on the medical criteria being modulated to account for advancement of age cannot be accepted. The timing of the administration of rigorous standards is a relevant consideration for determining their discriminatory impact, and not just an isolated reading of the standards which account for differences arising out of gender. The WSSCOs have been subject to indirect discrimination when some are being considered for PC, in their 20th year of service. A retrospective application of the supposedly uniform standards for grant of PC must be modulated to compensate for the harm that has arisen over their belated application. In the spirit of true equality with their male counterparts in the corresponding batches, the WSSCOs must be considered medically fit for grant of PC by reliance on their medical fitness, as recorded in the 5th or 10th year of their service. [Para 112][764-G-H; 765-A-C]

5.1 As regards the interpretation of the direction in *Babita Puniya's* case mandating WSSCOs who have completed 14 years of service as on the date of the judgment to be considered for PC, in the event of their non-approval or non-option, these officers are to be continued in service for 20 years, with benefits of pension. In *Babita Puniya's* case, the directions issued by this Court, were while accepting the policy decision of the Union Government. The policy decision of the Union Government for the grant of PCs to WSSCOs in all the ten streams where women were granted SSC in the Indian Army was accepted, subject to several conditions spelt out in clauses (a) to (g) of direction (1) in paragraph 69 of the judgment. Direction (d) refers to "existing SSC officers with more than 14 years of service". This expression is clearly intended to encompass those WSSCOs who had completed 14 years of service on the date of the judgment. It is important to note that these officers were also granted the benefit of continuing in service until the attainment of pensionable service. [Para 113][765-C-E; 766-C]

5.2 This Court, as a consequence of the constraint of information being provided to it by the parties arraigned before it in *Babita Puniya's* case, was not alive to the full extent of the cadres who were denied a timely opportunity for PC in their 5th or 10th year of service. Direction (c) and (d), as a one-time measure, attempted to correct the gross injustice that was meted out to women officers who had completed over 14 years in service, and were being considered for PC at a belated stage. The one-time benefit of continuation in service until their 20th year was provided as a corrective exercise for women who have devoted their careers to the Army, in spite of the dignity of PC being elusive to them, merely as a consequence of their gender. The Court's objective in providing for such a cut- off was to compensate for the impact of the discrimination which had denied them timely opportunities and to account for the significant risk and commitment they demonstrated by their continuation in service. [Para 117][767-D-F]

5.3 The women officers in the batches of WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 face a similar predicament as they

are being considered for PC beyond their 10th year in service (in the best case). Similar to the women in the older cadres who were denied opportunities, career progressions and assurances owing to the respondents' failure at the relevant time to ensure gender equality in the forces; the women in the batches who were between 10-14 years of their service were meted the same insecurity. The WSES scheme has been discontinued and the WSES(O) 31, commissioned in 2008, is the last batch to have gained entry in the scheme, rendering it a 'dying cadre'. The expression 'dying cadre' is deployed not in a pejorative sense. The expression has a specific meaning in service jurisprudence to denote a dwindling class of officers in service. The officers in the consequent batches of SSCW (T&NT) 1 to 3, although part of the new scheme that replaced WSES, will be the only batches who will face an adverse impact of the respondents' failure to implement the High Court judgement before the 10th year of their service. In exercise of the constitutional power entrusted to this court under Article 142 to bring about substantial justice, this Court is compelled to extend the benefit of directions (c) and (d) in *Babita Puniya's* case to the officers of the abovementioned batches, as a one-time benefit. This one-time extension, would bring parity inter se between officers who were discriminated by their non-timely consideration by the respondents. [Para 118][767-F-H; 768-A-C]

Secretary, Ministry of Defence v. Babita Puniya, **(2020) 7 SCC 469;** *Ministry of Defence v. Babita Puniya*, **2011 SCC OnLine SC 87;** *Babita Puniya v. Ministry of Defence*, **2010 SCC OnLine Del 1116 : (2010) 168 DLT 115;** *Titaghur Paper Mills Co. Ltd. v. State of Orissa and Ors.* **(1983) 2 SCC 433 : [1983] 2 SCR 743;** *Brig. Nalin Kumar Bhatia v. Union of India* **5 Civil Appeal No 5629 of 2017 decided on 11 February 2020– referred to.**

Sharron A. Frontiero and Joseph Frontiero v. Elliot L. Richardson, Secretary of Defense, et al., **411 U.S 677 – referred to.**

Case Law Reference

(2020) 7 SCC 469	**referred to**	**Para 1**
[1983] 2 SCR 743	**referred to**	**Para 40(i)**
[2007] 12 SCR 991	**referred to**	**Para 45**
[2014] 5 SCR 119	**referred to**	**Para 45**
[2016] 4 SCR 638	**referred to**	**Para 45**
[2018] 7 SCR 379	**referred to**	**Para 46**
(2009) 111 DRJ 1 (DB)	**referred to**	**Para 46**
[1985] 2 SCR 53	**referred to**	**Para 64**
[2017] 10 SCR 569	**relied on**	**Para 110**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 1109 of 2020.

(Under Article 32 of the Constitution of India)

With

Writ Petition (Civil) No. 1469 of 2020, Writ Petition (Civil) No. 34 of 2021, Writ Petition (Civil) No. 1223 of 2020, Writ Petition (Civil) No. 1457 of 2020, Writ Petition (Civil) No. 1158 of 2020, Writ Petition (Civil) No 1172 of 2020.

P.S. Patwalia, C.U. Singh, Ms. Meenakshi Arora, Sr. Advs., Rakesh Kumar, Ms. Pooja Dhar, Amjid Maqbool, Ms. Preetika Dwivedi, Tarunvir Singh Khehar, Shankar Divate, Sudhanshu S. Pandey, Gaichangpou Gangmei, Abhishek R. Shukla, Arjun D. Singh, Deepak Goel, Mohan Kumar, Ms. Archana Pathak Dave, Ms. Chitrangda Rastravara, Jaideep Singh, Manvendra Singh Rathore, Dashrath Singh, Ms. Vanya Gupta, Kumar Prashant, Advs. for the Petitioners.

Sanjay Jain, ASG, R. Balasubramanian, Sr. Adv., Ms. Seema Bengani, Adit Khorana, Ms. Shraddha Deshmukh, Ms. Swarupma Chaturvedi, Arvind Kumar Sharma, Anas Tanwir, Venkatesh, Nitin Saluja, Ms. Shivani Luthra Lohiya, Siddharth Joshi, Neil Chatterji, Suhael Buttan, Anant Singh, Aditya Ajay, Ms. Mehak Verma, Ms. Sasha Maria Paul, Advs. for the Respondents.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

This judgment has been divided into the following sections to facilitate analysis:

A **H Conclusion and directions**

"*I ask no favour for my sex. All I ask of our brethren is that they take their feet off our necks*"[1]

-Late Justice Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States of America

B **A A long and winding road**

1. By the judgment of this Court in **Secretary, Ministry of Defence** v. **Babita Puniya**[2], the claim of women engaged on Short Service Commissions[3] in the Indian Army for seeking Permanent Commission[4] was evaluated and held to be justified. Addressing the background of the dispute, the judgment described this as "a quest for equality of opportunity for women seeking PCs". As the Court observed, "a decade and more spent in litigation, women engaged on Short Service Commissions in the Army seek parity with their male counterparts". The battle for equality has been long drawn, engaging as much with reforming mindsets as with implementing constitutional principles.

2. The path traversed by the Women SSC Officers[5] commenced with a writ petition in public interest before the Delhi High Court in 2003. The judgment of the Delhi High Court which substantially upheld the entitlement of the WSSCOs was rendered on 12 March 2010[6]. The judgment of the Delhi High Court and its directions[7] formed the subject matter of the earlier proceedings before this Court which resulted in the decision in **Babita Puniya** (supra) being rendered on 17 February 2020. Between 12 March 2010, when the Delhi High Court pronounced its judgment, and 17 February 2020, when this Court rendered its decision in **Babita Puniya** (supra), there was no stay of the implementation of

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[1] Late Justice Ginsburg quoted Sara Grimké, noted abolitionist and advocate of equal rights of men and women, while arguing before the Supreme Court of the United States of America in **Sharron A. Frontiero and Joseph Frontiero v. Elliot L. Richardson, Secretary of Defense, et al**., 411 U.S 677.

[2] "**Babita Puniya**", (2020) 7 SCC 469

[3] "**SSCs"**

[4] "**PC**"

[5] "**WSSCO**"

[6] WP(C) No. 1597 of 2003 (High Court of Delhi)

[7] The directions of the Delhi High Court were in the following terms:

the judgment of the Delhi High Court. This, as a matter of fact, was clarified on 2 September 2011 in an order of this Court[8].

3. Despite the above clarification, the judgment of the High Court was not implemented by the Union Government. Several interim orders were issued for directing a stay on the release of the WSSCOs, for reinstatement in service coupled with an entitlement to salary. During the pendency of the appeal before this Court, the Union Government and the Ministry of Defence[9] ("**MoD**") issued a communication on 25 February 2019 envisaging the grant of PCs to WSSCOs in eight arms or services of the Army (in addition to the existing two streams of Judge Advocate General[10] and Army Education Corps[11] which had already been opened up for PC to WSSCOs). Eventually, in the judgment of this

" 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 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."

[8]The order of this Court in **Ministry of Defence** v. **Babita Puniya, 2011 SCC OnLine SC 87** provides as follows:

"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 [Babita Puniya v. Ministry of Defence, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115] is not stayed at all."

[9] "**MoD**"

[10] "**JAG**"

[11] "**AEC**"

A Court dated 17 February 2020, the following directions were issued to the Union Government, while taking on record its policy statement dated 25 February 2019:

"**H.** ***Directions***

B **69.** We accordingly take on record the statement of policy placed on the record in these proceedings by the Union Government in the form of the Letter dated 25-2-2019 and issue the following directions:

(i) The policy decision which has been taken by the Union Government allowing for the grant of PCs to SSC women officers in all the ten streams where women have been granted SSC in the Indian Army is accepted subject to the following:

C

(a) All serving women officers on SSC shall be considered for the grant of PCs irrespective of any of them having crossed fourteen years or, as the case may be, twenty years of service.

D

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

(c) Women officers on SSC with more than fourteen years of service who do not opt for being considered for the grant of the PCs will be entitled to continue in service until they attain twenty years of pensionable service.

E

F

(d) As a one-time measure, the benefit of continuing in service until the attainment of pensionable service shall also apply to all the existing SSC officers with more than fourteen years of service who are not appointed on PC.

G

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

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

H

(g) At the stage of opting for the grant of PC, all the choices for specialisation shall be available to women officers on the same terms as for the male SSC officers. Women SSC officers shall be entitled to exercise their options for being considered for the grant of PCs on the same terms as their male counterparts.

(ii) We affirm the clarification which has been issued in sub-para (*i*) of Para 61 of the impugned judgment [*Babita Puniya* v. *Ministry of Defence*, 2010 SCC OnLine Del 1116 : (2010) 168 DLT 115] and order of the Delhi High Court.

(iii) SSC women officers who are granted PC in pursuance of the above directions will be entitled to all consequential benefits including promotion and financial benefits. However, these benefits would be made available to those officers in service or those who had moved the Delhi High Court by filing the writ petitions and those who had retired during the course of the pendency of the proceedings."

This batch of petitions under Article 32 has questioned the manner in which the decision of this Court in **Babita Puniya** (supra) has been implemented.

4. Since the grievance in these proceedings emanates directly out of the steps taken by the Union Government to implement the earlier decision of this Court in **Babita Puniya** (supra), this Court has entertained the petitions under Article 32. Initially, in the counter affidavit filed by the Colonel Military Secretary (Legal) at the Integrated Headquarters of the Ministry of Defence (Army), an objection was raised to the maintainability of the petitions on the ground that the petitioners should be relegated to the pursuit of remedies before the Armed Forces Tribunal. However, this plea has not been pressed in the submissions by Mr Sanjay Jain, learned Additional Solicitor General[12] appearing on behalf of the Union of India, the MoD and the Indian Army. The respondents, through their written submissions, have also agreed to formulate a policy for granting time-scale promotions to the WSSCOs who have been granted PC. Hence, only the core contested issues which arose in the course of the proceedings are being addressed on merits in this judgment.

[12] "**ASG**"

A **B Steps for implementing the decision in Babita Puniya**

5. The steps which were taken by the Union Government to implement the decision in **Babita Puniya** (supra) have been elaborated upon in the

B (i) Counter Affidavit of the respondents; and

(ii) Written submissions formulated by the ASG.

6. Following the decision in **Babita Puniya** (supra), a governmental sanction was issued on 16 July 2020 for taking administrative steps to fulfill the directions. Accordingly, a set of General Instructions dated 1 C August 2020 were issued for the conduct of a special selection proceeding by a "Special No. 5 Selection Board 2020" to screen WSSCOs for the grant of PC "based on existing policy regarding grant of permanent commission…applied uniformly to all SCC officers". These General Instructions were issued by the Integrated Headquarters of MoD (Army) for implementing the guidelines in **Babita Puniya** (supra). The relevant D extracts are reproduced below:

"**General**

1. A Spl No 5 Selection Board (SB) 2020 will be held to screen the Short Service Commissioned WOs of the following courses, who are in service:

E

S No	Courses	Type of Consideration
(a)	**WSES(O) –3 to 14 courses**	**For PC/ To be Released with Pension forthwith (subject to completing 20 yrs pensionable service)**
(b)	**WSES(O)–15 to 26 courses**	**For PC/To serve till 20 yrs pensionable service & Released with pension**
(c)	**WSES(O)– 27 to 31 and SSCW(T&NT) - 1 to 3 courses**	**For PC/ To be Released on completion of the period of Extension already granted**

F

G

Aim

3. To lay down guidelines for submission of application by the WSES(O)s / SSCW(O)s for consideration for grant of PC by Spl No 5 SB 2020.

H

Scope

4. Following issues have been covered in the instructions:

a. Guidelines for preparation of application

b. Medical Board

c. Submission of application

d. Detailed checklist for submission of documents

e. Checklist / Misc Instrs for Unit & Sub-Unit Cdrs

Medical Board

9. All officers opting for PC have to undergo a medical board at the nearest Military hospital where facilities of medical specialists are available. The detailed instructions are contained in AO 110/81 & SAI 3/S/ 70, the extract of the same is as under:-

a. **Medical Board Proceedings**. **Only those officers who are opting for PC and are SHAPE-1 or Permanent Low Medical Category (PLMC) will undergo a medical board** as per AFMSF-2(ver 2002). Only one copy (ie original) of medical board proceedings [medical examination report on AFMSF-2 (ver 2002) format] without investigation reports and X-ray, duly approved by the competent authority, is required to be forwarded to MS Branch (MS-7B), through staff (medical) channel. Remaining copies of AFMSF-2 will be forwarded to AG/ MP-5&6, DGMS-5 and respective controlling groups at the MS Branch. The medical board proceedings should reach MS Branch (MS 7B) latest by **11 Sep 20.**

In case the medical documents are not submitted by the due date, the concerned officer will be considered as not opted for PC and will be dealt with as per the type of consideration mentioned at Para 1 above.

b. **Officers with Temporary Low Medical Category (TLMC)**

i. Officers with TLMC will submit the proceedings of medical categorization (AFMSF-15) / re-categorization [AFMSF-

15A (ver 2002)] giving their present medical category. These documents should reach MS Branch (MS 7B) latest by 11 Sep 20. In case the medical documents are not submitted by the due date, the concerned officer will be considered as not opted for PC and will be dealt with as per the type of consideration mentioned at Para 1 above.

ii. Officers with TLMC, who are otherwise found fit for PC by the Spl No 5 SB, will be given a maximum time period of one year for stabilization of their medical category. Such offrs will forward their medical docu on AFMSF-2 as per Para 9(a) above, on becoming SHAPE-1 of PLVS This time period of one year will be counted from the last date of submission of medical documents as per Para 9 (b) (i) above i.e. 11 Sep 20. Beyond the period, result of the board in respect of such offers will be declassified treating them to be medically unfit for PC.

iii. Women officers who are on maternity leave and cannot undertake medical examination, will forward the medical board proceedings vide which they were medically downgraded for maternity leave and follow instructions contained in Para 9(b) (i) & (ii) above.

c. <u>Eligibility of PC for Officers with PLMC</u>. The low medical category should not be due to medical reasons (whether attributable to military service or not) but should have been caused as a result of casualties suffered in action during operations or due to injury or other disability sustained during duty (for example while traveling on duty, playing organized games under regimental arrangements, during trainings exercises and so on). In addition, medical categories lower than S1 or H2 or A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2 are NOT ELIGIBLE for grant of PC. Officers are required to forward copies of Court of inquiry, Injury report (IAFZ 2006) and notification of battle casualty, if applicable in support of their medical category……"

(**emphasis supplied**)

7. Special No. 5 Selection Board was convened between 14 and 25 September 2020 to consider WSSCOs for the grant of PCs. According to the counter affidavit, this was "on same terms and criterion as their

male counterparts". 615 WSSCOs were considered for the grant of PCs. The result of the Special No. 5 Selection Board was declared on 19 November 2020. According to the Union of India, Special No. 5 Selection Board was conducted in the following manner:

"[…]

a. The Military Secretary's Branch constituted a Selection Board as per the provisions of Army Order 18 of 1988, which is being uniformly followed for consideration for grant of permanent commission to all SSC male officers and women officers of AEC & JAG. All Board members were from outside the Military Secretary's Branch. A women officer of Brigadier rank from AMC was also a member of the Board.

b. Identity of the officers being considered, was hidden from the Board. Women officers who were being considered by the Board were permitted to attend the Board proceedings as observers. A list of such officers and days of their attendance is given at **Annexure – R3**.

c. As per the laid down criteria, confidential reports, discipline and vigilance report, if any, honours and awards etc, as on the 5th or 10th years of service, as the case may be, of the women officers, depending upon the terms and conditions opted by the respective officer, was taken into consideration by the Selection Board. This procedure was exactly similar to what was followed for the similarly placed corresponding course & entry (Technical or Non-Technical) made officers.

d. The Board examined the MDS (Master Data Sheet) of each officer, for grant of Permanent Commission and gave independent value Judgement marks without any mutual consultation.

e. The Board then compared the total marks of each officer out of 100, with the marks of the male officer with lowest merit granted permanent commission in her corresponding course & entry (Technical or Non-Technical). Post this, the Board recommended 422 out of

A 615 officers for grant of Permanent Commission, on merit basis, subject to them meeting the criteria of medical fitness and DV (Discipline and Vigilance). On scrutiny of these 422 officers, it emerged that 57 out of these 422 had not opted for grant of Permanent Commission. Options (choice) of officers being considered, is not disclosed to the board members during the consideration stage to avoid any biasness."

B

(emphasis supplied)

8. The result of the Special No. 5 Selection Board has been tabulated by the respondents in the following terms:

C

(i)	Number of WSSCOs considered	615
(ii)	Candidates found fit on merits subject to medical and discipline parameters	422
(iii)	Candidates who did not opt for PC[13]	57
(iv)	Officers not granted PC and being released with pension	68
(v)	Officers not granted PC and being granted extension upto 20 years of pensionable service	106
(iv)	Balance out of (ii)	365
(iv)(a) Candidates found fit on merit and on medical parameters and granted PC		277
(iv)(b) Details of remaining candidates		88
	(a) Temporary Low Medical Category	42
	(b) Rejected for not meeting the medical criteria	35
	(c) Application for non-compliance with AO 110/1981	6
	(d) Document under scrutiny	3
	(e) Not clear from discipline and vigilance	2

D

E

F

Note: In the above list, 42 candidates who have been placed in the Temporary Low Medical Category have been granted one year stabilization period during which they have an opportunity to restore to the required criterion of medical fitness.

G The above tabulation, supplied on affidavit by the respondents, does not account for 19 women officers in the breakup. The data provided by the petitioners, on an analysis of the consolidated result of the Special No. 5 Selection Board proceedings, indicates the following figures which aids a comprehensive analysis:

H [13] "**non-optee**"

(i)	Number of WSSCOs considered	615
(ii)	Candidates granted PC	277
(iii)	Candidates whose result is withheld for various reasons, including TLMC	90
(iv)	Non-optees for PC: (a) To be released with pension, forthwith (b) To continue till 20 years of pensionable service (c) To continue till the expiry of their contractual period, without pension	58 10 39 9
(v)	Candidates who were not granted PC and to be released from service with pension, forthwith	34
(vi)	Candidates who were not granted PC and permitted to continue till 20 years of pensionable service	90
(viii)	Candidates who were not granted PC and are to continue till the expiry of their contractual period, with no post-retirement pension	66

C Criteria for the grant of PCs

C.1 Medical Criteria

9. One of the issues which has been debated in the present case is in regard to the SHAPE-1 qualification for grant of PC. The Army authorities have, in terms of the General Instructions dated 1 August 2020, stipulated that only those officers who are in SHAPE-1 would be granted PC. Officers in a Temporary Low Medical Category[14], who are otherwise found fit for PC by the Special No. 5 Selection Board are granted a time period of one year (at the maximum) for stablization of their medical category. Within a period of one year, the officers have to forward their medical documentation of having achieved SHAPE-1 status. As regards officers in the Permanent Low Medical Category[15], it has been stipulated that the low medical category should not be due to medical reasons (whether or not attributable to military service) but should be a result of casualties suffered in action during operations or due to injury or other disability sustained during the course of duty.

10. The medical criteria for the grant of PC are governed by Special Army Instructions dated 30 April 1970[16] (as amended from time to time in 1971, 1972, 1973 and 1993) and Army Order 110 of 1981[17]. According to the Union of India, "the criteria of medical fitness applied for grant of permanent commission, are exactly the same as applicable

[14] "**TLMC**"
[15] "**PLMC**"
[16] "**SAI 3/S/70**"
[17] "**AO 110/1981**"

to other SSC officers". Whenever the Special No. 5 Selection Board of an SSC officer is deferred and is held subsequently after the passage of one or two years, an officer has to undertake a fresh medical examination for the Board.

11. Before adverting to SAI 3/S/70 and AO 110/1981, it is necessary to understand the meaning and content of the SHAPE-1 norm, which finds place in Army Order 9 of 2011[18].

Army Order 9 of 2011

12. The expression "SHAPE" has been explained in AO 9/2011 in the following terms:

> "30. **Medical Classification**. Medical classification/ reclassification of serving officers will be made by a duly constituted Medical Board after assessing his/her fitness under five factors indicated by the code letter SHAPE which will represent following functions (details thereof given in Appendix 'E'):-
>
> **S-** Psychological including cognitive function abnormalities
>
> **H-** Hearing
>
> **A-** Appendages
>
> **P-** Physical Capacity
>
> **E-** Eye Sight"

In each of the above factors, the functional capacity for performing military duties is denoted by a descending order of fitness, denoted by numerals 1 to 5. Accordingly, while dealing with functional capacity, AO 9/2011 contains the following specifications:

> "31. **Functional Capacity.** Functional capacity for military duties under each factor will be denoted by numerals 1 to 5 against each code letter indicating declining functional efficiency. These numerals will be used against the word SHAPE to denote the overall medical classification and also against each factor of SHAPE while describing the disability profile. General evaluation of these numerals will denote guidelines for employment of the officers as under:-

[18] "**AO 9/2011**", Ref: AO 01/2004/DGMS

"**1A-** Fit for all duties anywhere.

1B- Fit for all duties anywhere; under medical observation and has no employability restrictions.

2- Fit for all duties but some may have limitations regarding duties which involve severe physical and mental stress and require perfect acuity of vision and hearing.

3- Except 'S' factor, fit for routine or sedentary duties but have limitations of employability, both, job wise and terrain wise as spelt out in Employment Management Index at Annexure II to Appendix 'E' to this Army Order.

4- Temporarily unfit for military duties on account of hospitalization/ sick leave.

5- Permanently unfit for military duties."

Special Army Instruction –SAI 3/S/70

13. SAI/3/S/70 was issued on 30 April 1970 to regulate the grant of PCs to SSC officers. According to Para 2(b), the medical category mandating SHAPE-1 was stipulated in the following terms:

"(b) Must be in Medical Category AYE ONE (A-1). Those who have been placed in Medical Category 'A-2', 'B-1' and 'B-2' as a result of casualties suffered in action during operations may also be considered on merits of each case by the Government."

Para 2(b) was amended in 1972 (Army Instructions 102/72) in the following terms:

"(b) For medical fitness, the officer should satisfy the following conditions:-

(i) Their medical category {should not be lower than grade 2 under any one of the SHAPE factors excluding 'S' factor in which the grade should not be lower than 1. In exceptional cases grading of 2 in both 'H' and 'E' together may be acceptable.

(ii) The low medical categorisation should not be due to medical reasons whether attributable or not (sic) but should have been caused as a result of causalities suffered in action during operations or due to injury or other disability sustained during duty (for example

A while travelling on duty, playing, organised games under regimental arrangements, during training exercises and so on).

(iii) They should be found fit for permanent commission in all other respects, through Services Selection Board selection where applicable at which selection they will be given modified tests, B taking into account the specific disability in each case."

14. On 1 August 1999, by corrigendum No 14/99, para 2(b)(i) was substituted as stated below:

"Existing Para 2(b)(i) is substituted as under:-

C "Their medical category should not be lower than S1 or H2 of A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2. However, grant of Permanent Commission to low medical category Short Service Commissioned Officers will be subject to rendition of the requisite certificate in terms of AO 20/75.""

D 15. The above policy provides a concession to such candidates who have suffered an injury on the line of duty as a result of which their medical category has been lowered. However, the concessions have been qualified. For ease of reference, S1 indicates grade-1 in the S factors; H2 means grade-2 in the H factors and A3 means grade-3 in the A factor. The requirement of being in SHAPE-1 is a pre-requisite, E even in respect of such arms and services, where both men and women join at the threshold age of up to 45 years, such as in the Army Medical Corps. While insisting upon the observance of the SHAPE-1 norm for the grant of PC, the Army also envisages a Temporary Low Medical Category - TLMC - under which an officer is given a period of one year, F called the category stabilization period, to return to SHAPE-1.

16. In the batch of writ petitions, eighty six petitioners are involved:

(i) 47 petitioners in Writ Petition (C) 1172 of 2020

(ii) 9 petitioners in Writ Petition (C) 1457 of 2020

G (iii) 5 petitioners in Writ Petition (C) 34 of 2021

(iv) 1 petitioner in Writ Petition (C) 1469 of 2020

(v) 14 petitioners in Writ Petition (C) 1223 of 2020

(vi) 9 petitioners in Writ Petition (C) 1109 of 2020

H (vii) 1 petitioner in Writ Petition (C) 1158 of 2020

The Army authorities submitted that out of 86 petitioners, 55 are still in SHAPE-1. Out of the 55, 30 are above the age of 45 going up to 52 years in age. 23 other petitioners have been placed in PLMC, while the remaining 9 have been placed in TLMC.

C.2 Substantive Assessment for PC

Special Army Instruction –SAI 3/S/70

17. SAI 3/S/70 stipulated that "serving short service commissioned officers granted commission under A-III/S/64 will be eligible for the grant of PCs under the terms and conditions of service" as laid down in the instruction. Para 2(b) prescribed medical requirements of SHAPE-1 with certain exceptions for duty-related casualties (extracted in the earlier section of this judgment). Para 5 envisaged that officers whose applications were in order would be called for an interview by the Services Selection Board. Under para 6(b), the Services Selection Boards were to consider the applicants for the grant of PC. The applicants' performance as short service commissioned officers would be evaluated and reckoned by the government in assessing their suitability for the grant of PC. Those found suitable for the grant of PC were to be placed on a panel. PCs would be granted to those found suitable in all respects in the arms or services as the case may be, the final decision resting with the government. Para 89(b) stipulated that

> "(b) Permanent commission will be granted depending on the vacancies existing in the Arms or Services and the officers suitable. The officer's choice of Arm/Service will be given due consideration but there is no commitment to give any particular Army Service."

18. Para 10 contained provisions for the manner in which the period as SSC officer would be counted; para 11 for pay and allowances; para 12 for pensionary awards; para 13 for termination of commission and para 14 for other conditions of service.

Army Order 110/1981

19. Officers granted SSC, both technical and non-technical were considered for PCs on the basis of their service performance in the fifth year of their service. AO 110/1981 *inter alia* contained instructions in regard to the submission of applications and evaluation of medical status by the medical boards. Officers who were not desirous of being considered for the grant of PC or for extension of SSC service, and

A sought release on the expiry of their contractual terms of five years were required to indicate their option. Similarly, officers who were non-optees for permanent commissions but were willing to continue on extended SSC services were required to furnish certain forms.

MoD Policy Letter dated 30 September 1983

B 20. This specified the criteria for grant of PC to SSC officers. The policy letter envisaged that :

> "The Selection Board will assess each officer's performance based on computerized Member Data Sheet. To facilitate the members to arrive at their decision, a computerized Member Data Sheet (MDS) indicating the year wise performance of each officer including performance on courses, strong points, weak points, disciplinary awards etc., will be made available. The computer evaluation as spelt out in para 4 below will have 80% weightage while 20% weightage will be given to the assessment of the members of the Selection Board."

The above policy letter contemplated the preparation of a computerized Member Data Sheet indicating the year-wise performance of the officer. Eighty per cent weightage would be given to the evaluation in the Member Data Sheet[19] while twenty per cent would be assigned for the assessment by the members of the selection board. The members of the selection board were required to take into account the MDS and bear in mind, among other things,performance on courses, strong / weak points, technical assessment and the disciplinary background, for which they would award marks out of 20. The members of the selection board were also required to award the following gradings. besides awarding marks :

(a)	Recommended for Permanent Commission	'B'
(b)	Recommended for Extension only	'BE'
(c)	Rejected for Permanent Commission and extension	'R'
(d)	Withdrawn (for want of sufficient material/ administrative reasons)	'W'
(e)	Deferred	'D'

21. Para 4 of the policy letter envisaged that for preparing the evaluation sheets, the following information regarding officers would be computed namely:

[19] "**MDS**"

(i) **QAP**: Overall performance of the officer is evaluated by taking the average of figurative assessment of all reporting officers other than "PTO" and "HTO". **Average will be worked out for each year as well as for the entire period of officer's service**. The latter QAP will be converted into a proportion of 60 marks;

(ii) **Honours and Awards**: Honours and Awards received by the officer will be allotted marks as under:

Param Vir Chakra/ Ashoka Chakra	6
Maha Vir Chakra / Kirti Chakra	4
Vir Chakra / Shaurya Chakra	3
Sena Medal / VSM	2
Mention-in-Despatches	1.5
GOAS's Commendation Card	1

The marks earned for honours and awards were to be added up, subject to the condition that the maximum will not exceed 6 marks.

(iii) **Performance grading** obtained by the officers on each courses: maximum 10 marks;

(iv) **Strong points** reflected in each ACR earned by the officer: maximum 4 marks;

(v) **Recommendation for PC**: a positive recommendation would carry 0 mark while a 'No' would carry minus 2 marks;

(vi) **Weak points**: Minus 3 marks could be awarded on the reflection of the weaknesses of the officer with reference to qualities of dependability, discipline, integrity and loyalty, financial management, addiction to wine, lack of morals and personal affairs. Any other weak point would be awarded a minus 0.5 mark; and

(vii) **Disciplinary awards**: the marks would be considered for denial of PC.

The marks/average worked out on the above basis were to be duly computed out of a total of 80 marks.

Army Order 18/1988

22. AO 18/1988 formulated the system of selection for the grant of PCs. Para 1 of AO 18/1988 stipulated grant of PC in the 5th year of service to officers:

> "**Officers granted Short (sic) Service Commission under AI 11/S/64 are considered for grant of Permanent Commission by No. 5 Selection Board on this basis of their record profile, in the fifth year of their service.** Option and Medical Board Proceedings are asked for 3 to 4 months in advance in terms of AO 110/81. The proceedings are approved by the Government."
>
> **(emphasis supplied)**

Under para 2, the first 50 per cent of officers screened by the Selection Board in order of merit were to be granted permanent commission; the next 35 per cent would be granted extension for five years; and the remaining 15 per cent would be released on completing the contractual period of five years' service. Para 3 stipulates that the selection board would be convened twice a year in May and September / October to ensure that officers of a particular course are screened before completing the initial contractual period of five years' service. The composition of Selection Board No. 5 was provided:

> "4. The occupation of No.5 Selection Board to screen SSCOs for PG is as under:
>
> (a) Chairman - Div Cdr (1)
>
> (b) Members - Bde Cdr (2)
>
> Brig on Staff (1) outside Army HQ DDG
>
> Org/DDG PS/DDG Rtg(l)
>
> (c) Secretary -Col. MS-7"

Under para 6, the gradings to each officer were to be in the following terms:

(a)	Recommended for Permanent Commission	'B'
(b)	Recommended for Extension only	'BE'
(c)	Rejected for Permanent Commission and extension	'R'
(d)	Withdrawn (for want of sufficient material/ administrative reasons)	'W'
(e)	Deferred	'D'

23. Para 7 provided for the assessment of the record profile or each candidate:

> "7. The undermentioned aspects are taken into account for computer evaluation and assessment by members of the Selection Board:
>
> (a) Annual Confidential Report.
>
> (b) Honours and awards.
>
> (c) Performance on courses
>
> (d) Recommendations for Permanent Commission.
>
> (d) Disciplinary awards.
>
> (e) Strong and Weak Points."

24. Para 8 provided that a minimum of three ACRs would be essential to consider the case of an officer for PC. If an officer did not have the requisite number of ACRs, the case would be withdrawn by the Selection Board and the officer would be granted an extension of one year's service during which, his case would be considered for grant of PC. Para 9 contained a provision for obtaining a "comprehensive service data output" in respect of each officer called the Member Data Sheet. The guidelines for assessment contained in para 13 are extracted below:

> "13. Assessment is made in accordance with the criteria approved by the Government. The salient points are given below:
>
> (a) **Officers are assessed on the merits of their service performance as reflected in the ACRs and course reports filed in the CR Dossier.** Personnel knowledge of an officer neither jeopardizes his selection nor is the basis for favourable consideration of his case .
>
> (b) While evaluating ACRs the possibility of subjective/inflated reporting and fluctuation in performance of officers occasioned by following circumstances, are taken note of:
>
> (i) **Last ACR before assessment for PC.**
>
> (ii) Set of initiating/reporting officers endorsing more than two reports.

A (iii) Period covered by the report, if less than six months.

(c) Rating and assessment in mandatory qualities of loyalty, integrity and dependability are given due weightage.

(d) More weightage are given to reports earned from regimental appointment as opposed to staff/ERE if any.

B (e) **Low Medical Category of the officer does not influence the assessment as it is an administrative restriction and not a; criteria for assessment."**

(emphasis supplied)

C The requirements of medical fitness were provided in the following terms:

"21. Officers should satisfy the following conditions:

(a) Their medical category should not be lower than grade 2 under any one of the SHAPE factors excluding 'S' factor in which the D grade should not be lower than 1. In exceptional cases grading of 2 in both 'H' and 'E' together may be acceptable .

(b) The low medical categorisation should not be due to medical reasons whether attributable or not but should have been caused as a result of casualties suffered in action during operations or E due to injuries or other disability sustained during duty, (for example while travelling on duty, playing organized games under regimental arrangements, during training exercise and so on)."

25. Under para 23, **SSC officers who are not selected for PC but are fit, suitable and willing would be granted an extension of** F **five years of the SSC period beyond the initial tenure of five years,** on the expiry of which they would be released from the Army. Under para 24, **officers other than those in an unacceptable low medical category or those charged with disciplinary action would continue to serve for a total period of ten years or until they were granted** G **PC whichever is earlier.** Para 34 provided that though SSCOs would be screened only once in the fifth year of service by the Selection Board for PC. In exceptional cases, the cases of officers for PC could be reviewed under a 'Special Review'.

MoD Policy Letter dated 15 January 1991

H

26. A policy letter was issued by the MoD on 15 January 1991 to regulate the grant of PCs to SSCOs. The policy letter envisaged:

"

(a) A maximum of 250 SSCOs will be granted Permanent Commission per year. The number of vacancies for the batches within the year will be allotted in proportion to their *inter se* strength.

(b) Minimum acceptable cut-off grade for grant of Permanent Commission to SSCOs will be 60%. This may, however, be reviewed by Army HQrs. every two years, keeping in view the rating tendencies as at that time.

(c) In case more than the specified number of officers make the grade from the batches considered in a year, the requisite number only, i.e. 250 will be granted Permanent Commission on competitive merit.

(d) All SSCOs, other than non-optees and those considered unfit for retention by the Selection Board, will be granted five year extension."

(emphasis supplied)

27. From the above stipulations it becomes evident that

(i) An annual cap of 250 SSCOs for the grant of PCs was introduced;

(ii) The cut-off grade was fixed at 60 per cent, which was liable to be reviewed after every two years;

(iii) In the event that more than 250 officers were to make the grade from the batches considered for the year, only 250 officers would be granted PC on the basis of competitive merit; and

(iv) Other than SSCOs who did not opt for PC and those found unfit, all other SSCOs would be granted a five year extension.

28. These stipulations make it abundantly clear that a cut-off grade of 60 per cent was provided as the eligibility for the grant of PC. An annual cap of 250 was introduced. In the event that the number of SSCOs

who fulfill the eligibility in terms of the 60 per cent grade exceed the cap of 250, *inter se* competitive merit would be the basis for determining those who would form a part of 250 SSCOs who would be granted PC. Consequently, where the number of SSCOs who had qualified fell short of the cap of 250 there was no occasion to apply *inter se* competitive merit. Moreover, the other SSCOs falling beyond the cap of 250 would be granted a five year extension unless they were "non-optees" or unfit for retention.

MoD Policy Letters dated 20 July 2006

29. On 20 July 2006, the Integrated Headquarters of MoD (Army) provided revised terms and conditions of service for men and women SSCOs both in the technical and non-technical branch:

(i) Grant of SSC (non-technical) to male officers: For SSC men officers in the non-technical branch of the Army, a tenure of 14 years' service was provided – an initial period of ten years extendable by four years. They would be entitled to substantive promotions to the rank of Major and Lieutenant Colonel[20] on the completion of 2, 6 and 13 years respectively of reckonable commissioned service. Serving SSCOs were given an option to be governed by the provisions of the revised scheme. Those who opted for the revised scheme who were on extension of service and had already been considered for PC on the completion of the seventh year or those who did not opt for PC on the completion of the seventh year, would not be eligible for further consideration for the grant of PC in the tenth year of service. On the other hand, optees between the fifth and seventh year of service who had not exercised their second option for PC, could be considered again for the grant of PC in the tenth year of service. Officers between the fifth and seventh year of service who had not exercised their second option were allowed to opt to continue under the old scheme;

(ii) Grant of SSC (technical) to men officers Extension of tenure and substantive promotions, including PC on similar terms as those for SSC(non-technical) for SSCO men technical officers in the Army;

[20] "**Lt. Col**."

(iii) Grant of SSC (technical) to women officers: By a policy letter dated 20 July 2006, the Women Special Entry Scheme (WSES) was closed by providing for the grant of SSC (technical) to women subject to the following conditions:

a. The total SSC tenure would be 14 years – an initial period of 10 years extendable by four years;

b. An option for release was available for newly inducted women officers on the completion of five years of service;

c. Substantive promotions to the rank of Captain, Major and Lt. Col. would be provided at the end of 2, 6 and 13 years respectively of reckonable service; and

d. Serving WSES women officers had an option to opt for the SSC scheme within six months;

(iv) Grant of SSC (non-technical) to women officers: By another policy letter dated 20 July 2006, a similar provision was made for the grant of SSC (non-technical) to women officers. Under the terms of the scheme,

a. The total engagement would be for 14 years (10 years extendable by a further 4 years); and

b. Serving WSES women officers were given an option to opt for the scheme;

Army Order 9 of 2011 including Appendix C and D

30. The aim of AO 9/2011 was to lay down instructions / procedures for carrying out the Annual Medical Examination (AME), Periodical Medical Examination (PME) and medical classification of all Army officers. The AO was to supersede all existing instructions and *inter alia* sought to delineate the criteria for medical classification vis-à-vis functional capacity:

> "31. Functional Capacity. Functional capacity for military duties under each factor will be denoted by numerals 1 to 5 against each code letter indicating declining functional efficiency. These numerals will be used against the word SHAPE to denote the overall medical classification and also against each factor of SHAPE while describing the disability profile. General evaluation

of these numerals will denote guidelines for employment of the officers as under:

1A- Fit for all duties anywhere.

1B- Fit for all duties anywhere; under medical observation and has no employability restrictions.

2- Fit for all duties but may have some limitations regarding duties which involve severe physical and mental stress and require perfect acuity of vision and hearing.

3- Except 'S' factor, fit for routine or sedentary duties but have limitations of employability, both, job wise and terrain wise as spelt out in Employment Management Index at Annexure II to Appendix 'E' to this Army Order.

4- Temporarily unfit for military duties on account of hospitalization/ sick leave.

5- Permanently unfit for military duties."

31. Appendix (C) provides for the male average weight in kilograms based on age group and height with a 10 per cent variation on either side of the average being acceptable. Appendix (D) contemplates a similar table for female average weight in kilograms for different age groups and heights with an acceptable 10 per cent variation from the average.

MoD Policy Letter dated 24 February 2012

32. As a result of the policy letter dated 24 February 2012, there was a revision of the weightage to be ascribed by the No. 5 Selection Board (for grant of PC / extension to SSCOs) as between

(i) The computerized MDS; and

(ii) Value judgment of the members of the Selection Board.

In the earlier policy letter dated 30 September 1983, the weightage had been fixed at 80:20. This was revised to 95:5, thereby reducing the subjective element comprised in the value judgment attributed to members of the Selection Board from 20 per cent to 5 per cent. In preparing the evaluation sheets, averages were to be taken against the following items:

(i) QAP – 75 marks

(ii) Honours and awards – 5 marks

(iii) Games, sports and special achievements – 5 marks

(iv) Performance of courses – 10 marks

(v) Weak points – minus 5 marks

(vi) Non-recommendation for PC- minus 2 marks

33. Para 5 of the policy letter envisages that the marks allotted under the computerized evaluation would be added to the value judgment to assess the overall merits of officers. A minimum acceptable cut-off of 60 per cent was fixed, which had to be reviewed every two years:

> "5. On conduct of the board, the quantified marks for overall performance of the officer would be obtained by adding the value Judgement marks to the Computerised Evaluation. The marks thus obtained would be used to draw out the overall merit of the officers. Minimum acceptable cut-off grade for grant of PC to SSCOs including women officers (sic) will be 60% (this may however be reviewed by MS branch every two years keeping in view the rating tendencies as at that time)."

D. Evaluation of the credentials of 615 Women SSCOs

34. The basic issue which falls for determination is in regard to the modalities which have been followed in assessing the 615 WSSCOs for the grant of PC, after the decision of this Court in **Babita Puniya** (supra). In order to obviate any factual dispute, the basis of evaluation is taken from the counter affidavit filed in these proceedings on behalf of the respondents by the Colonel Military Secretary (Legal) at the Integrated Head Quarters of the MoD. The relevant disclosures are contained in the section which titled: "*In Re: The Methodology for Conduct of Special No 5 Selection Board*". The counter discloses that 615 women officers "whose corresponding male counterparts have already been considered" were considered by a Special No. 5 Selection Board between 14 September and 25 September 2020. The process (as disclosed in the counter) is delineated below:

(i) The Military Secretary's Branch constituted a Selection Board in accordance with AO 18/1988. All members of the Board were from outside the Military Secretary's Branch. A woman officer of the rank of Brigadier was a member of the Board, drawn from the Army Medical Corps. The identity of the officers being considered was concealed from the

A members of the Board. The women officers who were being considered were permitted to attend the proceedings as observers;

(ii) "As per the laid down criteria", confidential reports, discipline and vigilance report (if any), honours and awards "etc", as on the 5th or 10th years of service, of the women officers were taken into consideration. This procedure was "exactly similar" to similarly placed male officers at the entry level;

(iii) The board examined the MDS for each officer for the grant of PC and gave independent value judgment marks without mutual consultation;

(iv) The marks for each officer, out of a total of 100 were compared "with the marks of the male officer with lowest merit granted PC" in their corresponding courses and entry (Technical and Non-Technical);

(v) On the above basis, the board recommended 422 out of 615 officers for the grant of PC on the basis of merit subject to their meeting the criteria of medical fitness, discipline and vigilance;

(vi) Since out of 422 recommended officers, 57 were non-optees after the approval of the Selection Board, medical board proceedings of the remaining 365 approved officers were scrutinized and the result of the Board was declassified on 19 November 2020; and

(vii) Out of 365 women officers 277 have been found fit and granted PC. Results have been withheld for 88 officers comprising of the following:

a. 42 officers are in the TLMC and have been granted a one year period for stabilization;

b. Medical documents have not been received for 6 officers; and

c. 40 officers are either in the PLMC or their results have been withheld on administrative grounds including discipline and vigilance clearance.

35. During the course of hearing and in the written submissions, the ASG informed the Court that out of 615 officers who were considered, 422 were recommended by the Special No. 5 Selection Board for PC on the basis of merit. The remaining 193 officers (615 minus 422 found fit) were not recommended, though 164 out of these officers fulfill the SHAPE-1 criterion and are SHAPE-1 officers even as of date. Further, out of 422, 57 WSSCOs were non-optees. Out of the 365 optee officers who were considered fit for PC by the Special No. 5 Selection Board, 277 WSSCOs were granted PCs after medical scrutiny. Out of the remaining 88 WSSCOs, 42 officers fall in TLMC. The division of the remaining 46 (that is non-TLMC) is that only 35 did not meet the medical criteria, which constitutes less than 10% of the women who were considered fit for PC on merit (10% of 365). 6 officers had not submitted forms compliant with AO 110/1981, 3 officers are under scrutiny and 2 officers are not cleared from the discipline and vigilance angle.

E Submissions

E.1 Submissions of petitioners

36. Mr P S Patwalia, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (C) 1109 of 2020 and Writ Petition (C) 34 of 2021 and Ms Meenakshi Arora, learned Senior Counsel representing the petitioners in Writ Petition (C) 1172 of 2020, urged the following submissions:

Medical Evaluation:

(i) The procedure laid down in the General Instructions dated 01 August 2020 is a mechanical reproduction of the existing procedure for male officers, who are evaluated for PC in their 5th or 10th year of service, without making any modifications;

(ii) The medical criterion laid down in para 9 of the General Instructions is arbitrary and unjust as the women officers who are in the age group of 40-50 years of age are being required to conform to the medical standards that a male officer would have to conform to at the group of 25 to 30 years;

(iii) The women officers who are being offered PC at a belated stage, due to the fault of the respondents, have already

A undergone medical scrutiny on the completion of their 5th, 10th and 14th years of service when an extension of service was granted to them. Thus, they must be exempted from any medical scrutiny at this stage of the grant of PC;

(iv) There is no material change in the job profile and the nature B of the work that is being carried out by the petitioners as SSC officers as compared to the profile attached to their work when they will be granted PC. Accordingly, any existing medical conditions that the women officers face is not an impediment in the discharge of their functions;

C (v) The criterion for grant of PC laid down in General Instructions is for officers who are in the service bracket of 5-10 years and does not take into account that the petitioners have served in the Army for 10-25 years;

(vi) The medical criterion does not account for the physiological D changes that have occurred due to the passage of time in women officers. These include common changes such as hypertension, obesity, diabetes and changes associated with pregnancy and lactation;

(vii) In comparison to the women officers, the male officers who E were granted PC in their 5th or 10th year of service continue to serve in the Army on different ranks, regardless of whether they have undergone any physiological changes. Thus, medical conditions at a later age are not an impediment in the career progression of male officers as once the PC is granted, there is no repeated medical scrutiny;

F (viii) Male officers who have been granted PC in their 5th or 10th year of service and have later fallen in the PLMC category are still permitted to continue till the attainment of the age of superannuation for all career courses, promotions to higher ranks, and opportunities of re-employment among G others;

(ix) The petitioners at the time of grant of extension of service at their 5th, 10th or 14th year have undergone the necessary medical boards and were found fit to continue in the Army; and

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(x) Owing to the physiological changes occurring due to natural processes of aging and hormonal changes occurring due to pregnancy, women officers are naturally downgraded to a category lower than SHAPE-1. Thus, they are unable to meet the stringent criteria laid down by the General Instructions for the grant of PC;

Reliance placed on Annual Confidential Reports[21]:

(xi) The reliance placed on ACRs as a basis to grant PC to women officers is flawed as in the absence of any provision of PC to women officers, the reporting officers used to endorse an "N/A" in the column relating to PC. Since the women officers could only seek an extension of service as SSC officers and not a PC in the Army, the ACRs were filled out by the reporting officers casually, as compared to the ACRs of male officers;

(xii) With respect to the women officers, the columns regarding medical fitness in the ACRs were never filled. In case the women officers were medically unfit, they were not given an opportunity to improve;

(xiii) The ACRs prepared during the term of criterion appointments have a disproportionate and adverse impact on the petitioners, as they quantify participation in junior command courses and other courses such as staff college and specialised courses such as M.Tech. Women officers were either denied the opportunity of attending these courses or if the opportunity was granted, they were not given the benefit of their performance during such courses in the ACRs of that year;

(xiv) The process of filling out ACRs for women officers was not conducted seriously and good grades were not awarded as the officers were not being considered for PC at the time. Thus, the manner of judging and grading of ACRs for women officers was different from that of male officers and the two cannot be placed on an equal footing;

(xv) The current performance of the women officers and their latest ACRs has been completely ignored for the grant of

[21] "**ACR**"

A PC. Thus, the hard work and qualifications attained after the 10th year of service have not been taken into account;

(xvi) Reliance was placed on MoD Policy Letter dated 24 February 2012 on the "Criteria for Grant of Permanent Commission/Extension to Short Service commissioned Officers". According to para 3 of this letter, for considering an officer for extension of service/grant of PC, the *overall* performance of the officer is to be evaluated by taking the average assessment of all reporting officers. The average has to be worked out for the entire period of the officer's service. Thus, the exclusion of the recent ACRs of the petitioners for grant of PC is unfair and arbitrary; and

Lack of announcement of vacancies:

(xvii) The respondent has failed to announce the number of vacancies against which PC would be granted to women officers. The number of vacancies available in each batch/ service is necessary for an officer to make an informed choice of opting for PC. The respondent failed to earmark the vacancies available to each batch within each service arm for grant of PC.

37. Mr Sudhanshu S Pandey, learned Counsel appearing on behalf of the petitioners in Writ Petition (C) 1457 of 2020, urged the following submissions:

(i) The women officers have never had a level playing field in the Army since their induction;

(ii) The use of ACRs as a metric for the grant of PC is arbitrary as unlike their male counterparts, the women officers were never given the reasons for non-recommendation for an extension of service / promotion; the assessment criteria for male and female officers in an ACR was entirely different as the women officers were not being considered for future career progression;

(iii) The consideration of ACRs of only the initial few years has led to a situation where women officers who have been granted commendation certificates and honours by the Chief of Army Staff[22] have not been granted PC; and

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[22] "**COAS**"

(iv) In 2001, a new evaluation system called 'UAC' was introduced which was not easily accessible and was found to be flawed. Although, ACRs were subsequently reintroduced, the UAC has been made a basis for evaluation and grant of PC to women officers.

38. In addition to the above petitioners, certain other women officers who are petitioners have faced specific circumstances which have been highlighted during the proceedings:

(i) The third petitioner in Writ Petition (C) 1109 of 2020, who has been denied PC by the results dated 19 November 2020, was selected to undertake an M. Tech degree course under the auspices of the Army. During the application process for selection, the petitioner was required to give a certificate of remittance dated 28 November 2019 stating that if her service is terminated or released by the Government due to the finalization of court proceedings in the matter concerning the grant of PC, the officer would be liable to pay the Government the cost of the training. On her selection, she was also required to given an undertaking dated 17 July 2020 to serve the Army for a minimum period of 5 years after completion of the course. Under the undertaking, if she obtained release or premature retirement, she would be liable to pay for the cost of the training course. After the denial of PC by the Army on 19 November 2020, a letter dated 1 December 2020 was issued to her demanding recovery of the training cost of the course, to the tune of Rs. 8.5 lakh - 10 lakhs;

(ii) The petitioner in Writ Petition (C) 1469 of 2021 has stated that she is being harassed by the respondent only on account of the fact that she had made a complaint against her Commanding Officer, who had allegedly made sexual advances towards her. Although the petitioner's service was terminated and she was released from service on 14 February 2018, her case was considered for a special review later. On 21 February 2019, she was granted an extension of 4 years in service till 16 March 2021. She has advanced similar arguments against the process for the grant of PC as the other petitioners. During the course of the

proceedings, the Court was informed that she is being considered by a Special Review Board and awaiting the results; and

(iii) The petitioners in Writ Petition (C) 34 of 2021 have supported the submissions advanced by other petitioners before the Court. These petitioners are 5 women officers of WSES(O) 27th batch, who were commissioned in the Army as SSC officers on 18 March 2006 and completed their 14 years of service on 18 March 2020. During the grant of PC, the petitioners were considered to fall in the category under Para 1(c) of the General Instructions dated 1 August 2020, that is "*WSES(O)- 27 to 31 and SSCW(T&NT)- 1 to 3 courses:For PC/To be released on completion of the period of extension already granted*". The petitioners contended that while as on the date of the judgment in **Babita Puniya** (supra), they had not completed 14 years of service, as on the date of the General Instructions dated 1 August 2020, they had completed 14 years and 6 months in service. Thus, they were to be considered in the category under Para 1(b) of the General Instructions: *"WSES(O)- 15 - 26 courses*: *For PC/To serve till 20 years of pensionable service and released with pension*". Thus, they have submitted that under the judgment in **Babita Puniya** (supra), in case they are not granted PC and have served for more than 14 years, they should be entitled to continue in service till the attainment of pensionable service.

39. The petitioners in Writ Petition (C) 1223 of 2020, are in the category of women officers belonging to batch 27 to 31, having been in service for 10-14 years. In terms of the General Instructions dated 1 August 2020, they have been placed in the category under Para 1(c), under which in case of non-grant of PC, they would be released on completion of their extension period, without any pension. Mr Huzefa A Ahmadi, learned Senior Counsel appearing on behalf the petitioners in Writ Petition (C) 1223 of 2020, made the following submissions:

(a) There was no valid basis for differentiating between the women officers of batches 27 to 31 from their seniors in batches 15 to 26 in the General Instructions dated 1 August

2020. The respondents have wrongly interpreted the decision of this Court in **Babita Puniya** (supra)and have denied extension of service till 20 years to WSSCOs who have not been granted PC and who had not completed 14 years of service as on the date of the judgment in **Babita Puniya** (supra); and

(b) In case such women officers from batches 27 to 31 who were in service between 10 years to 14 years, are released on completion of 14 years of service without pension, it would be a gross miscarriage of justice.

E.2 Submissions of the respondents

40. Mr Sanjay Jain, learned ASG, appeared on behalf of the respondents, assisted by Mr R Balasubramaniam, Senior Counsel. Addressing three broad issues on the (i) medical yardsticks for grant of PC; (ii) number of vacancies notified and the criteria for selection; and (iii) process of evaluation through the ACRs, the learned ASG made the following submissions:

Medical Yardsticks for grant of PC

(i) A writ petition under Article 32 is not maintainable for reliefs sought in service matters. The petitioners should have approached the Armed Forces Tribunal with their statutory grievance as has been held by this Court in **Titaghur Paper Mills Co. Ltd.** v. **State of Orissa and Ors.**[23](this submission in the counter has not been pressed during the hearing);

(ii) After the decision of this court in **Babita Puniya** (supra)**,** the respondents conducted a Special No. 5 Selection Board between 14 to 25 September 2020 to consider women for PC. 57 out of the 422 women eligible did not opt for PC. Consequently, out of the remaining 365, 277 were found eligible for PC;

(iii) The petitioners, on one hand seek parity with their male counterparts. On the other hand, they are seeking special and unjustified treatment in the eligibility criteria for obtaining PC;

[23] (1983) 2 SCC 433

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(iv) The General Instructions dated 01 August 2020 are administrative instructions based on the provisions of the SAI 3/S/70 and AO 110/1981. The latter provisions have not been challenged by the petitioners;

(v) The assessment on the medical criteria of a candidate is an
B intrinsic and inseparable part of the process for grant of PC. It is applicable to men and women alike;

(vi) The acronym 'SHAPE', translates as S' for psychological including cognitive function abnormalities, 'H' for hearing, 'A' for appendages, 'P' for physical capacity and 'E' for
C eyesight;

(vii) The stringent requirements of SHAPE-1 can be relaxed in the event candidates have suffered injury on the line of duty which renders a low medical categorization permissible;

(viii) The Army follows a concept of TLMC which allows an
D officer to come back in SHAPE-1 in one year. This concept is applicable to the grant of PC as well;

(ix) No SSC officer has ever been denied an extension of service due to medical reasons. Therefore, the comparison with the petitioner's medical fitness levels at their 5th or 10th
E year of service is baseless, since extensions were never denied on medical grounds;

(x) The contention that medical fitness cannot be expected forever in service lacks merits. The Army accounts for physiological changes occurring during childbirth and time
F waivers are provided in accordance with existing policies. Other physiological changes such as obesity and age are independent of gender and the petitioners cannot seek an exemption on that ground. The criteria of TLMC and PLMC are applicable to serving PC officers as well;

G (xi) The medical standard of SHAPE-1 weight is as per the age and height of the person. These parameters account for the changes induced by advancement of age in men and women. Therefore, the petitioners' belated consideration for PC does not adversely impact them as against their male counterparts;

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(xii) WSSCOs who seek to join the Army Medical Corps[24] can join up to 45 years of age, yet they have to comply with the SHAPE-1 medical category;

(xiii) There are 86 petitioners who are contesting this batch of petitions. Out of these 86 petitioners, 55 are still in SHAPE-1 (out of these 55, 30 women are in the age group of 45-52). 23 petitioners are assigned to the category of PLMC and 9 are placed in TLMC;

(xiv) The respondents have wholeheartedly complied with the directions of this Court in **Babita Puniya** (supra)and had identified 365 women for PC. 277 women have already been granted PC and if certain requirements are fulfilled by allottees, the number could rise up to 330;

(xv) This Court, in consonance with the spirit of Article 33, should not interfere with the medical yardsticks for determination of PC as this could be detrimental to the selected officers and the Army cannot afford to comprise on the rigour of its fitness policies;

Number of Vacancies Notified

(xvi) The MoD, by its letter dated 15 January 1991 had provided that a maximum of 250 SSC officers would be granted PC every year, with a minimum cut-off grade of 60%. In case more than 250 officers would make the grade, then only 250 posts would be granted based on competitive merit. No male officer has been granted PC merely by virtue of qualifying for the 60% cut-off. This policy and cap of 250 vacancies was relaxed for the Special No. 5 Selection Board proceedings, in order to implement **Babita Puniya** (supra)**,** in letter and spirit;

(xvii) The benchmark of assessing the women officers under consideration of PC against the benchmark of the last selected officer with lowest merit in that particular year is a rational policy, since no upper ceiling was notified for vacancies. The PC has to be granted on competitive merit. The policy adopted by the respondent is rational, reasonable and non-discriminatory; and

[24] "**AMC**"

A (xviii) The least meritorious male officer granted PC with the corresponding batch of the WSSCOs is an objective and just benchmark. This yardstick was also adopted by the respondent when PC was offered to women SSC officers in JAG and AEC in 2010;

B **Process of Evaluation through ACRs**

(xix) The ACRs are merely one component of the evaluation for PC, which also includes other factors of (i) honors and awards; (ii) performance on courses; (iii) recommendations for PC; (iv) disciplinary awards; and (v) strong and weak points. In terms of the erstwhile policy dated 15 January 1991 and the existing policy dated 24 February 2012, competitive merit has to be seen *inter se* officers under consideration for grant of PC.

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(xx) The decision of this Court in **Brig. Nalin Kumar Bhatia** v. **Union of India**[25] on the inapplicability of value judgement by the Selection Board was premised on its peculiar set of facts where the officer there was the sole person in the batch to be considered for a promotion. The case was not an indictment of policies of *inter se* merit;

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(xxi) The Special No. 5 Selection Board were alive to the reality that the column for recommendation of PC for the women officers would be blank. Accordingly, the evaluation was conducted on the assumption that all of the women who had opted for PC were recommended for the grant of PC and accordingly were not granted a 2 mark deduction; and

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F (xxii) The petitioners in **Babita Puniya** (supra) had contended that the consideration of ACRs for the first 5/10 years of service was a just and valid criterion for granting PC. Belatedly requesting for the entire career record to be considered would be contrary to applicable policies and the directions in **Babita Puniya** (supra).

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E.3 The petitioners in rejoinder

41. Responding to the submissions of the ASG, Mr Patwalia and Ms Arora, learned Senior Counsel, Mr Sudhanshu S Pandey and Mr Mohan Kumar, learned counsel, have submitted thus:

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[25] Civil Appeal No 5629 of 2017 decided on 11 February 2020

(i) The respondents have admitted that as a special case, the vacancy cap had been lifted for consideration of women officers for PC. The placement of a vacancy cap could be the only reason for a comparative determination of merit for PC;

(ii) In comparison to women officers, 85% to 100% male officers have been granted PC; and

(iii) The total marks for each woman officer were compared to the lowest marks achieved by the male officer who was granted PC, for determination of whether the woman officer would qualify for grant of PC. After this, the women officers were considered against each other on merit and the grant of PC was determined. Thus, the women officers first, had to meet the benchmark of the lowest qualifying male officers and second, compete *inter se* women officers. This is in stark contrast to the male officers who had to meet no external benchmark and were only required to compete among themselves, in the event that they were in excess of 250 candidates.

F Systemic Discrimination

42. At its heart, this case presents this Court with the opportunity to choose one of two competing visions of the antidiscrimination guarantee embodied in Article 14 and 15(1) of the Constitution: formal versus substantive equality. The formal conception of antidiscrimination law is captured well by Anatole France's observation: *"The law, in its majestic equality, prohibits the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread."*[26]

43. Under the formal and symmetric conception of antidiscrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment.[27] Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice, makes no difference. An apt illustration of

[26] Anatole France, THE RED LILY (1898)

[27] Sandra Fredman, DISCRIMINATION LAW (Oxford University Press, 2nd edition)2011 at p.8 ("**Sandra Fredman, Discrimination Law**")

A this phenomenon would be the United States' Supreme Court's judgment in **Washington** v. **Davis**[28], which held that a facially neutral qualifying test was not violative of the equal protection guarantee contained in the 14th Amendment of the American Constitution merely because African-Americans disproportionately failed the test.

B 44. On the other hand, under a substantive approach, the antidiscrimination guarantee pursues more ambitious objectives. The model of substantive equality developed by Professor Sandra Fredman views the aim of antidiscrimination law as being to pursue 4 overlapping objectives. She states as follows:

C "First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a
D price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension."[29]

E Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate
F an unjust *status quo*.

45. Indirect discrimination is closely tied to the substantive conception of equality outlined above. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The spirit of these
G tenets have been endorsed in a consistent line of authority by this Court. To illustrate, in **Anuj Garg** v. **Hotel Association of India**[30], this Court held that laws premised on sex-based stereotypes are constitutionally impermissible, in that they are outmoded in content and stifling in means.

[28] 426 U.S. 229 (1976)

[29] **Sandra Fredman, Discrimination Law** (supra n. 28), p. 24

H [30] (2008) 3 SCC 1

The Court further held that no law that ends up perpetuating the oppression of women could pass scrutiny. Barriers that prevent women from enjoying full and equal citizenship, it was held, must be dismantled, as opposed to being cited to validate an unjust *status quo*. In **National Legal Services Authority** v. **Union of India** [31], this Court recognized how the patterns of discrimination and disadvantage faced by the transgender community and enumerated a series of remedial measures that can be taken for their empowerment. In **Jeeja Ghosh** v. **Union of India**[32] and **Vikash Kumar** v. **Union Public Service Commission**[33] this Court recognized reasonable accommodation as a substantive equality facilitator.

46. The jurisprudence relating to indirect discrimination in India is still at a nascent stage. Having said that, indirect discrimination has found its place in the jurisprudence of this Court in **Navtej Singh Johar** v. **Union of India**[34], where one of us (Chandrachud J), in holding Section 377 of the Indian Penal Code as unconstitutional insofar as it decriminalizes homosexual intercourse amongst consenting adults, drew on the doctrine of indirect discrimination. This was in arriving at the conclusion that this facially neutral provision disproportionately affected members of the LGBT community. This reliance was in affirmation of the decision of the Delhi High Court in **Naz Foundation** v. **Government of NCT of Delhi**[35] which had relied on the 'Declaration of Principles of Equality' issued by the Equal Rights Trust Act in 2008 in recognizing that indirect discrimination occurs "*when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary*."[36] Similarly, this Court has recognized the fashion in which discrimination operates by dint of "*structures of oppression and domination*" which prevent certain groups from enjoying the full panoply of entitlements.[37] The focus in

[31] (2014) 5 SCC 438
[32] (2016) 7 SCC 761
[33] 2021 SCC OnLine SC 84
[34] (2018) 10 *SCC* 1, paras 442-446
[35] (2009) 111 DRJ 1 (DB)
[36] *Id.* at para 93
[37] ***Indian Young Lawyers*** **Assn.** v. **State of Kerala**, 2018 *SCC* OnLine SC 1690, (Chandrachud J., concurring opinion, paragraph 117); ***Joseph Shine*** v. **Union of India**, 2018 SC OnLine SC 1676, (Chandrachud J, concurring opinion, para 38) ("**Joseph Shine**")

A antidiscrimination enquiry, has switched from looking at the intentions or motive of the discriminator to examining whether a rule, formally or substantively, "contributes to the subordination of a disadvantaged group of individuals"[38].

47. Indirect discrimination has also been recognized by the High B Courts in India[39]. For instance, in the matters of public sector employment, the Delhi High Court in **Inspector (Mahila) Ravina** v. **Union of India**[40] and in **Madhu** v. **Northern Railways**[41], has upheld challenges to conditions of employment, which though appear to be neutral, have an adverse effect on one section of the society. Bhat, J., while analyzing the principles of indirect discrimination in **Madhu** (supra), held:

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> "20. **This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes**. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was pregnant, the Delhi High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in *Inspector (Mahila) Ravina* v. *Union of India* W.P.(C) 4525/2014 stated,

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E [38] *Ibid*, **Joseph Shine**

[39] **Patel Suleman Gaibi** v. **State of Maharashtra**, 2014 SCC OnLine Bom 4639

[40] Writ Petition (C) 4525 of 2014, Delhi High Court (6 August 2015)

[41] "**Madhu**", 2018 SCC OnLine Del 6660. A challenge to conditions of employment/ promotion in the Army Dental Corps was also made before the Delhi High Court in **Dr. Jacqueline Jacinta Dias & Ors.** v. **Union of India & Ors.,** (2018 SCC OnLine Del 12426). However, the challenge could not succeed as the Court failed to discern any F manifest bias. In doing so however, the High Court pointed out to the lack of clear norms regarding indirect discrimination in India and noted:

> "35…This court is conscious of the fact that indirect discrimination is harder to prove or establish. Hidden biases, where establishments or individuals do not overtly show bias, but operate within a discriminatory environment therefore, is hard to establish. Yet, to show such bias […], there should have been something in the record-such as pattern of marking, or predominance of G some element, manifesting itself in the results declared. This court is unable to discern any; Nor is there any *per se* startling consequence apparent from the granular analysis of the results carried out. Furthermore, equality jurisprudence in India has not yet advanced as to indicate clear norms (unlike legislative rules in the EU and the UK) which guide the courts. Consequently, it is held that the complaint of gender discrimination or arbitrariness is not made out from the record."

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"*A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy.*""

(**emphasis supplied**)

48. We must clarify here that the use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion[42].

49. The facts of this case present an opportune moment for evaluating the practices of the respondents in evaluation for the grant of PC. In this segment of the judgment, we will first outline the theoretical foundations of the doctrine of indirect discrimination. We will then survey comparative jurisprudence concerning the doctrine, with a view to understand its key constituents and the legal questions surrounding its application, namely the evidentiary burden to be discharged to invoke the doctrine and the standards of justification to be applied. We will then offer a roadmap for understanding and operationalizing indirect discrimination in Indian antidiscrimination law.

50. In evaluating direct and indirect discrimination, it is important to underscore that these tests, when applied in strict disjunction from one another, may end up producing narrow conceptions of equality which may not account for systemic flaws that embody discrimination. Therefore, we will conclude this section with an understanding of a systemic frame of analysis, in order to adequately redress the full extent of harm that certain groups suffer, merely on account of them possessing characteristics that are prohibited axles of discrimination.

F.1 Theoretical Foundations of Indirect Discrimination

51. Hugh Collins and Tarunabh Khaitan explain the concept of indirect discrimination using Aesop's fable of the fox and the stork. They note:

[42] Interchangeably referred as "**PCP**"

A "Aesop's fable of the fox and the stork invokes the idea of indirect discrimination. The story tells how the fox invited the stork for a meal. For a mean joke, the fox served soup in a shallow dish, which the fox could lap up easily, but the stork could only wet the end of her long bill on the plate and departed still hungry. The stork invited the fox for a return visit and served soup in a long-necked jar with a narrow mouth, into which the fox could not insert his snout. Whilst several moral lessons might be drawn from this tale, it is often regarded as supporting the principle that one should have regard to the needs of others, so that everyone may be given fair opportunities in life. Though formally giving each animal an equal opportunity to enjoy the dinner, in practice the vessels for the serving of the soup inevitably excluded the guest on account of their particular characteristics."[43]

52. Another excellent formulation of the doctrine can be found in the opinion of Advocate General Maduro of the Court of Justice of the European Union (CJEU). He notes that the distinctive attribute of direct discrimination is that the discriminator explicitly relies on a suspect classification (prohibited ground of discrimination) to act in a certain way. Such classification serves as an essential premise of the discriminator's reasoning. On the other hand, in indirect discrimination, the intention of the discriminator, and the reasons for his actions are irrelevant. He pertinently observes: "In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons."[44]

53. Thus, as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at

[43] Foundations of Indirect Discrimination Law (Hugh Collins and Tarunabh Khaitan (eds), Hart Publishing) 2018 at p.1

[44] **Coleman** v. **Attridge Law**, [2008] IRLR 722

issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible.

F.2 Position in the United States

54. The genesis of the doctrine can be traced to the celebrated United States Supreme Court judgment in **Griggs** v. **Duke Power Co**[45]. The issue concerned manual work for which the prescribed qualifications included the possession of a high school education and satisfactory results in an aptitude test. Two facts about the case bear emphasis. First, due to the inferior quality of segregated school education, African-American candidates were disqualified in higher numbers because of the aforementioned requirements than their white counterparts. Second, neither of these two requirements was shown to be significantly related to successful job performance.

55. Construing the prohibition on discrimination embodied in Title VII of the Civil Rights Act of 1964, Chief Justice Burger held:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." He went on: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability."[46]

On the question of the standard of justification for rebutting a charge of indirect discrimination, the Court held as follows:

> "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[47]

Griggs, therefore, laid the groundwork for the thinking that meaningful equality does not merely mean the absence of intentional

[45] "**Griggs**", 401 US 424, 431 (1971)
[46] *Id*. at p. 431
[47] *Ibid*.

A inequality. A statutory manifestation of disparate impact was codified in US law in the shape of the Civil Rights Act of 1991. Section 105[48] of the Civil Rights Act of 1991 makes a practice causing disparate impact a *prima facie* violation. The presumption can be rebutted by establishing that the practice is linked to the job and business. This can be overcome

B [48]"SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.
(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:
'(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
'(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or
C national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
'(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
'(B)(i) With respect to demonstrating that a particular employment practice causes a
D disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
'(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such
E practice is required by business necessity.
'(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.
'(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.
F '(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied
G with an intent to discriminate because of race, color, religion, sex, or national origin.'.
(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/ alternative business practice."

H

by a showing of alternative, equally efficacious, practices not causing disparate impact.

56. In 2005, in **Smith** v. **City of Jackson**[49], the US Supreme Court construed statutory language in The Age Discrimination in Employment Act, 1967 which proscribed actions which "otherwise adversely affect" an employee. This was read to include disparate impact liability. The Court held that this phrase "focuses on the effects of the action on the employee rather than the motivation for the action of the employer."

57. The third major case on disparate impact liability decided by the US Supreme Court was in 2015, concerning the Fair Housing Act which the Court interpreted as including disparate impact liability.[50] The Court also made instructive observations on the burden of proof that a plaintiff espousing a claim of disparate impact on the basis of statistical disparity must discharge. It held that the plaintiff must be able to establish that the defendant's policy is the cause of the disparity. The Court noted: "A robust causality requirement […] protects defendants from being liable for racial disparities they did not create."[51] On the standard of justification for rebutting such a claim, the Court held that courts must assess claims of disparate impact liability with caution so that defendants are provided reasonable margin for devising requisite policies that are tailored for their work requirement.

F.3 Position in the United Kingdom

58. In the United Kingdom (UK), the fault-line that separates direct discrimination from indirect discrimination is not the intention of the discriminator. Rather, it is the fact that direct discrimination cannot be justified in any circumstance, while indirect discrimination is susceptible to justification. To quote Baroness Hale:

> "Direct and indirect discrimination are mutually exclusive. You cannot have both at once … The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."[52]

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[49] 544 US 228 (2005)

[50] **Texas Department of Housing and Community Affairs** v. **Inclusive Communities Project Inc**, 135 S Ct 2411 [2015], per Kennedy J

[51] *Id.* at para 20

[52] **R (on the application of E)** v. **JFS Governing Body**, [2009] UKSC 15, para 57

A 59. The statutory definition of indirect discrimination is engrafted in Section 19[53] of the Equality Act, 2010. The definition has 4 salient features. First, it covers provisions, criteria and practices that are applied in a uniform fashion, to those with and without the ground on which discrimination is alleged. Second, the PCP puts, or would put, persons with whom the claimant shares the relevant ground at a particular B disadvantage when compared with persons with whom the claimant does not share it. Third, the claimant herself would be put, or is put, to such disadvantage by the operation of the PCP. Finally, the defendant cannot show the PCP to be a proportionate means of achieving a legitimate aim.

C 60. An instructive judgment of the UK Supreme Court for us is **Essop** v. **Home Office (UK Border Agency)**[54]. At issue was the allegedly disproportionate impact of an exam called the Core Skills Assessment, to secure public sector employment and promotion in civil services, on "black and minority ethnic (BME)" and older candidates. D The Court noted the statistical disparity in the following terms:

> "The BME pass rate was 40.3% of that of the white candidates. The pass rate of candidates aged 35 or older was 37.4% of that of those below that age. In each case, there was a 0.1% likelihood that this could happen by chance. Of course, they did not all fail. E No-one knows why the proportion of BME or older candidates failing is significantly higher than the proportion of white or younger candidates failing."

61. The Court outlined the following salient features of indirect discrimination in UK law:

F [53] "19. Indirect discrimination
(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
G (a)A applies, or would apply, it to persons with whom B does not share the characteristic,
(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c)it puts, or would put, B at that disadvantage, and
(d)A cannot show it to be a proportionate means of achieving a legitimate aim.
(3)The relevant protected characteristics are—age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation."

H [54] [2017] UKSC 27

(i) There is no need for the claimant to show why the PCP discriminates against individuals possessing the relevant ground. The fact that the PCP has such a disproportionate impact is sufficient;

(ii) Direct discrimination requires a causal link between the less favourable treatment and the relevant ground. On the other hand, indirect discrimination requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. This difference is rooted in the fact that the aim of direct discrimination is to achieve equality of treatment. On the other hand, indirect discrimination seeks to create a level playing field, by spotting and eliminating hidden barriers which disproportionately affect a particular group, absent a legally acceptable justification;

(iii) The inability of the relevant group to comply with the PCP can be ascribed to a variety of 'context factors'. These can include genetic factors, social understandings, archetypal presuppositions, etc.;

(iv) In order for a claim of indirect discrimination to succeed, it is not necessary to show that every single member of the group possessing the relevant ground was unable to meet the PCP. It is enough to show that the PCP disproportionately disadvantaged members of the concerned group;

(v) It is commonplace for indirect discrimination to be established on the basis of statistical evidence. Such evidence is often able to show the causal link that a particular variable played in arriving at a particular outcome; and

(vi) Finally, the defendant can always rebut a charge of indirect discrimination by showing that there exists a good justification for the PCP at issue.

F.4 Position in South Africa

62. In keeping with the progressive vision of the South African Constitution, Section 9 of the South African Constitution[55] prohibits indirect discrimination. The judicial exegesis of indirect discrimination can first

[55] "9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

A be found in the judgment of the South African Constitutional Court[56] in the case of **City Council of Pretoria** v. **Walker**[57] in which the Court expounded on the doctrine in the following terms:

> "The concept of indirect discrimination, ... was developed precisely to deal with situations where discrimination lay disguised behind
B apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them. In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination
C had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is
D taken."

In elaborating on how the impugned provision does not necessarily have to make a suspect classification on the grounds of race, the SACC concluded that differentiation between the treatment of residents of areas which were "historically, and overwhelmingly occupied by black
E persons….as opposed to areas which were still overwhelmingly white" was sufficient to evince indirect discrimination on the grounds of race.

63. In a recent judgment in **Mahlangu and Another** v. **Minister of Labour**[58], the SACC had to rule on the constitutionality of Section

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect
F or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
G (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination;
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[56] "**SACC**"

[57] (1998) 3 BCLR 257, paras 31-32

H [58] [2020] ZACC 24

1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act. This provision explicitly excluded domestic workers from the definition of employees under the Act. This had the consequence of depriving domestic workers access to the social security benefits contained in the legislation, in the event of injury, disablement and death. The SACC, *inter alia*, returned a finding that the provision was hit by the constitutional prohibition on indirect discrimination. This was for the reason that domestic workers are predominantly black women. As a result, held the Court: "This means discrimination against them constitutes indirect discrimination on the basis of race, sex and gender."

F.5 Position in Canada

64.In **Ontario Human Rights Commission** v. **Simpsons-Sears**[59], the Canadian Supreme Court expounded the doctrine of indirect discrimination (what it called adverse effects discrimination), while entertaining a challenge under Section 4(1)(g) of the Ontario Human Rights Code[60]. In analyzing whether a work policy mandating inflexible working hours on Friday evenings and Saturdays indirectly discriminated against the Appellant on the basis of her creed, in that her religion required her to strictly observe the Sabbath, the Court noted:

> "18. A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group,

[59] "**Ontario HRC**", [1985] 2 SCR 53

[60] Section 4(1)(g) of the Ontario Human Rights Code prohibited discrimination against an employee with regards to any term or condition of employment on the basis of race, creed, colour, sex, age etc.

A obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the
B terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed
C a prima facie case of discrimination based on creed before the Board of Inquiry."

It was further noted that the aim of the guarantee against discrimination is "not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the
D action complained of which is significant." Thus if the impugned action has the effect to "impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory."[61]

65. The principles laid down in **Ontario HRC** (supra) were
E consistently applied by the courts in Canada to protect indirect discrimination. In a recent judgment in **Fraser** v. **Canada (Attorney General)**[62], the Canadian Supreme Court was called on to determine the constitutionality of a rule categorizing job-sharing positions as "part-time work" for which participants could not receive full-time pension. Under the job-sharing programme, optees for the programme could split
F the duties and responsibilities of one full-time position. A large majority of the optees for the job-sharing programme were women, who found it burdensome to carry out the responsibilities of work and domestic work and were particularly hit by the new rule as they would lose out on pension benefits. The Court recognized indirect discrimination as a legal
G response to the fact that discrimination is "frequently a product of continuing to do things the way they have always been done", as opposed to intentionally discriminatory actions.[63] Pertinently, the Court outlined a

[61] **Ontario HRC** (supra n.60) at para 12
[62] ("**Fraser**"), 2020 SCC 28
H [63] *Id.* at para 31

2-step test for conducting an indirect discrimination enquiry. *First*, the Court has to enquire whether the impugned rule disproportionately affects a particular group. As an evidentiary matter, this entails a consideration of material that demonstrates that "membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group". However, as such evidence might be hard to come by, reliance can be placed on evidence generated by the claimant group itself. Further, while statistical evidence can serve as concrete proof of disproportionate impact, there is no clear quantitative threshold as to the quantum of disproportionality to be established for a charge of indirect discrimination to be brought home. Equally, recognizing the importance of applying a robust judicial common sense, the Court held: "In some cases, evidence about a group will show such a strong association with certain traits—such as pregnancy with gender—that the disproportionate impact on members of that group will be apparent and immediate*"*.[64] *Second,* the Court has to look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such disadvantage could be in the shape of: "[e]conomic exclusion or disadvantage, [s]ocial exclusion…[p]sychological harms…[p]hysical harms…[or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group."[65]

F.6 Evolving an analytical framework for indirect discrimination in India:

66. A study of the above cases and scholarly works gives rise to the following key learnings. *First*, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/ implicit biases or an inability to recognize how existing structures/ institutions, and ways of doing things, have the consequence of freezing an unjust *status quo*. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.

67. *Second*, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact

[64] *Id.* at paras 50-72
[65] *Id.* at para 76

A that the former cannot be justified, while the latter can (UK). We are of the considered view that the intention versus effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This is for the reason that the most compelling feature of indirect discrimination, in our view, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect. As the Canadian Supreme Court put it in **Ontario HRC** (supra), requiring proof of intention to establish discrimination puts an "insuperable barrier in the way of a complainant seeking a remedy."[66] It is this barrier that a robust conception of indirect discrimination can enable us to counteract.

C 68. *Third*, on the nature of evidence required to prove indirect discrimination, statistical evidence that can establish how the impugned provision, criteria or practice is the cause for the disproportionately disadvantageous outcome can be one of the ways to establish the play of indirect discrimination. As Professor Sandra Fredman notes, "Aptitude tests, interview and selection processes, and other apparently scientific D and neutral measures might never invite scrutiny unless data is available to dislodge these assumptions."[67] Consistent with the Canadian Supreme Court's approach in **Fraser** (supra), we do not think that it would be wise to lay down any quantitative thresholds for the nature of statistical disparity that must be established for a claimant to succeed. Equally, we do not think that an absolutist position can be adopted as to the nature of E evidence that must be brought forth to succeed in a case of indirect discrimination. The absence of any statistical evidence or inability to statistically demonstrate exclusion cannot be the sole ground for debunking claims of indirect discrimination. This was clarified by the European Court of Human Rights in a case concerning fifteen Croatians of Roma F origin claiming racial discrimination and segregation in schools with Roma-only classes. In assessing the claims of the fifteen Croatians, the court observed that indirect discrimination can be proved without statistical evidence[68]. Therefore, statistical evidence demonstrating patterns of exclusion, can be *one* of the ways to prove indirect discrimination.

G 69. *Fourth*, insofar as the fashion in which the indirect discrimination enquiry must be conducted, we think that the two-stage test laid down by the Canadian Supreme Court in **Fraser** (supra) offers a well-structured framework of analysis as it accounts for both the

[66] **Ontario HRC** (supra n. 60), para 14

[67] **Sandra Fredman, Discrimination Law** (supra n. 28) at p. 187

H [68] **Orsus and others** v. **Croatia**, [2010] ECHR 337, para 153

disproportionate impact of the impugned provision, criteria or practice on the relevant group, as well as the harm caused by such impact. It foregrounds an examination of the ills that indirect discrimination seeks to remedy.

70. *Fifth* and finally, while assessing the justifiability of measures that are alleged to have the effect of indirect discrimination, the Court needs to return a finding on whether the narrow provision, criteria or practice is necessary for successful job performance. In this regard, some amount of deference to the employer/defendant's view is warranted. Equally, the Court must resist the temptation to accept generalizations by defendants under the garb of deference and must closely scrutinize the proffered justification. Further, the Court must also examine if it is possible to substitute the measures with less discriminatory alternatives. Only by exercising such close scrutiny and exhibiting attentiveness to the possibility of alternatives can a Court ensure that the full potential of the doctrine of indirect discrimination is realized and not lost in its application.[69]

F.7 Systemic Discrimination as antithetical to Substantive Equality

71. As noted in the analysis above, the emphasis on intent alone as the key to unlocking discrimination has resulted in several practices, under the veneer of objectivity and "equal" application to all persons, to fall through the cracks of our equality jurisprudence. Indirect discrimination as a tool of jurisprudential analysis, can result in the redressal of several inequities by probing provisions, criteria or practice that have a disproportionate and adverse impact on members of groups who belong to groups that are constitutionally protected from discrimination under Article 15(1). However, it needs to be emphasized that a strict emphasis on using only one of the two tools (between direct and indirect discrimination) to establish and redress discrimination may often result in patterns and structures of discrimination remaining unaddressed.

72. In order to conceptualize substantive equality, it would be apposite to conduct a *systemic* analysis of discrimination that combines tools of direct and indirect discrimination. In the words of Professor Marie Mercat- Bruns[70]:

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[69] **Sandra Fredman, Discrimination Law** (supra n. 28) at p. 194

[70] Marie Mercat-Bruns, *Systemic discrimination: Rethinking the Tools of Gender Equality*, European Equality Law Review, Vol. 2 (European Commission, 2018) at p.5-6

A "Systemic discrimination posits the need to conceptualize discrimination in terms of workplace dynamics rather than solely in existing terms of an identifiable actor's isolated state of mind, a victim's perception of his or her own work environment, or the job-relatedness of a neutral employment practice with adverse consequences. Systemic discrimination derives from how
B organizations, as structures discriminate."

73. A particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate. Exclusive reliance on tools of direct or indirect discrimination may also not effectively account for patterns arising out
C of multiple axles of discrimination. Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction[71]. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-to-day interaction and
D decision-making.[72] The duty of constitutional courts, when confronted with such a scheme of things, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social re-distribution by providing for positive entitlements that aim to negate the scope of future harm.

E

74. The Supreme Court of Canada, in **Action Travail des Femmes** v. **Canadian National Railway Company**[73] analyzed the claim of woman seeking equal employment opportunities in the National Railroad Company. In echoing the mutually reinforcing consequences of direct and indirect discrimination within organizational structures as a
F systemic feature, the Court noted[74]:

"systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then
G reinforced by the very exclusion of the disadvantaged group

[71] *Id.* at p.10-13
[72] Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, Berkeley Journal of Employment and Labour Law, Vol. 32(2), 2011, 400-454
[73] "**Canadian National Railway Company**", (1987) 1 S.C.R. 1114
H [74] *Id.*at 1139

> because the exclusion fosters the belief, both within and outside the group, that the exclusion is a result of "natural forces", for example, that women "just can't do the job"…..To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged"

In prescribing remedies against systemic discrimination, the Court consciously noted that the remedies do not have to be merely compensatory, but also prospective in terms of the benefit that is designed to improve the situation in the future. The Court structured the remedy as follows:

> "An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless....
>
> Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping....
>
> Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from a targeted group eliminates the problems of "tokenism"[75].

This framework provided in **Canadian National Railway Company** (supra) was followed by the Human Rights Tribunal of Canada, in the case of **National Capital Alliance on Race Relations** v. **Canada (Health and Welfare)**[76], wherein the Court had to examine a case against the Health and Welfare Department of Canada for discriminating against visible minorities by establishing employment policies and practices that deprive visible minorities (race, colour and ethnic origin) of employment opportunities in senior management. The Court conducted a holistic analysis of the organization by collating testimonies of workers in the organization and by engaging experts on statistical analysis and human resource management. The evidence of

[75] **Canadian National Railway Company** (supra n. 74) at p.1143 to 1144
[76] 1997 28 C.H.R.R.D/179 (Canadian Human Rights Tribunal)

A the expert on human resources was analysed to situate systemic issues ranging from ghettoization of minorities in Canada translating into lesser encouragement for professional ambition. Societal impact of discrimination was evidenced in the informal staffing decisions providing fertile ground for unconscious bias and a broader perception of visible minorities as unfit for management. In upholding the claims of the plaintiffs, B corrective measures were prescribed to counteract the effects of systemic discrimination in the workforce.

75. In the United States, the Supreme Court analysed a Title VII claim of workers (represented by the Government) in a trucking company alleging pattern and practice of employment discrimination against C "Negroes and Spanish-surnamed Americans" by failing to place them equally with whites in long-distance, line-driver positions[77]. The Court noted certain legal principles that could govern a claim of systemic disparate treatment and used a mixture of statistical patterns with worker testimonies to arrive at a conclusion of systemic discrimination:

D "Consideration of the question whether the company engaged in a pattern or practice of discriminatory hiring practices involves controlling legal principles that are relatively clear. The Government's theory of discrimination was simply that the company, in violation of s 703(a) of Title VII, 14 regularly and E purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons.…The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." …

F **As the plaintiff, the Government bore the initial burden of making out a prima facie case of discrimination**. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280; McDonnell Douglas Corp. v. Green, supra, 411 U.S., at 802, 93 S.Ct., at 1824. **And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of** G **Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination**

H [77] **International Brotherhood of Teamsters** v. **United States**, 431 U.S. 324 (1977)

> **was the company's standard operating procedure the regular rather than the unusual practice**….
> The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that "(n)umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." Minority employees who wanted to transfer to line-driver jobs met with similar difficulties. The company's principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on "statistics alone." **The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life**."[78]
>
> (**emphasis supplied**)

Therefore, once a petitioner could establish a *prima facie* case of discrimination that did not occur as accidental or sporadic instances of conduct, it could prove its case using statistical evidence, witness testimonies and other qualitative methods to establish a preponderance of systemic discrimination.

76. In 1997, in the United Kingdom, Sir William Macpherson, a retired High Court judge, was commissioned to study institutional racism in the police force. This study was situated in the backdrop of the lacunae in the investigation of a murder of Stephen Lawrence, a Black British teenager. The findings, publicized as the "Macpherson Report" on 24 February 1999[79] concluded that the investigation by the police was marred

[78] *Id.* at p. 334-340
[79] The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny (February 1999) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf#page=375

A by incompetence and institutional racism. The report studied prejudices within officers which fed into an institutional culture as follows:

> "6.34….The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in
B processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate
C such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease."

77. Therefore, an analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving our constitutional vision of equality and antidiscrimination.
D Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure. In propounding this analysis, this Court is conscious of the practical limitations of every
E framework to understanding workforces, considering the bulk of litigation against systemic discrimination, would be from members of an organized and formal workforce who would have the wherewithal and evidence of patterns or practices to bolster their claims. For the laboring class in India, which is predominantly constituted by members facing multiple axels of marginalization, litigating their right to work with equality and
F dignity may be a distant dream. However, it is our earnest hope, that a vision of systemic discrimination, would aid members of even informal workforces who, in addition to battling precarity at their places of work, will be able to assert a right to equality and dignity. A framework that would situate their discrimination, against systemic societal patterns of
G discrimination that are constituted and compounded by social and economic structures, would help in addressing several fractures that are contributing to inequality in our society.

78. In the dispute at hand, this Court is tasked with a duty to analyse the implementation of its earlier directions in **Babita Puniya**

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(supra) that struck down a directly discriminatory practice of excluding WSSCOs from PC. The petitioners' claim of further discrimination in implementation, will have to be analyzed from the framework of systemic discrimination (which encompasses indirect discrimination), to determine a constitutional violation. In examining a retroactive grant of PC, a study of the systemic impact of the prolonged denial of PC to women and the evaluation structures and patterns therein, would be indispensable.

G Analysis

79. The fundamental issue is whether the procedure which was followed in evaluating the women SSCOs comports with the requirements of law. In arriving at this determination, we will primarily be guided by the Army Orders, Army Instructions and policy letters of the Union Government which have been set out above and will be further explained below. At this stage, it needs to be emphasized that the issue as regards the applicability of the SHAPE-1 criteria will not be taken up in the first part of the analysis and will be dealt with independently in a subsequent part of this judgment. With this clarification, we proceed to outline the interplay between the Army instructions and policy letters.

G.1 Selection Process & Criteria set by the Army

(i) SAI/3S/70 set out the modalities for the grant of PC to serving SSCOs while making SSCOs eligible to apply for PC. This was *inter alia* subject to the conditions of eligibility spelt out in paragraph 2. These conditions of eligibility were

a. An upper age limit of 27 years;

b. Fulfillment of medical criteria; and

c. Possession of technical qualifications as prescribed by officers seeking PCs in the Corps of Engineers, Signals and EME. The Army instruction provided for interviews by a Service Selection Board. All officers who have been found suitable for the grant of PC would be placed in a panel and the final decision would rest with the government. Para 8b stipulated that the grant of PCs would depend upon the vacancies

A existing in the arms or services and the suitability of officers. The form of application at Appendix-A to the Army Instruction *inter alia* stipulated the requirement of the applicant being recommended by the Commanding Officer and the Brigade Commander;

B

(ii) On 30 September 1983, the criteria for the grant of PC to SSCOs were formulated. The criteria envisaged that the Selection Board will assess each officer's performance on the basis of a computerized MDS. While the computerized

C evaluation would receive 80 per cent weightage, 20 per cent weightage would be given to the assessment of the members of the Selection Board. The Selection Board was also required to award a grading, besides awarding marks, on whether an officer was recommended for

D

a. PC; or

b. Extension; or

c. In the alternate was rejected, deferred or withdrawn.

E Of the 80 marks earmarked for computerized evaluation, 60 marks were for the Quantitative Assessment of Performance (QAP), 6 for honours and awards, 10 for performance in courses and 4 for strong points. A candidate who was recommended for PC by the reporting officer in

F the ACR would get a '0' mark for "Yes" and 'minus 2' marks for "No". Minus marks were also be given for weak points.

(iii) On 24 February 2012, a policy letter was issued by the MoD to amend the weightage attributed to the computerised

G evaluation. This policy currently holds the field. The computerized evaluation was enhanced from 80 per cent to 95 per cent and the subjective evaluation of the members of the Selection Board No 5 was brought down from 20 to 5 per cent. The weightage of 95 per cent assigned to computer evaluation was distributed amongst QAP (75

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marks), honours and awards (5 marks), sports and games (5 marks) and performance and courses (10 marks). The recommendation of the reporting officer in the ACR for grant of PC would carry '0' mark, while a negative recommendation carries minus '2' marks. It was envisaged that the marks quantified for overall performance would be obtained by cumulating the value judgment marks to the computerized evaluation. The marks so obtained would be used to draw out the overall merit of the officer. The minimum cut-off grade for SSCOs including women officers would be 60 per cent which could be reviewed every 2 years;

(iv) AO 18/1988 contained provisions in regard to "system for selection for grant of permanent commission of SSCOs". Under para 8 of the AO it was envisaged that the first 50 per cent of officers screened by the Selection Board in the order of merit would be granted PC, the next 35 per cent would be granted extensions for another five years while the remaining 15 per cent officers would be released on competing the contractual period of five years' service. Para 2 of the AO 18/1988, in other words, made it abundantly clear that while at one end of the spectrum 50 per cent of the officers in order of merit would be conferred with PC, at the other end of the spectrum only 15 per cent would be released on completing the contractual term. Between these two ends were officers (35 per cent) who were granted an extension of five years. AO 18/1988 specified in para 4, the constitution of the Selection Board which was to assess performance strictly in accordance with the laid down criteria. Under para 6 gradings were required to be assigned to the officers on whether or not they were recommended for PC or for extension or, in the alternative, to be deferred. Para 7 envisaged that the computer evaluation and assessment by members of the selection board would be based on ACRs, honours and awards, performance in courses, recommendations for PC, disciplinary awards and strong and weak points. A minimum of three ACRs were

A required as essential to consider the case of an officer for PC. Moreover, the AO stipulated in paragraph 13 that "officers are assessed on the merits of their service performance as reflected in the ACRs and not by the reports filed in the CR dossier". Further, while evaluating the ACRs, the possibility of subjective/inflated reporting and fluctuation in performance of officers were taken note of by, *inter alia,* stipulating that the last ACR before assessment for PC would be taken into consideration. The Army Order also clarified in para 13(e) that the low medical category of the officers would not influence the assessment as it is an administrative restriction and not a criteria for assessment. Moreover, para 21 spelt out the medical requirements (to be considered subsequently in this judgment). Para 23 stipulated that those who are not selected for PC but are otherwise fit and suitable would be granted an extension of five years beyond the initial term of five years on the expiry of which they would be released from the Army. This is how the SSC engagement (at that time) came to be described as an engagement for 5+5 years. Persons in the PMLC who could not be granted PC would be allowed to continue in service for a full extended tenure of 5 years beyond the initial tenure of 5 years (Para 26). Moreover, under para 34, it was stipulated that SSCOs would be screened only once in the 5th year of service by a selection board for PC. However, in certain circumstances, a special review for the grant of PC was envisaged;

(v) On 15 January 1991, MoD issued a policy letter capping the number of vacancies per year for PC at 250. The minimum acceptable cut-off grade for the grant of PC to SSCOs is 60 per cent which would be reviewed every two years. In the event that more officers, in excess of the ceiling of 250 fulfill the cut - off grade of 60 per cent, the requisite number of 250 officers would be granted PC in competitive merit. All officers, irrespective of the grant of PC, would be given an extension of 5 years, unless they opt out or are considered unfit for retention; and

(vi) MoD's Policy Letters dated 20 July 2006 provided that SSCOs both in the technical and non-technical branch would have a tenure of 14 years – the initial 10 years, extendable by 4 years. Moreover, serving WSES officers were given an option to seek SSC within a period of six months.

80. Now, in the backdrop of the above analysis it becomes necessary to evaluate themethodology which has been followed while considering 615 women SSCOs across several batches for the belated grant of PC, by the constitution of a special board.

G.2 Benchmarking with the Lowest Male Officer

81. The first aspect to be considered in relation to the assessment criteria provided in the General Instructions dated 1 August 2020 is the bench-marking of the marks awarded to WSSCOs with the lowest placed male officer of the corresponding batch. In the course of his submissions, the ASG has argued that "there is a considerable rationale in assessing the women officers on the basis of their first 5/10 years of service (as the case may be) and keeping the above benchmark [that is, for bench-marking them with the lowest selected male officer of the corresponding batch]". The rationale which the ASG put forth can be summarized as follows:

(i) The cut-off of 60 per cent marks is only a criterion of eligibility for considering officers for the grant of PC. This is a minimum cut-off grade applicable both to men and women officers. Securing 60 per cent in itself, which is a threshold criteria, does not automatically entitle an officer to the grant of PC;

(ii) Since 1991, an upper ceiling of 250 vacancies per year for PC was prescribed. The number of candidates above the 60 per cent cut-off, amongst whom the selection for PC would be made, will fluctuate from year to year and hence "the marks of the 250th candidate automatically becomes a benchmark";

(iii) In the present case, while implementing the judgment of this Court in **Babita Puniya** (supra) dated 17 February 2020,

A the upper limit of 250 vacancies was dispensed with for women officers in order to ensure that no WSSCO who is found eligible on merits and qualified in terms of the medical criterion is denied PC for want of vacancy;

B (iv) The decision in **Babita Puniya** (supra) required the Army authorities to offer PC to the WSSCOs at par with their male counterparts. AO 18/1988 had initially stipulated that 50 per cent of the officers falling in the order of merit would be granted PC, 35 per cent would be granted an extension of 5 years and 15 per cent would be released on completing C the contractual period of 5 years of service. This governed the earlier regime of SSCOs under which SSCOs were recruited for 5 years and were granted an extension of 5 years. This regime was modified in 2004 when a second extension option up to four years was introduced making it 5+5+4. In 2006, the above regime was revised by the Policy D Letter dated 20 July 2006 by MoD, the effect of which was that the SSC regime of 5+5+4 was substituted by a regime of 10+4;

(v) The policy decision of MoD dated 15 January 1991 indicated E a cap of 250 SSCOs for the annual grant of PC; a minimum cut-off grade of 60 per cent, and in case more than the specified number of officers make the grade, only 250 would be granted PC on competitive merit;

F (vi) Even for male officers, the statistics pertaining to 32 batches would indicate that 67.86 per cent were granted PC and hence there is no discrimination against women SSCOs; and

G (vii) In the absence of an upper ceiling of vacancies, the field would be left open for any number of WSSCOs to get PC. To avoid this, a benchmark had to be fixed. The need for fixing a benchmark is indisputable though any benchmark has to satisfy the test of being rational and of not being arbitrary. If two views are possible, the view which has been adopted by the Army authorities must be given H preference. Benchmarking the aspirant WSSCOs with the

lowest of their male counterparts on merit is an objective criterion.

82. The fundamental postulate in the submissions of the ASG is that since there is a cut-off of 250 vacancies per year for the grant of PC to SSCOs and a minimum of 60 per cent is fixed as the cut-off grade by the Policy Letter dated 15 January 1991 of the MoD, the evaluation of competitive merit is necessary. Though, the WSSCOs in the present case were not subjected to any ceiling of vacancies as a one-time measure, benchmarking (in the submission) became necessary to place them at par with their male counterparts.

83. There is a fundamental fallacy in the entire line of reasoning which has been advanced by the Army authorities both in the counter affidavit as well as in the written submissions of the ASG. The Policy Letter dated 15 January 1991 indicates that

(i) A maximum of 250 SSCOs will be granted PC annually;

(ii) A minimum cut-off grade 60 per cent is fixed, which is reviewable every two years;

(iii) In case more than 250 officers fulfill the cut-off grade of 60 per cent, only 250 would be granted PC on competitive merit; and

(iv) Other than non-optees and those unfit for retention, all others would be granted an extension of 5 years.

84. The clear intent of the policy letter is that the issue of applying competitive merit arises only if more than 250 officers fulfill the cut-off grade annually. If the number of officers who achieved the 60 per cent cut-off is less than 250, then evidently there is no requirement of assessing *inter se* competitive merit among the officers who meet the minimum threshold.

85. In the present case, there are a total of 615 women officers for consideration, across several batches. As many as 32 batches were under consideration. Annexure WR-6 to the written submissions of the Union of India carries the details of PC granted to male officers. The table is extracted below:

DETAILS OF PERMANENT COMMISSION GRANTED TO MALE OFFICERS				
SER No	YEAR OF COMMISSION	PASSING OUT STR	No OF OFFICERS GRANTED PC	PC %
1	Mar/94	107	77	71.96
2	Aug/94	143	106	74.13
3	Mar/95	144	90	62.50
4	Aug/95	109	67	61.47
5	Mar/96	170	113	66.47
6	Aug/96	135	96	71.11
7	Mar/97	35	23	65.71
8	Sep/97	249	178	71.49
9	Mar/98	111	85	76.58
10	Sep/98	173	120	69.36
11	Mar/99	198	141	71.21
12	Sep/99	243	166	68.31
13	Mar/00	168	114	67.86
14	Sep/00	274	159	58.03
15	Mar/01	231	141	61.04
16	Sep/01	248	161	64.92
17	Mar/02	169	108	63.91
18	Sep/02	178	95	53.37
19	Mar/03	161	95	59.01
20	Sep/03	219	115	52.51
21	Mar/04	182	107	58.79
22	Sep/04	271	168	61.99
23	Mar/05	211	138	65.40
24	Sep/05	243	168	69.14
25	Mar/06	225	175	77.78
26	Sep/06	210	156	74.29
27	Mar/07	161	132	81.99
28	Sep/07	183	133	72.68
29	Mar/08	160	128	80.00
30	Mar/09	102	87	85.29
31	Sep/09	148	117	79.05
32	Mar/10	92	77	83.70
TOTAL		**5653**	**3836**	**67.86**

86. The above table has been filed by the ASG as a part of his submissions, to counter the contention of the women officers that whereas most male officers have been granted PC, the number of women officers is abysmally low. The above chart provides for

(i) The number of male officers passing out;

(ii) The number of male officers granted PC; and

(iii) The percentage of those granted PC under (ii) as a proportion of the officers passing out in (i).

87. The chart, however, suppresses an important feature which is the number of officers who had not opted for being considered for PC (described in the parlance as 'non-optees"). In other words, the percentage of male officers granted PC has been computed in the chart without disclosing the factual details of the number of male officers who had not opted for PC. Only when the number of "optees" is considered against the "non-optees", can the percentage of male officers who were successfully granted PC be accurately determined. This is a significant omission on the part of the Army authorities from which an adverse interference must be drawn. However there is another and more fundamental aspect which emerges from the disclosure which has been made in the above chart by the Army authorities. The chart indicates the number of officers who were granted PC during the course of the selections which took place twice every year. A close reading of the data would show that in a number of years, the male officers who were granted PC was far lower than the ceiling of 250 vacancies prescribed by the policy letter of the MoD dated 15 January 1991. The table below, which is prepared on the basis of the above chart of the Union of India, computes the number of male officers granted PC between 1994 and 2010:

Year of Commission	No. of Officers granted PC	Total Officers granted PC in one year
1994	77 + 106	183
1995	90 + 67	157
1996	113+ 96	209
1997	23 + 178	201
1998	85 + 120	205
1999	141 + 166	**307**
2000	114 + 159	**273**
2001	141 + 161	**302**
2002	108 + 95	203
2003	95 + 115	210
2004	107 + 168	**275**
2005	138 + 168	**306**
2006	175 + 156	**331**
2007	132 + 133	**265**
2008	128 + 87	215
2009	87 + 117	204
2010	77	77

88. The statistics which have been advanced by the Army authorities disclose two things. Firstly, in a number of years between 1994 and 2010, the ceiling limit of 250 had not been crossed. If the ceiling limit of 250 had not been crossed, the justification which has been offered for benchmarking women officers against the lowest male officers of the corresponding batch turns out to be specious and a red-herring. Evidently, in their anxiety to rebut the submission of the petitioners in regard to the disparity in the percentage of male and female officers granted PC, the statistics which have been placed on the record, completely demolish the case for benchmarking. It is also necessary to understand is that in many years the ceiling of 250 officers was not met

and the number of officers that were granted PC were below 250, the question of evaluating officers on the basis of *inter se* competitive merit did not arise. This leads us to the second important aspect, which is, that in certain years such as 1999, 2000, 2001, 2004, 2005, 2006 and 2007, the ceiling of 250 was crossed for the male officers. This again belies the claim that benchmarking is crucial to maintain the integrity of competitive merit for grant of PC, as envisaged by the Policy Letter dated 15 January 1991. The data, in fact, shows that in several years, the ceiling was crossed, which is an indicator of the fact that it has not been applied as a rigid norm.

89. Bearing this in mind, we note the submission of the ASG that for the present year, while implementing the judgment of this Court in **Babita Puniya** (supra) the ceiling of 250 vacancies was not applied as a one-time measure. This further demolishes the so-called rationale for benchmarking which has been offered by the ASG. For the above reason, there can be no manner of doubt whatsoever that the attempt to apply the benchmark of the lowest selected male officer is a ruse to deviate from the judgment of the Court and to bypass the legitimate claim of the WSSCOs. This benchmarking becomes particularly problematic, when coupled with the manner in which the reliance on ACRs was made.

G. 3 Reliance on Annual Confidential Reports

90. The next aspect which needs to be analysed is the grievance of the women officers on the reliance placed on their ACRs for determining the grant of PC. The WSSCOs claim that when their ACRs were being written, women who had been appointed on SSC were not entitled to PC and hence their ACRs were written in a casual manner. Now, the narration of the Army Orders and instructions adverted to earlier, demonstrates that the recommendation of the Commanding Officer and the Brigade Commander was necessary for evaluating an officer for the grant of PC. This was reiterated in MoD's Policy Letter dated 30 September 1983, AO 18 /1988 and MoD's Policy Letter dated 24 February 2012. The MoD Policy Letter dated 24 February 2012, for instance, clearly specifies the requirement that in every ACR, where the officer has been recommended for PC by the reporting officer, he will be awarded '0' mark, and where he has not been recommended for PC, he will be awarded minus 2 marks. Now, it is an indisputable position that since WSSCOs were not entitled to the grant of PC, this part of the ACRs was invariably left blank.

A 91. In this context, Army Order 45 of 2001[80] dated 31 December 2001 *inter alia* stipulated in para 124 that "communicating the relevant portions of the assessment by first level of reporting officers, is one of the basic principles for achieving objectivity in the system of reporting". Para 125(c) specifically stipulated that "when ratee is Not Recommended for Promotion or Not Recommended for Permanent Regular Commission/ B Extension for Short Service Commissioned Officers", even then the assessment by the second or higher-level rank officer must be disclosed. The reasons and justification were to be communicated along with the pen picture to the officer reported upon. On the other hand, it has been accepted by the Army authorities that the ACRs of the WSSCOs on the C aspect of the recommendation for PC were left blank for the simple reason that these officers were not being considered for the grant of PC. As a matter of fact, even as late as 23 October 2020, a communication has been addressed by the Secretary Military Branch, Integrated Headquarters of MoD (Army) in the following terms:

D "A/17151/5/MS 4 CR Policy 23 Oct 2020

HQ

Southern Comd (MS)

Eastern Comd (MS)

E Western Comd (MS)

Central Comd (MS)

Northern Comd (MS)

ARTRAC (MS)

F South Western Comd (MS)

SFC (MS)

IDS (MS & SD)

ANC (MS)

G **ENDORSEMENT OF RECOMMENDATION FOR PERMT COMMISSION IN CRs FOR WOMEN OFFRS**

1. As per instrs issued vide ADG PS/ AG's Br Letter No PC 32313/PC to Women offr/Admn Instrs/AG/ PS-2(a) dt 30

H [80] AO 45/2001/MS- Confidential Reports on Officers

Jul 20, women offrs of the IA will hereinafter be considered for permt commission in all Arms/services. ***The same necessitates endorsement of specific recoms (Yes/ No) wrt grant of permt commission by Reporting Offrs in CRs of women offrs.*** It has however been obs that Reporting offrs are still erroneously endorsing 'NA' in the CR coln related to the same.

2. Above in view, in accordance with instrs above, it is clarified that ***Reporting Offrs will mandatorily endorse either 'YES' or 'NO' in the coln of "Recommendation for Permt Commission"*** in CRs of all women offrs.

3. The above may pl be disseminated to all concerned for compliance."

This indicates that as recently as in October 2020, the same problem of the ACRs of WSSCOs not being endorsed with the recommendation continued to persist. The ASG submitted that this structural problem was corrected by treating all the WSSCOs in the present batch of 615 officers to be recommended for the grant of PC. However, the issue is not confined merely to WSSCOs not being recommended for PC in their ACRs, but instead relates to the broader aspect which permeated the whole process of ACR writing for women.

92. WSSCOs, unlike their male counterparts, were not eligible for being considered PC in the 5th / 10th year of their service. The grievance is that the reporting officers treated these WSSCOs differently while writing their ACRs as compared to their male counterparts who were eligible for the grant of PC. For instance, a document titled "Ready Reckoner for Initiating/Reviewing/Endorsing the Confidential Reports, Unit Assessment Cards and Non Initiation Reports"[81] states that in the case of women special entry officers, a recommendation for extension is mandatory. Evidently WSSCOs were being treated differently for the reason that they were not eligible for the grant of PC. Following the decision of this Court in **Babita Puniya** (supra), a study group was constituted by the Integrated Headquarters of MoD (Army) on 2 March

[81] Ref MS Br Letter No A/17151/MS 4 (Coord) dated 20 February 2004, provided that: "(o) In case of Short Service Commissioned Officers, recommendations for 'PRC/ Extension' are mandatory. In case of Women Special Entry Scheme Officers, recommendation for 'Extension' is mandatory. Reasons for 'Not Recommended' should be communicated to the Ratee."

2020 to carry out a "Holistic Appraisal of Induction and Employment of Women Officers in Indian Army"[82]. In this context, the communication dated 2 March 2020, has taken note of the fact that career progression for women officers in terms of their being assigned for Army courses and posting exposure was limited as a result of an option for PC not being available. Noting this anomaly, the document records:

> "11. **Career Progression**. The 'in service' career progression of WOs in terms of detailment for Army courses and posting exposures etc is presently limited keeping in view that option for PC and further career prog was NA. The same will now need to be aligned to male offrs so as to place them on equal footing to compete for Nos 5, No 3 and other SBs. The Study Gp would be required to delve upon this issue in details and may also review the list of male courses applicable for WOs."

The above communication which has been issued by Lt. General SK Saini, Vice Chief of Army Staff states that it has the approval of the COAS. The observation in the communication in regard to the limited posting opportunities which were available to women officers is borne out by an earlier communication[83] dated 30 December 2003 of the Military Secretary Branch, Army Headquarters which records that the posting of women officers in "soft field and peace stations is affecting the posting profile of their male counterparts". Consequently, specific directions were issued for the posting of women officers at appointments in peace regions as well as in formations in the field.

93. The above factors must be coupled with the following circumstances, which must be borne in mind while considering the remedial steps necessary to rectify the discrimination which has been suffered by the WSSCOs:

(i) The number of vacancies which were available for the grant of PCs in the batches for which the WSSCOs were being considered over the years has not been disclosed while processing the claims for the grant of PC. As noted earlier, in many cases, the upper ceiling of 250 officers to be granted PC was not met and in some years, this limit was breached. If, as suggested by the tabulated statement produced by the ASG in the written submissions, vacancies

[82] Ref Letter No B/32313/Road Map/AG/PS-2(a) dated 2 March 2020

[83] Ref Letter No 04520/MS Policy dated 30 December 2003

were available, the criteria of meeting the benchmarking of the lowest male selected officer is evidently irrational and arbitrary. This rationale, while touted as a manner of including competitive merit, was ignorant of the structural discrimination that was faced by women officers whose ACRs were casually graded, even when compared to the least meritorious male officer in their corresponding batch;

(ii) In the case of male officers, the process of conducting the Special No. 5 Selection Board for considering the grant of PC is initiated by issuing an order declaring the date of the Board in advance so that the preceding three ACRs can be taken into consideration to assess the performance of the officer for the grant of PC. An officer has the option to seek remedial measures before the redressal mechanism to espouse any adverse entry in the ACR. This process has not been followed in the case of the WSSCOs before the Special No. 5 Selection Board was conducted. As an illustration for this, the petitioners have relied on a communication dated 17 January 2020 of the Integrated Headquarters of MoD (Army) which specifically states as follows:

> "**Initiation and Despatch of CRs**
>
> 14 The cut off CR for consideration by No 5 SB is 31 Oct 2019 vide AO 4512001/MS as amended CO/OC will ensure that CR for the year 2018-19 is forwarded in time in the correct format, vide AO 45/2001/MS as amended, and should reach MS Branch (respective CR library) within specified time Intermediate formation HQs should ensure that the CRs/Spl CR is initiated/endorsed for timely submission Also ensure Spl CR (if initiated) reaches concerned CR Library on or before 31 Mar 2020"

(iii) In the counter affidavit which has been filed by the Col. Military Secretary (Legal) it has been specifically admitted that:

> "15…**it is submitted that women officers were considered by No 5 SB in 5th and or 10th year for extension of service only**. The criteria of medical

A fitness for grant of permanent commission and grant of Extension of service are entirely different. No SSC officer has ever been denied extension of service due to medical reasons. Therefore, the contention that since the petitioners were found medically fit at 5th or 10th year of service, as the case may be, when they were considered for extension of service, they should be now considered as fit for grant of permanent commission, are baseless." (emphasis supplied)

Women officers were considered by Special No. 5 Selection Board in their 5th and/or 10th year of service for extension of service only. In other words, Selection Board 5 was for extension and PC, but the women officers were granted only extensions because the option of PC was not available;

(iv) The ratio between the marks assigned to computer evaluation and the value judgment marks assigned by the members of the Board was initially pegged at 80:20 as on 30 September 1983. This came to be altered on 24 February 2012 by MoD's Policy Letter to 95:5. In the written submissions tendered by the ASG it has been argued that :

"21. As per Annexure R-5 (page 122-132) [MoD Policy Letter dated 30 September 1983], the quantified profile marks are to be given out of 80, while the marks for value-judgment are to be given out of 20. Juxtaposed, as per Annexure R-6 (page 133-144) [MoD Policy Letter dated 24 February 2012], the same are to be given in the ratio of 95:05 (Please see page 134). **Depending upon their batch, the petitioners and other similarly placed women SSC officers were assessed either under Annexure R-5 or under Annexure R-6, as was done in the case of their male counterparts as well.**" (emphasis supplied)

The above submission indicates that while with effect from 30 September 1983, the value judgment marks were graded out of 20, it was subsequently brought down to 5 marks on 24 December 2012. The above extract indicates that the petitioners and other similarly situated WSSCOs were assessed either under the 30 September 1983 norm or as

the case may be the 24 February 2012 norm, depending on their batch. The inherent lack of fairness is evident from the fact that the value judgment marks which were assessed for their male counterparts were by a different Special Board 5 in distinction to the Special Board which considered the case of the WSSCOs. There is a subjectivity inherent in value judgment marks which is the reason for bringing them down from 20 to 5. The issue is exacerbated in the case of the WSSCOs involved in the present case because the marks for value judgment have been assigned by a completely distinct Board;

(v) It has been admitted in the counter-affidavit that the confidential reports, discipline and vigilance reports if any, and honours and awards as on the 5th or 10th years of service were considered in the case of the women officers. As a consequence of this, the qualifications, achievements and performance of women officers after the 5th or 10th year of service (as the case may be) have been ignored. At this stage, it is necessary to note that para 13(b) of AO 18/1988 specifically contemplates the "last ACR before assessment for PC" being taken into reckoning for grant of PC. Similarly MoD's Policy Letter dated 24 February 2012 specifically contemplates that in evaluating the overall performance of the officer, "the average will be worked out for each year as well as for the entire period of officers' services". Para 4(a) stipulates thus:

> "(a) QAP: Overall performance of the officer is evaluated by taking the average of figurative assessment of all reporting officers other than FTO and HTO. **Average will be worked out for each year as well as for the entire period of officers service.** The latter QAP will be converted into a proportion of 75 marks." (emphasis supplied)

In spite of the above clear stipulations, it is now an admitted position that the distinguished record of the WSSCOs beyond the 5th/10thyear of service has been disregarded. The laurels achieved by them in the service of the nation after the 5th/ 10th year of service have been ignored;

(vi) It has been submitted on affidavit that even women officers who have been awarded the prestigious commendation card from the COAS have been denied PC. As an example it has been stated that Lt. Col. Shikha Yadav (as well as several other women officers) have been denied PC though they have been awarded the COAS commendation. Lt. Col. Tashi Thapliyal was awarded the Vishisht Seva Mandal. Several women officers who have served in UN Missions overseas have been denied PC. There are women officers who have excelled in national sports events, exemplified by Major Pallavi Sharma who has a proven track record *inter alia* in shooting championships which has been ignored[84];

(vii) In IA 12148 of 2020 in Writ Petition (C) 1172 of 2020 (**Lt. Col. Sonia Anand** v. **Union of India),** a detailed chart has been annexed indicating illustrations of women achievers who have been denied PC. At the cost of enlarging the size of this judgment, it becomes necessary to highlight the tabulated statement. The facts which have been set-forth before the Court have not been denied during the course of the submissions of the ASG :

"Illustrations: Women Officer Achievers who have been denied Permanent Commission.

Name	Lt Col Anuja Yadav
Course	WS 12
Arms	Engineers
Achievements	First Women officer of an Engineering Regiment. First Indian Woman to be selected for a UN Mission as a Military Observer Instructor in College of Military English Engineer in Charge of Op Wks active formation Outstanding ACRs COAS Commendation Card 01 GOC in C Commendation Card 02 Nos
Remarks	Selected for UN Mission based on initial 6 years ACR

[84] We cite these examples only to reflect the outstanding nature of the service of WSSCOs. We do so in full recognition of the fact that that these instances merely constitute a drop in the ocean of the contribution of women officers in the Armed Forces.

Name	Lt Col Archana Sood
Course	WS 15
Arms	Engineers
Achievements	• First Woman Officer to be posted to 7 Engineer Regiment, Madras Sappers. • Topper of Geographic information officers course. Felicitated with a trophy by Engineer in Chief for best student in 2002. 'A' grading in Geographic and Information and remote sensing course from CDAC Pune in 2004. • Shape 1, Mandatory courses JC qualified • First Woman Officer to be handpicked and posted to cops of Military Police as Second in Command of an Infantry Division Provost Unit as a part of a pilot project in 2016 before inducting women jawans in mil police. • First Woman Officer to be posted as Garrison Engineer of an Engineer Park which holds over 21000 tons of operational stores and is responsible for its maintenance, upkeep and issue on the Western front. • Instructor tenures in Cat A and Cat B training establishments. • Called to appear for interviews to UN missions twice in service, based on first seven CRs. • Qualification: BE(Civ), Domain knowledge, survey and remote sensing. • Served in operational area, Counter Insurgency Ops (J&K)
Remarks	

Name	Lt Col Julee
Course	WS 26
Arms	AAD
Achievements	1. Trained first batch of Women constables for Assam Rifles 2014-16 who are doing well and have been employed in J and K off late. 2. Handpicked to train first batch of Women Mil Police soldiers for Indian Army who are under training at CMP centre and school [B]ang[a]lore.. 3. Participated in active CI by doing incident free ROP in Anantnag district during hot scenario of stone pelting in 2016-17 where I got downgraded medically due to strenous(sic) type of field working involving lives of troops. 4. Participated in active ops post Uri attack with Unit. 5. Got COAS commendation in Jan 17 for Assam Rifles. 6. GOC in C SC on the spot commendation for work execution in COVID. 7. Have done all mandatory courses incl LGSC and JC
Remarks	Two tenures of J and K and one Nagaland as my field service.

Name	Lt Col Gopika Bhati
Course	WS 10
Achievements	Qual BA (Hons) 1. Only off[ice]r to receive GOC-in-C Commendation Card for rendering emergency duties in Northern Command sector in the year 2016. 2. Active participation in 'OP Cloud burst': Rescued lives of foreign and Indian nationals. 3. 'OP Parakram' 4. 'OP Vijay' 5. 'OP Rakshak' 6. High Altitude Area HAA and OC 'R' Centre Leh 7. Cl Ops Area and DAAG of Infantry Division in Cl Ops 8. Northern and North-East sector 9. Represented India in Lawn Tennis 10. National level Squash player 11. National level Tennis player 12. Recipient of 'Award of Appreciation' for sports by Govt. of India 13. Recognition by Hon'ble Supreme Court and Indian Media
Remarks	Service profile is mainly towards operations and challenging duties outside comfort zone and in forefront with troops in step with male counterparts throughout the service of 23 years.

Name	Lt Col Saras Handa
Course	WSES(O)- 05
Arm	AOC
Achievements	1. Only Lady Off[icer] to be detailed for UAV logisticians' course in Israel. 2. Participated in Op Vijay and Op Parakram. 3. Posted in CI/Hard Fd/HAA areas like Masimpur, Leimakhong, Leh, Bari Brahmana. 4. One of the first lady off[icer] to be detailed for Advanced Materials Management course (TSS) at CMM Jabalpur. 5. Instrumental in raising the Provision branch of Avn depot. 5. Proficient in French language. Undertook assignments at French language instructor in AFLC, Delhi Cantt (IHQ of MoD, MT 15). 6. Included in the IHQ pool of foreign linguistic pool. 7. Participated in Marathons in High Altitude Area (Leh). 8. A polyglot, double Masters in Microbiology and English, MBA and a Bachelor's in Law.
Remarks	Four ERE assignments, two with EME, One with Avn and Current with Edn. Five Field postings including Counter insurgency and High Altitude areas. Volunteered for Siachen.

Name	Lt Col Nisha Rani
Course	WS 18
Arms	AOC
Achievements	1. Awarded with Army Cdr Commendation Card, SWC 2. Served as Administrative Off[ice]r in CI ops 3. Served in ERE with Army Aviation Corps 4. Been part of National Integration Camps 5. 2 units awarded with Best DOU while serving as OIC, Inventory Control Wing 6. Participated in EWTs (5 exercise)
Remarks	

Name	Lt Col Navneet Khangura
Course	WS 15
Arms	Signals
Achievements	Qual BTech (pre comm) MTech (Done myself from BITS Pilani in 2 years online classes but proper physical semester exams subject – SOFTWARE SYSTEMS) 1. First WO Posted to an Infantry Division Signal Regiments 2. First WO Posted to an Armoured Division Signal Regiment 3. First to be selected for UN Mission as Military Observer 4. Instructor Class B at Military College of Telecommunication Engineering 5. Instructor Class A at Military College of Telecommunication Engineering 6. All outstanding ACR 7. Participated in Op Parakaram

	8. Done a tenure in CI (Ops) at Jorhat (Assam) 9. Domain Expertise – Cyber Security -: Three years posted as System Manager at Army Cyber Group handling Cyber Audits of Army HQ and PAN India Command HQs, Cyber Forensics, CERT – Even present website of CERT – Army made by Lt Col Navneet Khangura
Remarks	Selected for UN Mission based on CRs of first 4 years of her service

Name	Lt Col Poonam Sharda
Course	WS 19 (Mar 2002)
Arms	Intelligence Corps
Achievements	1. First lady off[ice]r served in CI unit – 21 CIIU Doda under D force which is equivalent to an RR tenure for int off[ice]r 2. First lady off[ice]r from whom PIT for lady off[ice]r as well as for int offer started 3. Satellite imagery interpreter for last eight years 4. Only lady off[ice]r in Int corps who is interrogation cadre qualified
Remarks	

Name	Lt Col Preena Verma
Course	WS21 (08 Mar 2003)
Arms	Engineers
Achievements	1. LLB Officer commissioned in Corp of Engineers 2. First woman officer to be posted with Border Road Organisation in Corp of Engineers in 2003 3. Silver medal in First Asian White Water River Rafting Championship in Sept 2003 4. Goc in c -D1 5. Handled law and Dv cases of MES throughout 17 yrs in Cort of Engineers
Remarks	

Name	Vanita Dhaka
Course	WS09
Arms	EME
Achievements	1. Topped the degree course and got DGEME best all rounder officer trophy. First lady off[icer] to achieve this with inst grading 2. Done specialized course. TO course (psychologist) assessor and was done tenures at Selection centre Bangalore and Kapurthala. 3. Presently posted at SI trg of a cat A est Institute of National Integration as a psychologist 4. Passed out with Gold medal from OTA 5. Obtained 'A' grading in YO's 6. Called for interview to UN Msn in Ethiopia & Eritrea (UNMEE) in 2005.
Remarks	

Name	Maj Garima Gulati
Course	SS – 01
Arms	Sigs
Achievements	1. 'A' grading in SODE course. 2. 'A' grading in MLIT course 3. Citation sent for COAS commendation card 4. Participated in EWT and all Exercises within one year of svc as part of 18 IDSR (A) 5. Served in CI area from Dec 2013 till Jun 2016
Remarks	All Outstanding ACR for last 3 years

Name	Lt Col Ritu Srivastava
Course	WS 12
Arms	• AOC
Achievements	1. Goc in C Commendation card - 01 2. GSO 1 tr[ainin]g at ADC reg[imen]t Centre 3. Did 5 important appointments. (AE), All Outstanding AE reports from IO 4. Awarded Van Prahari from Rajasthan State Govt 5. Qualified in computer course from CDAC, Disaster management from NIDM, MBA in supply chain management 6. Prov n proc off[ice]r of two biggest tech COD 7. Subject matter expert in civilian personnel management 8. Participated in Op Parakaram and Op Rakshak
Remarks	

Name	Lt Col Sonali Singh
Course	WS 14 (04 September 1999)
Arms	Army Service Corps
Achievements	1.First WO of HQ 21 Sub Area to be the convoy cdr for Pathankot to Leh convoy in the year 1999 with a strength of 50xALS/10 tonner approx. 2.First WO to be the sole Officer-in-Charge of Ammunition dump, Valla (Amritsar) during OP Parakram. 3.Was appointed the first AAG of HQ 84 Inf Bde and was responsible for segregating the duties of A and Q branch. 4.First WO to be appointed as SSO(Land) in St[atio]n HQ Mamun and handled legal cases pertaining to army land, arbitration cases, hiring of land in consultation with civil administration. 5.Selected as Ad[ministrative] officer of Sainik School.
Remarks	One tenure of J&K and one tenure of Nagaland as my F[iel]d service.

Name	Major Pallavi Sharma
Course	SS 02 (19 SEP 2009)
Arms	EME
Achievements	1.Served in Cl area (03years) 2.and Op Parakarm. Led the adv party of the DOU to the fwd area during Op Vijay. 3,). Got an Outstanding in the unit. Selected at AMU (Army marksmanship unit) International participation **Represented Indian shooting team at Czech Republic and Hannover, Germany (2019)** *Represented Services team at 35th National games* *Represented Army in over 20 National level* championships Medals **03* Gold medals** **02* Silver medals** **Shortlisted twice for world mil games (china & Qatar)** Table tennis 2017 College of military engineering Pune 3* gold medal in singles, doubles and mixed doubles category 2020-MCEME-1* Gold (single category) Badminton 2014- 36 Division Badminton Championship 1*silver medal (singles) 2* gold medal (mixed doubles and double category) 2016- CME badminton tournament 01*silver medal (mixed doubles category)

	4.Responsible for implementation of automation of the first Technical Store Section in EME. Did officiating OC in arty brigade workshop Citation from the unit initiated for refurbishing Karazes and making mobile ramp girders in just two months. And awarded outstanding Acr. 4.Did OC LRW 114 AER, no breakdown in exercises. 5.Doing mandatory EMEODE after YOs and Ops and logistics. Convocation of technical degree course on 10 Dec next month. 6.Medically Shape One. 503 x tenures in Field in North East and 02 x tenures in J& in criteria appt of Ord. 6. Qualified in CI from CITS Balipara. 7 Received COAS CC in 2020. Meghalaya Governor's Award for best NCC off[ice]r in NER. 8.Project off[ice]r for implementing the Pilot Project of Automation of enrolment of cadets of NCC Dte in NER. 9. Extension taken by the Commanding Officers in two different units in Organisational interest in field and peace. 10. Mostly outstanding ACRs.
Remarks	

Name	Lt Col Mamta Gupta
Course	WS 18
Arms	EME
Achievements	From First batch to do TO (psychologist) course First WO to be posted at selection centre Bangalore, Kapurthala and INI as psychologist First WO to get gold medal and DGEME all rounder officer trophy in degree course Twice got UN mission call Sports person, won stn competitions in many postings Instructor grading Did all arm QM course Conducted PDP for service entry at HRDC as assessor

Name	Lt Col (Dr) Kamalpreet Saggi
Course	WS 15
Arms	EME
Achievements	BE(mechanical) MBA PhD TO(psychologist) course posted at selection center Bhopal as psychologist First WO to get gold medal and DGEME all rounder officer trophy in degree course Twice got UN mission call Sports person, won stn competitions in many postings Instructor grading Did all arm QM course Conducted PDP for service entry at HRDC as assessor

Name	Lt Col Asha Kale
Course	WS 04 (20 Aug 1994)
Arms	AOC
Achievements	1.First WO to be posted to J & K in active Cl. Extn of tenure was taken by unit in organisational interest. 2.Deployed in forward area during Op Vijay and Op Parakram. 3.Raised Technical Store Section (TSS) in 14 Corps EME Bn during its raising. Also carried out automation of TSS for the first time in 1999-2000. Was awarded an outstanding ACR. 4. Successfully completed training in CITS Balipara, Assam in 2005. 5. During tenure in NCC Dte NER was Project officer to implement Pilot Project for Automation of cadets enrolment in complete NCC. Extn for 6 months was taken by Dte in organisational interest. 6.Was awarded COAS CC in 2020 and also Meghalaya Governors' Medal for best NCC offr in NER. 7.All ACRs are outstanding after reinstatement.
Remarks	Three ERE tenures…02 with EME and 01 with NCC (Deputation)

Name	Lt Col Ipsa Ratha
Course	WS 15
Arms	ASC
Achievements	Qual B Sc MA in Personnel Management and Industrial Relations 1.Total Regimental service of 10 years in second line and third line Bns. 2.Served as a DAQMG in 25 Inf Div. 3.Served as GS01 SD in 16 Corps 4.Catering Off[ice]r in School of Arty. 5.All outstanding ACR 6.Participated in Op Parakaram 7.Three tenures in CI(Ops) in Northern Command and one tenure in CI(ops) in North East 8.Awarded GOC in C Commendation

Name	Lt Col Inderjeet Kaur
Course	WSES 20
Arms	EME
Achievements	Qual B Tech (E&CE) with DISTINCTION all 4 yrs M Tech (Quality Mgt) from BITS PILANI (CGPA 9.4) YOs grading 'A' 1.18 yrs of physical service. Served in Strike Corps, ArtyDiv, 2x Base Wksp tenure, Corps Zonal Wksp, EME Bn and Armd Div. 2.Tenented Appt of LPO &MtrlControl offr in 509 Army Base Wksp, OC LRW in 31 ADSR an indep appt, Admoffr in 505 Army Base Wksp. 3.Participated in OP Parakaram. 4.Served in OP Rakshak. 5.Served in OP Rhino. 6.Overall Good/Outstanding ACRs. 7.SHAPE I in Medical Category.

Name	Lt Col Navneet Lobana
Course	WS19
Arms	Engineers
Achievements	First women off[ice]r to do a Garrison Engineer Appointment. Got best GE Trophy in Central Command during the tenure. Done all mandatory courses incl JC with good gradings. Raised a new unit GE Command Test Lab in Udhampur and got outstanding report for the same. Got UN call in 4th year of service but could not proceed due to personal issues. Done instr CL A appt at MEG & Centre, Bangalore. Outstanding/very good ACRs during entire service. Presently doing MTech which is a promotion course After clearing interview and MS criteria.
Remarks	I am pursuing MTech since July 2020 for which MS Branch found me fit & competent • Post Feb judgement

Name	Lt Col Anjali Bisht
Course	Ws 09
Arms	Signals
Achievements	Participated in nationals while representing army team in ski Instr tenure in mctemhow Army Commander Northern Command, commendation card Just been recommended for COAS citation 3rd rank in Lucknow Self volunteered for jc course at 20 years of service and apart being nominated as course senior got B grading Specialised in procurement procedures, endorsed in pen picture.
Remarks	8 out of last ten Acr were graded as outstanding

Name	Lt Col Amandeep Aulakh
Course	WS 10
Arms	Eng[inee]rs
Achievements	Part of the first course to do Combat Engr Yos First lady off[ice]r to be posted in Armd Engr Regt First lady off[ice]r to be posted in an Engr plant unit Actively participated in Op Prakaram being posted in aengr plant unit. Was responsible for detachment maintenance at LC in 15 XXX, carried out inspection on ground of all the dets Done three regti tenures out of which two were in Cl/Fd Commanded a unit in CI for seven months. Outstanding/Above avg ACRs
Remarks	

Name	Lt Col Ritu Srivastava
Course	WS 12
Arms	• AOC
Achievements	1.Goc in C Commendation card-01 2.GSO 1 trg at AOC regiment Centre 3.Did 5 important appointments. (AE), All Outstanding AE reports from IO 4.Awarded Van Prahari from Rajasthan state Govt 5.Qualified in computer course from CDAC, Disaster management from NIDM, MBA in supply chain management 6.Prov n proc off[ice]r of two biggest tech COD. 7.Subject matter expert in civilian persmgt 8.Participated in Op Parakaram and Op Rakshak.
Remarks	

Name	Lt Col Manreet
Course	WSES 13 (March, 1999)
Arms	AOC
Achievements	1 Outstanding ACRs in AE appointments. 2 Tenanted appointment of Dy Commandant of an Advanced Base Ordnance Depot. Outstanding ACR during the tenure and Name forward for outstanding officer of the corps. 3 Tenanting appointment of second in command in various Units with outstanding and above average ACRs. 4 Officiated as Commanding Officer in Arunachal Pradesh during Doklam dispute when loads ammunition was required to be pushed fwd to Op location. 5 Participated in Op Parakram, Op Vijay and Op Zafran and various Exercises With Troops (EWT) 6 Tenures in Cl Ops and Field 7 SHAPE 1 medical category.

Name	Lt Col Karuna Sood
Course	WSES 15 (March, 2000)
Arms	Sigs
Achievements	Present Med Cat SHAPE 1 Civil Qualifications. BSC (PCM) MFC Performance in Army 1.Initially commissioned in the Strike Corps and participated in OP Parakaram 2.Served in Command and Army HQ Units. 3.Considered for UN MSN interview however could not appear due to maternity reasons. 4. Served in CI (Ops) in Northern Command as DAA&QMG. 5.Commanded NCC boys Bn for one and half year in officiating capacity. 6. Nominated for GTO and first women officer GTO to be posted in SSB (C) Bhopal. 7. Handpicked for appointment of 2IC provost in an Div Provost Unit as part of test bed for posting women officers in CMP. 8. First women officer to be given second tenure of CMP in a elite unit of Delhi. 9.Participated in all ceremonial events of National level for consecutive two and a half years. 10.Presently posted in a Cat B training establishment. 11.Have been rated as above average to outstanding grading in all the UACs/ACRs by IOs in few cases by ROs as well where ever IO was not present.

Name	Lt Col Preetal Parkhi
course	WS 17
Arm	Corps of Sigs
Achievements	Achievement 1.Volunteered for RR posting and served in Force Sig Regt. 2. Served three field tenures in J&K including one each of RR and High altitude. 3. Carried out only AE appts (Comn Coy Cdr of Comd, Corps and Div Sig Regt) from 6th-13th year of service in field and peace and criteria ACR initiated for all those appts. 4. Independently taken entire Unit for EWT as OIC Ex. 5.Chosen for and represented Sigs for demonstrating e-learning capabilities of Indian Army to US delegation. 5. Presently, Single handedly executing Landline Comn projects of Airforce in SWAC
Remarks	

(viii) Of the above officers, it is necessary to emphasize in particular Lt. Col. Navneet Lobana (serial No XIV above). Lt. Col. Lobana is presently pursuing an M.Tech degree course for which she has been depued by the Army from 30 July 2020. Following the decision not to grant a PC to her, the officer has been asked to refund the cost of the

course which is approximately between Rs. 8.5 to 10 lacs. Applications for selection of officers for a Master of Technology in Structures at the College of Military Engineering were invited by the Training Branch, E-i-C's Branch of Integrated Headquarters of MoD (Army), by a communication dated 28 November 2019. Based on a qualitative requirement criterion, the applications were shortlisted and a list of officers eligible for the interview was published on 20 April 2020. Lt. Col. Lobana was interviewed by a panel of DRDO Scientists at the College of Military Engineering, a Board of Officers headed by Brigadier rank officers and member officers from MS Branch 12 (Military Secretary Branch of Corps of Engineers) and Training Branch from E-in-C's Branch. The officer was finally detailed on 10 July 2020 and has given an undertaking to continue to serve the Army for a minimum period of five years. Following her selection for the course, Lt. Col. Lobana moved from her posting at Patiala and reported to the College of Military Engineering, Pune and the course commenced on 30 July 2020. She is the only woman officer who has qualified in 2020 for an M.Tech in the Indian Army. She has been denied PC and has been asked to refund the cost of the course. The issue of medical fitness is not being considered here since it will be dealt with later.

94. The above analysis leads to the conclusion that the process by which WSSCOs, were evaluated for the grant of PC was by a belated application of a general policy that did not redress the harms of gendered discrimination that were identified by this Court in **Babita Puniya** (supra). Additionally, its belated and formal application causes an effect of indirect discrimination. The petitioners submitted that Special No. 5 Selection Board appears to have been more a Board for rejection of candidates, than for selection. Some of the finest women officers who have served the Indian Army and brought distinction by their performance and achievements have been excluded by refusing to consider their achievements on the specious ground that these were after the 5th/10th year of service. They have been asked to benchmark with the last male counterparts from the corresponding batches. The benchmarking criterion plainly ignores that in terms of the MoD Policy Letter dated 15 January

A 1991 a cut-off of 60 per cent was prescribed and a cap of 250 officers who would be granted PC annually was laid down. Competitive merit was required to be assessed *only* where the number of eligible officers exceeds the ceiling of 250. As the figures which have been disclosed by the Union of India indicate, for the period from 1994-2010, there were years when the ceiling of 250 officers had not been reached. Then there B are other years where the total number of male officers granted PC was well in excess of 250. For years during which the ceiling of 250 had not been reached, there is absolutely no justification to exclude the WSSCOs who had fulfilled the cut-off grade on the basis of the benchmarking criteria. Moreover, it is evident that the ceiling of 250 was C not regarded as an absolute or rigid criterion as already indicated in the earlier part of this judgment.

95. The evaluation process which has been followed in the case of the WSSCOs has clearly ignored that the writing of their ACRs was fundamentally influenced by the circumstance that at the relevant time D an option of PC was not available for women. Even as late as October 2020, the authorities have emphasized the need to duly fill in a recommendation on whether or not WSSCOs should be granted PC. The manner of allocating 20 marks or 5 marks as the case may be, in the subjective assessment has been found to be flawed since male counterparts of the WSSCOs were assessed by an entirely distinct Special E No. 5 Selection Board. To make a comparison in regard to the award of subjective marks ranging between 5 and 20 by different sets of boards would be completely unfair and arbitrary. It does not fulfill the avowed purpose of benchmarking which was to compare like with like.

96. In addition to this, an argument on systemic flaws has been F advanced by the petitioners that they were not given career enhancement opportunities available to their male counterparts, such as participating in performance courses, and in cases where they did participate in such courses, it was not given due reflection in their ACRs. The ASG in his written submissions has stated that this argument is incorrect and that G women officers have done mandatory courses. The only difference, he states, lies in the fact that certain male officers had done additional non-mandatory courses, which would not give any extra advantage as the marks were given only on an average basis. We do not find merit in the submissions of the ASG. While it may be the case that in some instances women officers were given the opportunity to undertake additional H

courses to enhance their performance, we must also be alive to the other end of the spectrum which is that, at no point during their service were women officers incentivized to take such performance enhancement courses as they were never eligible for grant of PC then. It may have been the case that for extension of their service such performance enhancing measures were not critical. Even if we take the argument of the ASG at its highest and concede that these additional courses would not make any difference since the marks were given on an average, it is still possible that these courses could have impacted the value judgment or the subjective criterion of 20 or 5 marks, as the case may be, in their ACRs. The impact caused by the evaluation of ACRs, particularly on the marks for performance of courses is a stark representation of the systemic discrimination that pervaded the structures of the Army. A formalistic application of pre-existing policies while granting PC is a continuation of these systemic discriminatory practices. WSSCOs were continued in service with a clear message that their advancement would never be equal to their male counterparts. Their ACR evaluations made no difference to their careers, until PC was granted to them by a court mandate in **Babita Puniya** (supra). Accordingly, some women's failure to opt for courses in the past that would strengthen their chances and reflect positively on their ACRs is not a vacuous "exercise of choice" but a consequence of a discriminatory incentive structure.

97. Finally, the above analysis indicates that there has been a flawed attempt to peg the achievements of the WSSCOs at the 5th/10th years of service thereby ignoring the mandate that the last ACR ought to be considered and the quantitative performance for the entire record of service must be assessed. Considering the ACRs as on the 5th or 10th year of service for grant of PC would have been appropriate, if the WSCCOs were being considered for PC at that point of time. However, the delayed implementation of the grant of PC to WSSCOs by the Army and considering of ACRs only till the 5th/10th year of service has led to a situation where, in effect, the Army has obliviated the years of service, hard work and honours received by WSSCOs beyond their 5th/10th year of service and relegated them back to a position they held, in some cases, more than 10 years ago. The lack of consideration given to the recent performance of WSSCOs for grant of PC is a disservice not just to these officers who have served the nation, but also to the Indian Army, which on one hand salutes these officers by awarding them honours

A and decorations, and on the other hand, fails to assess the true value of these honours when it matters the most - at the time of standing for the cause of the WSSCOs to realise their rights under the Constitution and be treated on an equal footing as male officers who are granted PC.

98. On the basis of our analysis we have come to the conclusion B that while implementing the judgment of this Court in **Babita Puniya** (supra), the Army authorities have attempted to demonstrate the application of a facially neutral standard as between WSSCOs and their male counterparts. The entire approach is indicated in the following averment in the counter affidavit filed by the Military Secretary:

C "That the Petitioners herein on one hand seek to be treated at par with the male counterparts, however, on the other hand, seek special and unjustified treatment inthe eligibility conditions."

Subsequently, in the course of the written submission, an apology has been tendered in the following terms:

D "11. At this stage, an apology would be in order as regards the equivocality of the last sentence in **para 14 of the C/A (pages 21 and 22)**, which though made in good faith to emphasize the point that the implementation is being done, treating women officers at par with the men officers, ended up, albeit inadvertently, carrying an impression as if the same is being done to complete the rituals. E It is submitted that the UoI is immensely proud of the contribution of women officers to the cause of Indian Army. It is submitted that it is not by any pre-planning that a particular number of women SSC officers do not find themselves approved for PC."

F 99. The fact that there was no pre-planning to exclude women from the grant of PC is irrelevant under an indirect discrimination analysis. As we have noted previously, under this analysis, the Court has to look at the effect of the concerned criteria, not at the intent underlying its adoption. In light of the fact that the pattern of evaluation will in effect lead to women being excluded from the grant of PC on grounds beyond G their control, it is indirectly discriminatory against WSSCOs.

100. We must recognize here that the structures of our society have been created by males and for males. As a result, certain structures that may seem to be the "norm" and may appear to be harmless, are a reflection of the insidious patriarchal system. At the time of

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Independence, our Constitution sought to achieve a transformation in our society by envisaging equal opportunity in public employment and gender equality. Since then, we have continuously endeavored to achieve the guarantee of equality enshrined in our Constitution. A facially equal application of laws to unequal parties is a farce, when the law is structured to cater to a male standpoint.[85] Presently, adjustments, both in thought and letter, are necessary to rebuild the structures of an equal society. These adjustments and amendments however, are not concessions being granted to a set of persons, but instead are the wrongs being remedied to obliterate years of suppression of opportunities which should have been granted to women. It is not enough to proudly state that women officers are allowed to serve the nation in the Armed Forces, when the true picture of their service conditions tells a different story. A superficial sense of equality is not in the true spirit of the Constitution and attempts to make equality only symbolic.

101. Accordingly, the respondents must remove the requirement of benchmarking the WSSCOs with the last male officer who had received PC in their corresponding batches and all WSSCOs meeting the 60% cut-off must be granted PC. Additionally, the calculation of the cut-off at 60%, which must by army orders and instructions be reviewed every 2 years, must be re-assessed to determine if the casual completion of their ACRs is disproportionately impacting the WSSCOs ability to qualify for PC even at that threshold. In light of the systemic discrimination that women have faced in the Army over a period of time, to call for the adoption of a pattern of evaluation that accounts and compensates for this harsh reality is not to ask for 'special and unjustified treatment'. Rather, it is the only pathway for the attainment of substantive equality. To adopt a symmetrical concept of equality, is to empty the antidiscrimination guarantee under Article 15, of all meaning.

G.4 Medical Criteria

102. The medical criteria for assessing officers for the grant of PC have been specified in Army instructions and Army Orders to which a detailed reference has been made in the earlier part of this judgment. While dealing with the application of the criteria to the WSSCOs in pursuance of the judgment in **Babita Puniya** (supra),it would be necessary to revisit some salient features:

[85] Catharine A. MacKinnon, TOWARDS A FEMINIST THEORY OF STATE (Harvard University Press 1989) at p.220.

A (i) SAI/3/S/70 specifically provided that in order to be eligible to apply for PC, an SSC officer must be in medical category A-1. Those placed in medical categories A-2, B-1 and B-2 as a result of casualties suffered in action during operations could also be considered on the merits of each case by the government;

B (ii) Subsequently, when the SHAPE criteria was introduced, para 2(b) was re-constructed in 1972 by AI 102/1972 to stipulate that the medical category should not be lower than grade-II under any of the SHAPE factors, excluding the 'S' factor in which the grade should not be lower than 1. In exceptional cases, it was stipulated that a grading of 2 in both H and E together may be acceptable. A low medical categorization could not be due to medical reasons, but only as a result of casualties suffered in action during operations or due to injury or other disability sustained during duty;

C (iii) Subsequently, AO 110/1981 contained a stipulation for medical boards. Para 13 indicated that for officers who are placed in the TLMC, medical board proceedings recorded on form AFMSF-2 are not required until their medical category stabilizes. Upon the stabilization of the medical category, certain procedures had to be followed;

D (iv) Army Instruction 75-81 dated 4 November 1978 provided for the terms and conditions of service for officers granted SSC in the Army Medical Corps. While laying down an upper age limit of 45 years, para 3(d) also stipulated that applicants must be in medical category SHAPE-1;

E (v) AO 18/1988 stipulates in para 21, that the medical category of an officer seeking PC should not be lower than grade 2 under any of the SHAPE factors, excluding the 'S' factor in which the grade should not be lower than 1. In exceptional cases, grading of 2 in both H and E together acceptable. Moreover low medical categorization should have been caused as a result of casualties suffered in action during operations or due to injuries or other disabilities sustain during duty;

F (vi) Army Instruction 14/1999 dated 1 August 1999 amended SAI 3/S/70 by stipulating that

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"Their medical category should not be lower than S1 or H2 or A3 or P2 or E2 or H2E2 or H2A3 or H2P2 or E2A3 or E2P2. However grant of Permanent Commission to low medical category Short Service Commissioned Officers will be subject to rendition of the requisite certificate in terms of AO 20/75"

(vii) AO 9/2011 specifically defines the meaning of the SHAPE criteria and makes detailed provisions in regard to modalities for evaluation of medical fitness. We have already adverted to the meaning and content of the SHAPE criteria in the earlier part of this judgment.

103. The essence of the submission which has been urged on behalf of the petitioners is that the General Instructions dated 1 August 2020 stipulated that only those officers who are SHAPE 1 or in the PLMC will undergo a medical board. Officers with TLMC were required to submit the proceedings of their medical categorization or re-categorization, giving their present medical category. Such TLMC officers who were otherwise found fit for PC by the Special No. 5 Selection Board were given a maximum period of one year of stabilization of their medical category. As regards officers in the PLMC categorization, it was clarified that this should not be due to medical reasons (whether attributable to military service or not) but should have been a result of casualties suffered in action during operations or due to disabilities by other injury sustained during duty such as while traveling on duty, during training exercises or playing organized games under regimental arrangements. In addition, certain specific medical categories were made ineligible for the grant of PC.

104. Now the singular aspect of the medical requirements that must be noticed at the outset is that there is a broad consistency of policy on the norms, which have to be fulfilled in order for an officer to qualify for the grant of PC. Another important facet which needs to be emphasized is that SHAPE-1 has a specific meaning which is assigned to it under AO 9/2011. 'S' donates the physiological features including cognitive function abnormalities, 'H' stands for hearing, 'A' for appendages, 'P' for physical capacity and 'E' for eye-sight. The requirement of being in grade-1 in each of the five factors of SHAPE is subject to relaxation in terms of exceptions which are clearly spelt out. The policy provides a concession to such candidates who may not have

suffered injury on the line of duty as a result of which their medical categorization has been lowered. But this should not be lower than S1 or H2 or A3 or P2 or E2 or A2E2 or H2A3 or H2P2 or E2A3 or E2P2. The exception which has been provided is available if an injury (as distinct from a disease) has been suffered while on the line of duty, irrespective of whether it has been incurred during peace time or in field operations. Officers in the PLMC who fulfill the terms of the exception are granted PC, if they are otherwise found fit on merits. The requirement of fulfilling the SHAPE criteria as explained earlier is a pre-requisite even in such arms or services where both men and women join up to the age of 45 years, as in the case of the Army Medical Corps. The Army follows and adopts the TLMC norm which allows an officer placed in that category to return to SHAPE 1 within the stabilization period of one year. By this, an opportunity is granted to the officer to return to the SHAPE-1 category within one year.

105. Physical fitness is crucial for securing a place in the Army. While exercising judicial review, the Court must be circumspect on dealing with policies prescribed for the Armed Forces personnel in attaining norms associated with physical and mental fitness. In the present case, as disclosed before this Court, out of the initial 87 petitioners contesting the proceedings in 7 writ petitions, 55 are SHAPE 1 going up to the age of 52 years, 23 have been assigned to PMLC, while 9 are placed in TLMC. The material which has been placed on record in the form of AO 9/2011 indicates a classification range of minimum and maximum permissible parameters for each of the five factors comprised within the SHAPE norm. The submission of the respondents is that these parameters have been fixed, keeping in mind the inevitable advancement of age of both men and women officers. Moreover, in refusing to consider the SSC extensions as sufficient evidence of fitness, it has been submitted by the respondents that an unsaid concession is made in terms of medical requirements where an officer has been considered for extension as opposed to when they are considered for grant of PC. Another important aspect which has been emphasized is that out of 615 WSSCOs officers, 422 were found fit on merits for PC subject to fulfillment of medical and discipline parameters. Out of these 422, 57 were non-optees. From the remaining 365, 277 women officers were found fit on merits as well on medical parameters and have been granted PCs. Of the remaining 88, 42 are TLMC and have the opportunity to upgrade this to the required medical parameters within one year. Out of the remaining 46, only 35

were found not to meet the medical criteria. These 35 officers constitute less than ten per cent of the 365 who had opted for the grant of PC and were found fit on merits. Even in the remaining 193 officers (615 minus 422 found fit) that were not considered fit for PC, it was submitted that 164 of these officers fulfilled the SHAPE-1 criterion. This tabulation indicates a significant proportion of WSSCOs, irrespective of their belated consideration, are able to presently meet the prescribed criteria. With respect to the medical criteria prescribed by the Army, we are cognizant that there can be no judicial review of the standards adopted by the Army, unless they are manifestly arbitrary and bear no rational nexus to the objects of the organization. The SHAPE criterion is per se **not** arbitrary.

106. Having come to the conclusion that the medical criterion is *per se* not arbitrary, it is the Court's responsibility to examine whether it has been equally applied. We cannot shy away from the fact, that these 615 WSSCOs are being subjected to a rigorous medical standard at an advanced stage of their careers, merely on account of the fact that the Army did not consider them for granting them PC, unlike their male counterparts. By the judgment of the Delhi High Court dated 12 March 2010, specific directions were issued for considering the women SSC officers for the grant of PC. This was a decade ago. During the pendency of the appeal from the judgment of the Delhi High Court before this Court, there was no stay on the application of the judgment of the High Court. This was specifically clarified by the order of this Court on 2 September 2011. The intent of the clarification was that implementation of the directions of the High court must proceed. The WSSCOs have submitted with justification that had they been considered for the grant of PC then, as the respondents were directed to do by the decision of the Delhi High Court, they would have met the norms of eligibility in terms of medical parameters. Their male counterparts who were considered for and granted PC at that time are not required to maintain SHAPE 1 fitness to be continued in service. Serious hardship has been caused by the Army not considering the cases of these WSSCOs for the grant of PC at the relevant time, despite the express clarification by this Court. Though the contempt proceedings against the respondents were stayed, this did not obviate the obligation to comply with the mandate of the judgment of the Delhi High Court especially after a specific clarification that no stay had been granted. Consideration for PC was not just a legitimate expectation on the part of the WSSCOs but a right

which had accrued in their favour after the directions of the High Court, which were issued about a decade ago. The WSSCOs who have been excluded on medical grounds in November 2020 have a legitimate grievance that whether they fulfilled the SHAPE 1 criterion has to be determined from their medical status on the date when they were entitled to be considered, following the decision of the Delhi High Court. Such of them who fulfilled the criterion at the material time are entitled to PC and can continue in service so long as they continue to meet the medical standards prescribed for continuance in the Army. In other words, there is no challenge to the criteria for medical fitness prescribed. These WSSCOs do not seek a special dispensation or exemption for themselves, as women. The essence of the dispute is when the SHAPE 1 criterion has to be applied in the peculiar circumstances which have been noted above.

107. Within the SHAPE criterion, para 31 of AO 9/2011 provides for functional capacities. This ranges from category 1A (fit for all duties anywhere) and category 1B (fit for all duties anywhere under medical observation without employability restrictions); category 2 (fit for all duties but with limitations involving severe physical and mental stress); category 3 (except 'S' factor fit for routine or sedentary duties but limitations of employment duties both job wise and terrain wise); category 4 (temporarily unfit for duties on account of hospitality/sick leave); and category 5 (permanently unfit for military duties).

108. It has been submitted by the petitioners that while being in SHAPE 1 is the requirement at the induction or entry level, it is not the requirement for continued service in the Army. Many of their male counterparts who are granted PC in their 5th or 10th year of service are entitled to continue in service, irrespective of whether they continue to be compliant with SHAPE 1 criteria. In fact, the ASG and Mr Balasubramaniam, learned Senior Counsel, submitted that even for the time scale promotions to the rank of Colonel and Brigadier, there may be no SHAPE-1 requirement. We need not dwell on that aspect since it is an admitted position that SHAPE-1 is not a requirement for continuation in service. The ASG had sought to bolster his submission of SHAPE-1 as a threshold requirement for PC, by relying on the recruitment process for the Army Medical Corps, where even a 45 year old person seeking recruitment, must comply with SHAPE-1 medical criteria. However, a critical assumption that undergirds the grant of PC is the approximate

age of persons who would be under consideration. The WSSCOs in this case are not fresh recruits who are due to be considered in their 5th or 10th year of service, nor are they seeking exceptional favors on account of their sex.

109. On one hand, the Army authorities are insistent on relying on the medical criteria as a filtering mechanism for grant of PC to WSSCOs. On the other hand, we have WSSCOs who have legally fought for their rights and are additionally suffering due to the untimely implementation of their hard-won rights. The Army authorities have stated that the medical criterion has been sufficiently adjusted to take into account age related factors. However, the Army authorities are insistent to apply the medical criteria as of today, while simultaneously attempting to freeze the ACRs of the WSSCOs at the 5th or 10th year of service. Indirect discrimination coupled with an exclusionary approach inheres in this application. An enhancement in the qualifications of WSSCOs from their 5th/10th year of service till today, as would be reflected in their recent ACRs, would demonstrate them as an experienced pool of human resource for the Indian Army. However, a reduction of medical fitness below the SHAPE 1 norm at present as a consequence of age or the tribulations of service is not a necessary detriment to the Army when similarly aged male officers with PC (invariably granted in the 5th or 10th year of their service) no longer have to meet these rigorous medical standards for continuing in service. This is further bolstered by the fact that the WSSCOs who are no longer in SHAPE-1, have been meaningfully continuing in service, even after 14 years of service, till the declaration of results of the PC in November 2020.

110. We also must express our anguish at the respondents' failure to implement the judgment rendered by the Delhi High Court in 2010, whose operation was specifically not stayed by this Court in 2011. The conundrum on the applicability of the medical criterion to WSSCOs who are 40-50 years old, has arisen only because of the Army not having implemented its decision in time, despite the course correction prescribed by the Delhi High Court in 2010. The WSSCOs, a few of whom are petitioners before us today, have persevered for over a decade to gain the same dignity of an equal opportunity at PC. The fact that only around 35 women who are otherwise fit for PC, and 31 women who do not qualify in addition to not meeting the medical criteria, is irrelevant in determining whether each of these women is entitled to equality of

A opportunity in matters of public employment under Article 16(1) and (2). As observed by a 9 judge bench of this Court in **Justice KS Puttaswamy** v. **Union of India**,[86] a *de minimis* rationale is not a permissible exception to invasion of fundamental rights. The Court, speaking through one of us (Chandrachud, J.) had held that "*the de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment*."[87] Similarly, the percentage of women who have suffered as a consequence of the belated application of rigorous medical criteria is irrelevant to the determination of whether it is a violation of Articles 14, 15 and 16 of the Constitution.

C 111. In rendering the decision in **Babita Puniya** (supra), this Court was mindful of the insidious impact on the generations of women who must have given up on their dreams to serve in the Armed Forces owing to the gendered roadblock on their aspirations, and of the women who must have chosen to opt out of availing an extension to their SSC terms D on similar grounds. We must not forget that those women officers who have remained in service are those with the tenacity to hold on and to meet the exacting standards of performance of which the Indian Army has made her citizens proud. It is also important for us to bear in mind that a career in the Army comes with a serious set of trials and tribulations of a transferable service with postings in difficult terrains, even in times E of peace. This is rendered infinitely more difficult when society relegates functions of domestic labour, care-giving and childcare exclusively on the shoulders of women. The WSSCOs before us are not just women who have dedicated their lives to the service of the Army, but are women who have persevered through difficult conditions as they trudged along F a lengthy litigation to avail the simplest of equality with their male counterparts. They do not come to the Court seeking charity or favour. They implore us for a restoration of their dignity, when even strongly worded directions by the Court in **Babita Puniya** (supra) have not trickled down into a basic assessment of not subjecting unequals to supposedly "neutral parameters".

G 112. We are unable to accept the ASG's submission on the medical criteria being modulated to account for advancement of age. The timing of the administration of rigorous standards is a relevant consideration

[86] (2017) 10 SCC 1

H [87] *Id.* at para 128

for determining their discriminatory impact, and not just an isolated reading of the standards which account for differences arising out of gender. The WSSCOs have been subject to indirect discrimination when some are being considered for PC, in their 20th year of service. A retrospective application of the supposedly uniform standards for grant of PC must be modulated to compensate for the harm that has arisen over their belated application. In the spirit of true equality with their male counterparts in the corresponding batches, the WSSCOs must be considered medically fit for grant of PC by reliance on their medical fitness, as recorded in the 5th **or** 10th year of their service.

G.5 WSSCOs belonging to WSES(O) 27-31 and SSC(T&NT) 1-3 who had not completed 14 years of service as on the date of Babita Puniya

113. Another aspect of the case relates to the interpretation of the direction in **Babita Puniya** (supra) mandating WSSCOs who have completed 14 years of service as on the date of the judgment to be considered for PC. In the event of their non-approval or non-option, these officers are to be continued in service for 20 years, with benefits of pension. In **Babita Puniya** (supra), the directions issued by this Court, were while accepting the policy decision of the Union Government. The policy decision of the Union Government for the grant of PCs to WSSCOs in all the ten streams where women were granted SSC in the Indian Army was accepted, subject to several conditions which were spelt out in clauses (a) to (g) of direction (1) in paragraph 69 of the judgment. The directions (a) to (c) are again reproduced below as a convenient point of reference:

> "69. […]
>
> (i) […]
>
> (a) All serving women officers on SSC shall be considered for the grant of PCs irrespective of any of them having crossed fourteen years or, as the case may be, twenty years of service.
>
> (b) The option shall be granted to all women **presently in service** as SSC officers.
>
> (c) Women officers on SSC with more than fourteen years of service who do not opt for being considered for the

A grant of the PCs will be entitled to continue in service until they attain twenty years of pensionable service.

(d) As a one-time measure, the benefit of continuing in service until the attainment of pensionable service shall also apply **to all the existing SSC officers with more** B **than fourteen years of service who are not appointed on PC**."

(**emphasis supplied**)

Directions (e), (f) and (g) are not material at this stage. Direction (d) refers to "existing SSC officers with more than 14 years of service". C This expression is clearly intended to encompass those WSSCOs who had completed 14 years of service on the date of the judgment. It is important to note that these officers were also granted the benefit of continuing in service until the attainment of pensionable service.

114. The petitioners in **Lt. Col. Reena Gairola** v. **Union of India**[88] D and in **Major Nilam Gorwade** v. **Union of India**[89] belong to the group of women officers recruited under the WSES(O)- 27 to 31 and SSCW(T&NT) 1 to 3. These petitioners were commissioned on or after March 2006 and had not completed 14 years of service as on the date of the judgment in **Babita Puniya** (supra). Under the directions in **Babita** E **Puniya** (supra), in case they do not opt for PC or opt for PC and are not granted PC, they will be released at the end of their 14 years of contractual service. The petitioners in these batches would neither be entitled to pension as they would have only completed 14 years of service at the end of their contract, nor would they be given the one time relief granted in **Babita Puniya** (supra) of entitlement to continue in service F for 20 years.

115. The petitioners in the abovementioned writ petitions have argued that within their batches (WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3), 161 women have been granted PC, out of the 284 serving officers. 66 officers who were not approved for PC (allegedly, *inter alia*, as a G consequence of the medical criteria and ACR assessment) and 9 officers who did not opt for PC, have to retire at the end of their contractual term of 14 years, with no pension or benefits. It is pertinent to mention that these petitioners were not a party before this Court in **Babita Puniya**

[88] Writ Petition (Civil) No. 34 of 2021

H [89] Writ Petition (Civil) No. 1223 of 2020

(supra) and consequently could not make out a case for their entitlement to a similar relief for extension till they attain pensionable service, in light of the respondents failing to consider them in time, despite the petitioners being beneficiaries of the judgment of the Delhi High Court.

116. The case of the petitioners is also that at the time of rendering of the judgment of the Delhi High Court in 2010, these WSSCOs had completed a maximum of 4 years in service (or less). Once relief was granted to them by the Delhi High Court and the interim order of the Supreme Court, these WSSCOs took a conscious decision based on these reliefs to continue in service, in anticipation that sooner or later, they would be granted PC. Had they been rejected for PC upon the judgment of the Delhi High Court in 2010, that is over a decade ago, it would have been easier for them to make a career shift and seek employment elsewhere.

117. This Court, as a consequence of the constraint of information being provided to it by the parties arraigned before it in **Babita Puniya** (supra), was not alive to the full extent of the cadres who were denied a timely opportunity for PC in their 5th or 10th year of service. Direction (c) and (d), as a one-time measure, attempted to correct the gross injustice that was meted out to women officers who had completed over 14 years in service, and were being considered for PC at a belated stage. The one-time benefit of continuation in service until their 20th year was provided as a corrective exercise for women who have devoted their careers to the Army, in spite of the dignity of PC being elusive to them, merely as a consequence of their gender. The Court's objective in providing for such a cut-off was to compensate for the impact of the discrimination which had denied them timely opportunities and to account for the significant risk and commitment they demonstrated by their continuation in service.

118. It has been brought to our attention that the women officers in the batches of WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 face a similar predicament as they are being considered for PC beyond their 10th year in service (in the best case). Similar to the women in the older cadres who were denied opportunities, career progressions and assurances owing to the respondents' failure at the relevant time to ensure gender equality in the forces; the women in the batches who were between 10-14 years of their service were meted the same insecurity. The WSES scheme has been discontinued and the WSES(O) 31,

commissioned in 2008, is the last batch to have gained entry in the scheme, rendering it a 'dying cadre'. We have deployed the expression 'dying cadre' not in a pejorative sense. The expression has a specific meaning in service jurisprudence to denote a dwindling class of officers in service. The officers in the consequent batches of SSCW (T&NT) 1 to 3, although part of the new scheme that replaced WSES, will be the only batches who will face an adverse impact of the respondents' failure to implement the Delhi High Court judgement before the 10th year of their service. In exercise of the constitutional power entrusted to this court under Article 142 to bring about substantial justice, we are compelled to extend the benefit of directions (c) and (d) in **Babita Puniya** (supra) to the officers of the abovementioned batches, as a one-time benefit. This one-time extension, would bring parity *inter se* between officers who were discriminated by their non-timely consideration by the respondents.

H Conclusion and directions

119. Based on the above analysis, we are of the view that the evaluation criteria set by the Army constituted systemic discrimination against the petitioners. The pattern of evaluation deployed by the Army, to implement the decision in **Babita Puniya** (supra) disproportionately affects women. This disproportionate impact is attributable to the structural discrimination against women, by dint of which the facially neutral criteria of selective ACR evaluation and fulfilling the medical criteria to be in SHAPE-1 at a belated stage, to secure PC disproportionately impacts them vis-à-vis their male counterparts. The pattern of evaluation, by excluding subsequent achievements of the petitioners and failing to account for the inherent patterns of discrimination that were produced as a consequence of casual grading and skewed incentive structures, has resulted in indirect and systemic discrimination. This discrimination has caused an economic and psychological harm and an affront to their dignity.

120. For the above reasons, we allow the petitions in terms of the following directions:

(i) The administrative requirement imposed by the Army authorities while considering the case of the women SSCOs for the grant of PC, of benchmarking these officers with the officers lowest in merit in the corresponding male batch is held to be arbitrary and irrational and shall not be enforced

while implementing the decision of this Court in **Babita Puniya** (supra);

(ii) All women officers who have fulfilled the cut-off grade of 60 per cent in the Special No 5 Selection Board held in September 2020 shall be entitled to the grant of PC, subject to their meeting the medical criteria prescribed by the General Instructions dated 1 August 2020 (as explained in (iii) below) and receiving disciplinary and vigilance clearance;

(iii) For the purpose of determining the fulfillment of direction (ii), the medical criteria stipulated in the General Instructions dated 1 August 2020 shall be applied at the following points of time:

(a) At the time of the 5th year of service; or

(b) At the time of the 10th year of service, as the case maybe.

In case the officer has failed to meet the medical criterion for the grant of PC at any of these points in time, the WSSCO will not be entitled to the grant of PC. We clarify that a WSSCO who was in the TLMC in the 5th/10th year of service and subsequently met the SHAPE-1 criterion after the one year period of stabilization, would also be eligible for grant of PC. Other than officers who are "non-optees", the cases of all WSSCOs, including the petitioners who have been rejected on medical grounds, shall be reconsidered within a period of one month and orders for the grant of PC shall in terms of the above directions be issued within a period of two months;

(iv) The grant of PC to the WSSCOs who have already been granted PC shall not be disturbed;

(v) The WSSCOs belonging to WSES(O) - 27 to 31 and SSCW(T&NT) 1 to 3 who are not considered to be eligible for grant of PC after the above exercise, will be extended the one-time benefit of direction (c) and (d) in **Babita Puniya** (supra);

A (vi) All consequential benefits including the grant of time scale promotions shall necessarily follow as a result of the directions contained in the judgment in **Babita Puniya** (supra) and the present judgment and steps to do so shall be completed within a period of three months from the date of the judgment;

B (vii) The candidature of Lt. Col. Navneet Lobana, Petitioner No. 3 in Writ Petition (C) 1109 of 2020, will be reconsidered for grant of PC in terms of the above directions. In case the officer is not granted PC, she will be allowed to complete her M.Tech degree course for which she has been enrolled at the College of Military Engineering, Pune and shall not be required to pay or reimburse any amount towards the course;

C (viii) In accordance with pre-existing policies of the respondents, the method of evaluation of ACRs and the cut-off must be reviewed for future batches, in order to examine for a disproportionate impact on WSSCOs who became eligible for the grant of PC in the subsequent years of their service; and

D (ix) During the pendency of the proceedings, the ASG had assured the Court that all the serving WSSCOs would be continued in service, since the Court was in *seisin* of the proceedings. There shall be a direction that this position shall continue until the above directions of the Court are implemented and hence the serving WSSCOs shall be entitled to the payment of their salaries and to all other service benefits.

E 121. The writ petitions are accordingly disposed of in the above terms.

122. Pending application(s), if any, stand disposed of.

F Nidhi Jain Writ petitions disposed of.