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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 5455/2021 & CM No.16917/2021 (for stay)
CDR. A. SWAPNA Petitioner

Through: Mr. Santhosh Krishnan, Adv.

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Ruchir Mishra, Mr. Sanjiv Saxena, Mr. Kavinder Gill, Mr. Mukesh Kumar Tiwari & Mr. Ramneek Mishra, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

ORDER

% **22.07.2021**

[VIA VIDEO CONFERENCING]

1. Counter affidavit has been filed on behalf of respondents Indian Navy.
2. The counsel for the petitioner states that he is ready to argue the petition.
3. The issues entailed in the petition are required to be heard at length and which is not possible, owing to the impending superannuation of one of us (Rajiv Sahai Endlaw, J.).
4. The counsel for the petitioner expresses urgency. It is contended that the petitioner was inducted as a Short Service Commission (SSC) officer in the respondents Indian Navy and her maximum tenure of SSC, of 14 years, is due to lapse on 5th August, 2021 and the petitioner has already been issued a release letter; this petition has been filed impugning her non-consideration for grant of Permanent Commission and also impugning the reasons for

which she has been denied consideration for Permanent Commission. It is stated that the application of the petitioner for interim relief is also pending consideration.

5. We have heard the counsel for the petitioner and the counsel for the respondents Indian Navy on the aspect of interim relief.

6. We have enquired from the counsel for the petitioner, how, by an interim order, pending consideration of this petition, the petitioner can be granted stay of her release from the respondents Indian Navy, as is sought by way of interim relief. It is further enquired, whether not the same would tantamount to this Court, by an interim order, permitting the petitioner to occupy a public office, even before any right of the petitioner to occupy the same has been adjudicated by this Court. It has yet further been enquired, whether not in the event of the petition being dismissed, the petitioner, by way of an interim order, would have usurped a public office, without authorization of law. We may mention, that the respondents Indian Navy, on 24th May, 2021 when this petition had come up first for admission, opposed even issuance of the notice of the petition, on the ground of the jurisdiction to entertain the same being of the Armed Forces Tribunal (AFT). The said question is also still at large, for adjudication in this petition, and if it were to be held that this Court, in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India would not entertain this petition, owing to the statute having vested jurisdiction with respect thereto in AFT, this Court would have by an interim order allowed the petitioner to continue in employment, when as per the terms of her employment, she was not entitled to so continue after 5th August, 2021.

7. Attention of the counsel for the petitioner has been drawn to the decision of Supreme Court in *State of Haryana Vs. Suman Dutta* (2000) 10 SCC 311, wherein it has been observed that by an interim order, if an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same. Similarly, in *State of U.P. Vs. Sandeep Kumar Balmiki* (2009) 17 SCC 555, it was held that by an interim order, termination of employment could not be stayed, as giving such a relief amounted to allowing the writ petition itself. In *Bhankra Byas Managing Board Vs. Suresh* (2009) 7 SCC 515 also, while setting aside an interim order of the High Court granting compassionate employment, the Supreme Court observed that the High Court was not justified in granting such interim order at the admission stage and although a decree had been passed against the appellant directing the appellant to make compassionate appointment, but at the interim stage of the second appeal, the appellant could not be directed to appoint the respondent, on the statement of the respondent that he was ready to forego the past benefit if he was taken in service. Reference in this regard may also be made to the dicta of this Court in *Rohit Sharma Vs. Union of India* MANU/DE/0971/2021 (DB), *Air India Ltd. Vs. Aditya Beri* MANU/DE/2781/2012 (DB) and *The Co-operative Store Ltd., Superbazar Vs. Superbazar Karamchari Hitesh Sangathan* MANU/DE/5089/2012 (DB) [Special Leave Petition (Civil) No. 33541/2012 preferred whereagainst was dismissed on 23rd October, 2012]. Notice may also be taken of the observations of the Supreme Court in *U.P. Junior Doctors' Action Committee Vs. B. Sheetal Nandwani* 1992 Supp (1) SCC 680, though in different facts; it was held to be a well-known rule of

practice and procedure, that at interlocutory stage, a relief, which was asked for and was available at the disposal of the matter, is not granted. The writ petitioners in the said case wanted admission into postgraduate course, as the main relief in the writ petition. Supreme Court observed, that unless there was any special reason to be indicated in clear terms in an interlocutory order, as a rule, no provisional admission should be granted and more so into technical courses. It was further held that grant of such a relief at the threshold, creates a lot of difficulties and in a case where the petitioner ultimately loses in a case of this type, a very embarrassing situation crops up if he has by then read for two to three years, there is a claim of equity, on the plea that one cannot reverse the course of time.

8. The counsel for the petitioner has taken us through, (i) Regulation 203 in Chapter IX titled “Grant of Permanent Commission to Short Service Commission Officers” of the Naval Ceremonial, Conditions of Service and Miscellaneous Regulations, 1963, which is as under:

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

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

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

(ii) the communication dated 25th February, 1999 of the Ministry of Defence to the Chief of the Naval Staff on the subject of “Terms and Conditions of Service of SSC Officer (including Women)” and which also provides that the policy for grant of Permanent Commission will be in accordance with Regulation 203 aforesaid; (iii) ***Union of India Vs. Lieutenant Commander Annie Nagaraja*** (2020) 13 SCC 1, and has informed that two of the respondents therein also belonged to the Air Traffic Control (ATC) branch / cadre of Indian Navy, to which the petitioner also belongs and has contended that as per the said judgment also, the grant of Permanent Commission to SSC officers is to be governed by Regulation 203 aforesaid; (iv) the cadre strength in the Indian Navy, as set out in paragraph 98 of the aforesaid judgment, to contend that the officers in each cadre are in excess of the sanctioned strength; it is informed that under as many as 77 interim stay orders of High Courts, Supreme Court and AFT, SSC officers have been granted stay of discharge, even though their continuance in the service is beyond the sanctioned strength of the cadre; and, (v) order dated 4th August, 2020 of Supreme Court in Special Leave Petition (Civil) No.9043-9046/2020 titled ***Rupali Rohatgi Vs. Union of India***, granting interim stay of discontinuance of the petitioner/s therein from service; it is informed that the said Special Leave Petition was preferred against the order dated 23rd July, 2020 in W.P.(C) No. 4413/2020 titled ***CDR. Senthil VP Vs. Union of***

India and other connected petitions of one of us (Rajiv Sahai Endlaw, J.), refusing interim stay.

9. The counsel for the petitioner / applicant has argued that considering the flavour of interim orders granted in favour of SSC officers, by the Supreme Court, High Courts and the AFT, notwithstanding the principles of law and the judgments referred to by us in paragraph 7 hereinabove, discontinuance / discharge of the petitioner should also be stayed.

10. Per contra, the counsel for the respondents Indian Navy has drawn attention to the counter affidavit of the respondents, where the respondents have *inter alia* pleaded that, (i) in *Annie Nagaraja* supra, the Supreme Court, having examined the issue of granting Permanent Commission to SSC officers, has concluded in regard to ATC cadre of respondents Indian Navy, that there were no grounds for grant of Permanent Commission to SSC women officers in ATC cadre, as neither men or women SSC officers were considered for the grant of Permanent Commission in the ATC cadre of Indian Navy and there was also no direct induction of men officers to the Permanent Commission in the ATC cadre; (ii) neither men nor women SSC officers were/are entitled for the grant of Permanent Commission in ATC cadre; (iii) there is no Permanent Commission cadre in ATC; when Permanent Commission in ATC cadre does not exist, the question of the petitioner being eligible and being entitled to be considered for grant of Permanent Commission in ATC cadre does not arise; (iv) there is no policy to grant Permanent Commission to SSC officers appointed in the ATC cadre; (v) beyond the rank of Commander, there is no post / position sanctioned by the Government of India in ATC cadre; (vi) one of the conditions envisaged in Regulation 203 supra for granting Permanent

Commission, is the availability of vacancies; in the ATC cadre there are no vacancies beyond the rank of Commander and therefore the right to be considered for Permanent Commission is not available to SSC officers (neither men nor women) of the ATC cadre, including the petitioner; (vii) this is a policy matter and a manpower management exercise and the Courts ought not to interfere therein; (viii) the government has not sanctioned Permanent Commission posts in the ATC cadre and the officers in the ATC cadre are appointed on SSC; (ix) the decision not to have Permanent Commission posts in the ATC cadre is a policy decision falling within the exclusive domain of the Executive; (x) none of the petitioners in *Priya Khurana Vs. Union of India* 2016 SCC OnLine AFT 798 belonged to the ATC cadre; and, (xii) it is not as if there is any discrimination between the men and women in the present case and the SSC officers of ATC cadre, whether male or female, are equally treated.

11. We have considered the aforesaid contentions.

12. As would be obvious from above, the respondents Indian Navy have a credible challenge, not only to the invocation of jurisdiction under Article 226 of the Constitution of India of this Court but even on merits. The counsel for the respondents is correct in his contention that this Court and the Supreme Court, in earlier litigations to which reference is made, was concerned with discrimination on the basis of gender. The orders including interim orders were passed in the said context. However, as far as the present case is concerned, it is not the case of the petitioner even that any other officer in the ATC cadre of the respondents Indian Navy, equally placed as the petitioner, has been granted or has been considered for grant of Permanent Commission. The petitioner thus cannot in our view, on the

basis of the said earlier orders, claim interim relief. Certain other interim orders were granted by the Courts, finding the respondents to have not complied with the directions passed by the Supreme Court. That is not the case here. For the petitioner to succeed in this petition, she will have to first challenge the non-existence of Permanent Commission posts in the ATC cadre, by also showing how the Court can get into the matters which are strictly in the domain of the respondents as employer and the cadre controlling authorities. This Court cannot assess the manpower needs of the respondent Indian Navy and direct creation of a post for the petitioner in the ATC cadre.

13. Regulation 203, which according to the respondents Indian Navy also provides for grant of Permanent Commission, is “subject to the availability of vacancies in the stabilized cadre”. The petitioner has not controverted that the highest post in the ATC cadre is of Commander, which the petitioner is already occupying / holding and that there are no permanent posts in the said cadre. Once it is so, till her right to grant of Permanent Commission and / or to consideration therefor is determined, the petitioner cannot, by an interim order, be continued on a public post of Commander in the respondents Indian Navy.

14. Grant of any interim relief to the petitioner in such a situation would be strictly in the teeth of the principles of law and judgments referred to in paragraph 7 hereinabove.

15. No case for grant of interim relief is made out.

16. Accordingly, CM No.16917/2021 is dismissed.

17. Needless to state, the discharge of the petitioner shall be subject to further orders in the petition.

W.P.(C) No.5455/2021

18. List the writ petition for hearing on 27th August, 2021.

RAJIV SAHAI ENDLAW, J

AMIT BANSAL, J

JULY 22, 2021

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