

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
SLP (C) Nos.30791-30796/2015

**IN THE MATTER OF:**

Union of India & Ors. ... Petitioners

VERSUS

Lt. Cdr. Annie Nagaraj & Ors etc. etc. ... Respondents

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New Delhi

Date: .02.2020

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**Written Submissions by Ms. Aishwarya Bhati, Senior Advocate on behalf of Cdr Seema Chaudhary who was commissioned in the Indian Navy on 06 Aug 2007 in JAG Branch and is the only SSC JAG Branch Officer in the entire Navy**

1. It is submitted that the plea of Women Officers of the Indian Navy to serve as Permanent Commission Officers of the Indian Navy, with fairness, and in a just and reasonable manner, is not a welfare measure being sought by Women Officers. The issue is about allowing Women, who are competent and capable, equal opportunity in Nation Building Roles. Indian Armed Forces are amongst the most respected Armed Forces in the World and women officers should be allowed a fair chance to serve as proud officers, in service to the nation. It is about being fair, just and reasonable and allowing the gender equality in true spirit and purport.
2. It is submitted that the brief Note on behalf of the Petitioners - Union of India given at the time of arguments, *interalia*, urges the following grounds for upsetting the impugned order of High Court and to apply the Policy decision to allow Women Officers Permanent Commission, prospectively, from the date of the Policy i.e. 26.08.2008, are following:-
  - a) Cadre Management and Training issues
  - b) Impracticability to work out the modalities and policies

- c) Disturbance to the paramedical structure of Permanent Commission
- d) In case Short Service Commission Officers are inducted in Permanent Commission retrospectively, "they will be performing jobs which were to be performed by a fresh recruit since billets at the higher ranks are limited and will lead to cadre saturation'
- e) "Young people are required also on account of hierarchy based requirements because there are certain jobs critical to national security, which are not expected to be performed by senior people".
- f) The ratio of Permanent Commission to Short Service Commission, i.e. 60 : 40 as mandated by Ajay Vikram Singh Committee, would get disturbed.

(Paragraphs 9 and 15 of the Note)

3. It is submitted that these contentions are not just discriminatory and contrary to the Constitutional guarantees as enshrined under Articles 15 & 16 of the Constitution, namely, right to be treated with rationality and right of equal opportunity, but also displays the age-old stereotypical and mindset issues in allowing fairness to the fairer gender in the Armed Forces. This Hon'ble Court has expressly held in a catena of judgments that gender based distinctions, must serve important governmental objectives and must be substantially related (strong nexus) to achievement of those objectives. The flimsy and farcical grounds raised by the Union of India in restricting the Policy for grant of Permanent Commission to Women Officers of the Indian Navy prospectively, and denying the same to the serving Women Officers of the Indian Navy, who were serving on the date of the policy in 2008, displays a complete disconnection with the government objectives that are sought to be achieved. Additionally, these apparent reasons are also misconceived,

farfetched and in complete disregard to the distinguished and exemplary role played by the women in Indian Navy since 1991, which persuaded the Navy itself to give them the option of Permanent Commission in 2008 and progressively more significant role in more streams of Indian Navy.

4. It is submitted that this Hon'ble Court, recently, had the occasion of dealing with similar submissions of UOI, for applying the grant of Permanent Commission to the women officers of the Indian Army prospectively, with regard to cadre management, training issues, paramedical structure of the force, disturbance of the ratio between Short Service Commission Officers and Permanent Commission Officers, national security and many other additional contentions based on gender stereotypes in the case of the Secretary, Ministry of Defence vs. Babita Puniya & Ors., Civil Appeal Nos.9367-9369/2011. However, by the judgment of this Hon'ble Court dated 17.02.2020, the Hon'ble Court has rejected all the contentions made on behalf of the Indian Army, on the grounds of equality in paragraph 52 of the judgment and on the ground of stereotypes in paragraphs 53 to 57 of the judgment. Additionally, this Hon'ble Court in this judgment also held in paragraph 67 that "implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of person, it does not differentiate them in an unreasonable or irrational manner. In this sense, even at its bare minimum, the right to equality is a right to rationality". This Hon'ble Court further held that as an instrumentality of the State, the burden squarely fell on the Army to justify such differentiation with reason and that no such rational justification has been offered by the Army. This Hon'ble Court thereafter in paragraph 69 of the judgment went on to affirm the impugned judgment of the Hon'ble High Court of Delhi with a few clarifications and allowed serving Women Officers to be

considered for grant of Permanent Commission retrospectively, whereas the Policy that was framed by the Indian Army was also prospective.

5. It is submitted that a ruse has been raised by the Indian Navy that the transition from Short Service Commission to Permanent Commission was not available even to Gentlemen Officers prior to the Policy of 2008, and therefore, this is not a case of gender discrimination. This Hon'ble Court has also had the occasion to deal with covert discrimination, where the legislation under challenge is facially neutral i.e. on the face of it, it appears to be natural, however by its very operation, it perpetrates discrimination for a particular class. In the present case also, it is farcical to say that there is no gender discrimination because transition from Short Service Commission to Permanent Commission was not available to Gentlemen Officers prior to 2008 for the following reasons:-
  - i). Gentlemen Officers have always had all opportunities to apply and get selected for Permanent Commission without any gender based discriminations or irrational discriminations from the very beginning. In other words, all avenues of Permanent Commission have always been opened to the Gentlemen Officers in the Indian Navy.
  - ii). Women Officers were inducted for the first time in Indian Navy in 1991 and from 1991 till the policy for grant of Permanent Commission came in 2008, there was no avenue available or open to Women Officers to apply or opt for the option of Permanent Commission. In other words, the option of Permanent Commission was not available to Women Officers in Indian Navy till the Policy of 2008.

- iii). Indian Navy was allowing transition of Gentlemen Officers from Short Service Commission to Permanent Commission in technical branches, in which they were not taking Women Officers, even after 1991 till 2008.
  - iv). In any case, on a specific query that was put by this Hon'ble Court at the time of hearing, as to how many Gentlemen Officers were seeking to opt for Permanent Commission and the number of such cases pending before the Courts, to which the Union of India had responded that total 80 Officers are seeking implementation of the Policy of grant of Permanent Commission retrospectively and their cases were pending across the entire country, out of which only 22 are men. It is, therefore, clear that Gentlemen Officers, apart from the 22 whose cases are pending, have not been aggrieved by prospectivity of the Policy of 2008 and have not raised any such grievance for the last 12 years.
  - v). In any case, the Gentlemen Officers choose to opt for Short Service Commission (SSC) rather than Permanent Commission, not as the only alternate, since they have always had the option of choosing between Permanent Commission and Short Service Commission Officers in different streams across the Indian Navy from its inception. Whereas, for women officers, the only option available till 2008 was SSC.
6. It is submitted that despite the overtly apparent distinguishing factors between the issue of Permanent Commission for the Women Officers in the Indian Army and the Women Officers in the Indian Navy, the issues that are being faced by Women Officers of the Indian Navy are similar to the issues of Women

Officers in the Indian Army, on atleast the following two counts:-

- A. Both the Indian Navy as also the Indian Army wanted to apply the policy of grant of Permanent Commission prospectively, excluding the serving Women Officers. Infact, despite wording the Policy as prospective, the Indian Army submitted a proposal for serving Women Officers, wherein Women Officers upto 14 years of service would be allowed to opt for Permanent Commission on parity; Women Officers between 14 to 20 years of service would not be given the option of Permanent Commission but would be allowed to serve for 20 years, thereby permitting them to complete pensionable service of 20 years and ; Women Officers beyond 20 years of service would be retired immediately with pension. Even this proposal has been rejected by this Hon'ble Court in the aforesaid judgment of Army, wherein this Hon'ble Court has specifically directed that all serving Women Officers in the Short Service Commission should be considered for grant of Permanent Commission irrespective of them having crossed 14 years or 20 years of service. Infact, as a onetime measure this Hon'ble Court has directed that Women Officers who had completed more than 14 years of service should be allowed the benefit of continuing the service until the attainment of pensionable service in view of the reasons mentioned in the judgment. It is the humble submission of the Women Officers of the Indian Navy that similar directions are passed and Women Officers of the Indian Navy serving prior to the coming into force the 2008 Policy for grant of Permanent Commission are also allowed the option of Permanent Commission. It is further submitted that the

onetime measure of continuing in service till pensionable service, may also be allowed to these Women Officers serving since prior to 2008, as granted to the Women Officers of the Indian Army.

- B. It is submitted that the slightly different shade of reasons given to deny the benefit of policy of permanent commission to serving Women Officers of the Indian Navy, bear an uncanny resemblance to the issues of mindset and stereotypes, in the case of the Women Officers of the Indian Army. These misconceived reasons are being masqueraded as organizational issues to scuttle and deny the right of rationality, equality and equal opportunities and deserve to be rejected completely and outrightly, in the same manner.
7. It is submitted that classifications based on gender have traditionally been the touchstone for pervasive and often subtle discrimination and any State law that overtly or covertly, is designed to prefer males over females in public employment, would require an exceedingly persuasive justification to withstand a Constitutional challenge under the Constitutional guarantees enshrined under the Indian Constitution, where women are entitled to not just fairness on equal footing but the Constitution even enables affirmative and positive action in favour of women in the background of centuries of discrimination.
8. It is submitted that the journey of women officers/soldiers in Armed Forces, across the world, has been full of similar road blocks and obstinate mindset issues. An analysis of their journeys in other countries, where women are now performing shoulder to shoulder with their male counterparts, even in

combat roles, makes it writ large and abundantly clear that the problem lies with the mindset.

9. Some important published opinions of experts in the field, from across the world, are appended herewith :-

- i). Article dated February 5, 2019 of Modern War Institute at West Point titled as "*Women aren't the problem. Standards are*" – Author Capt. Micah Ables (currently deployed with the 1<sup>st</sup> Cavalry Division as the commander of one of the Army's first and, currently, only four mixed-gender mechanized infantry companies. He previously served as a platoon leader and executive officer in an all-male heavy weapons company with the 101<sup>st</sup> Airborne Division during a deployment to Afghanistan. He is a graduate of Ranger, Airborne, and Air Assault schools). [enclosed herewith as **Appendix A**]

This Commander makes a point that it's the changing culture that takes time - "*It took the US infantry fifty-five years and thousands of deaths to abandon the idea of trench warfare. It took the US cavalry twenty-five years to accept that armored tanks were better than horses against a machine gun. It took the US Supreme Court almost sixty years to decide that "separate but equal" was anything but equal and black Americans should attend school alongside white ones. It took America more than 130 years to declare that men and women should have equal voting rights. Just because policies take time and adjustments to "get it right" does not mean that they should be abandoned altogether. Women serving in combat roles is no exception:*

*implementation and standards should be addressed, but the policy aim is right.”*

This Article also highlights that the main reason to ban women from military combat, even in the USA, where women are serving in combat since 2015 is *“first, that women are physiologically incapable of handling combat; second, that women cannot meet physical standards; next, that the “inevitable introduction of eros” will erode unit cohesion; and, finally, that military policies should only be made to improve combat effectiveness.”*

The male Commander draws from his rich experience, riddled with physical injuries argues that *“Most average Americans cannot meet the basic eligibility standards to join the military”*. The response cannot be to ban all Americans from military combat roles. He further explains *“That’s why standards are applied individually; if an individual can meet the qualifying standard, he or she should be permitted to do the job.”*

The concluding paragraphs of this Article, drawn from the rich experience of this serving Captain who served as a Platoon Leader in Afghanistan, make very common sense points in the following words:-

*“Are there females in my company who are overweight or cannot pass a fitness test or do a buddy drag or complete a ruck march or finish an obstacle course? Yes, unfortunately. Are there also males in my company who are overweight or cannot do these things? Yes, unfortunately. Is that a problem? Absolutely. But there are also several stars—of both genders—that pull more than their fair share of the weight. Though we encounter*

*myriad obstacles, my first sergeant and I work ceaselessly to train and improve the soldiers that cannot meet the standard and dismiss the soldiers from the Army if they are ultimately unable to do so.*

*Women can and do bring different skills and perspectives to the table and often approach problems differently. Some women have proven themselves able to demonstrate leadership and articulate new ideas better than some of their male counterparts. Women like Capt. Shaye Haver or Capt. Kris Griest, the first two female Ranger School graduates; or my female executive officer, my highly competent second-in-command; or Rezagul, the Afghan woman who killed twenty-five Taliban fighters; or any of the Army women's rugby players—any of these would undoubtedly make any infantry unit better, stronger, and more lethal. Are they "average" women? No. But they can meet the standard; why ban them from doing so?*

*Changing a culture is never without headache or heartache. Racial integration of the Army was not easy, either—it had more than its fair share of stutters and missteps, from social isolation to all-black units to segregated facilities. But flawed standards and imperfect implementation are not good reasons to scrap worthy policies. We should not penalize a capable and competent minority of women because the majority may not be qualified to serve in combat arms units; instead, let's fix the real problem so that all of our combat forces adhere to a higher standard."*

- ii). Article dated July 11, 2019 published in Army Times titled as "Groundbreaking female general in command

*of US Army North*”, chronicles the journey of an accomplished Women Commander who flew combat missions during Iraq war and rose to become the first female Combat Arms General Officer – Author Sig Christenson [Senior Reporter covers the military for the San Antonio Express-News and been with the paper since 1997. He was embedded with the 3<sup>rd</sup> Infantry Division during the invasion of Iraq in 2003, and has reported from Baghdad and Afghanistan seven times since. Awards & Recognition - Hearst Eagle Award (2009); Texas APME Specialties Award, first place, 2008; San Antonio Express-News Reporter of the Year (2004). Co-founder and former president of Military Reporters & Editors (2002)] [enclosed herewith as **Appendix B**]

- iii). United Nations, Meetings Coverage and Press Releases dated April 11, 2019 titled as “Deployment of Female Personnel Boosts Effectiveness, Says Secretary-General, as Security Council Holds Open Debate on Women in Peacekeeping” [enclosed herewith as **Appendix C**]

This Press Release of 8508<sup>th</sup> meeting of the United Nations Security Council, which had speakers from countries across the globe, discussing deployment of female personnel called for “*Greater Political Will, Incentives to Encourage Greater Numbers*”. It states in no uncertain terms that “*Deploying female personnel in United Nations peace operations is not only the right thing to do, but also the smart thing because they can win the hearts and minds of the local people with whom they work*”

In the said meeting, India's delegate suggested that, *"instead of supporting mixed-gender units as a way to increasing the overall number of women peacekeepers, the United Nations should incentivize troop- and police-contributing countries to deploy all-women units. India's landmark deployment of the first-ever female formed police unit to the United Nations Mission in Liberia (UNMIL) served as a role model for local women to participate in policing and other aspects of the rule of law, she noted. The country will contribute a 22-member female engagement team to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) rapid deployment battalion in 2019, as well as an all-female formed police unit to the United Nations Mission in the Republic of South Sudan (UNMISS)."*

- iv). Article dated February 26, 2018 published in History Stories titled as *"How women fought their way into the U.S. Armed Forces"* – Author Erin Blakemore [a journalist from Boulder, Colorado. She has been a regular contributor to History.com since 2017. Her work has appeared in outlets like *The Washington Post*, *National Geographic*, *The Atlantic*, *TIME*, *Smithsonian* and more. Her book, *The Heroine's Bookshelf* (Harper), won the Colorado Book Award for nonfiction] [enclosed herewith as **Appendix D**]

This exhaustive Article of the reputed History channel chronicles the extremely interesting and tumultuous journey of women starting of as Nurses & washer women to becoming equal members of the USA Armed Forces.

The quotation from the experience of Mary A. Hallaren, who began her career in the U.S. Army as a WAAC and eventually became a Colonel in the 1950's, is particularly interesting, she says *"A prime objection [to integrating women into regular service] which we were told was discussed in closed sessions, was that if women were in the regular military, men would have to take orders from a woman. Heaven forbid"*

The concluding paragraphs of this Report candidly narrate -

*"Slowly, women's roles expanded. In 1970, women were finally allowed to rise to command roles in non-combat units, and women and men began training together.*

*In 2013, women achieved full status in the military when they were granted the right to serve in direct ground combat roles. That milestone then raised the issue of whether women should, like men, be required to register for the draft. In February 2019, a U.S. District judge ruled that requiring all men to register for a military draft, while excluding women, is unconstitutional"*

**Landmark judgments :**

10. In the landmark pronouncement reported at (1974) 4 SCC 3 : AIR 1974 SC 555, *E.P. Royappa v. State of Tamil Nadu*, it was held by *Bhagwati, J.*, in his separate but concurring view, that:

*"85. ... Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great*

*importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable*

*alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. ...”*

11. In yet another determinative decision reported at 518 US 515 (1996) : 1996 SCC OnLine US SC 74, *United States v. Virginia* [enclosed herewith as **Appendix E**], the United States Supreme Court was considering the decision rendered by the Court of Appeals for the Fourth Circuit laying down that the exclusion of women from the educational opportunities by the Virginia Military Institute (VMI) was violative of the equal protection to women. In 1990, prompted by a complaint filed with the Attorney General by a female high school student seeking admission to the Virginia Military Institute (VMI), the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. The VMI was the sole single sex school amongst Virginia's public institutions of higher learning with the mission of producing “*Citizen-Soldiers*”, men prepared for leadership in civilian life and in military service. The District Court had ruled in VMI's favour. The Fourth Circuit reversed and ordered Virginia to remedy the Constitutional violation. In response, Virginia proposed a parallel program for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective.

The opinion of the United States Supreme Court was delivered by *Ginsburg, J.* in which *Stevens, O'Connor, Kennedy, Souter and Breyer, JJ.* joined. *Rehnquist, C.J.*, filed a concurring opinion while *Scalia, J.*, filed a dissenting opinion.

The Supreme Court considered its current directions for cases of official classification based on gender pointing out that the court must determine: (i) Whether the proffered justification is “*exceedingly persuasive*”. The burden of justification is demanding and it rests entirely on the State; (ii) The State must show “*at least that the challenged classification serves ‘important governmental objectives and that the discriminatory means employed’ are substantially related to the achievement of those objectives*”; (iii) The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation; (iv) It must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

It was held that Virginia has shown no “*exceedingly persuasive justification*” for excluding all women from the “*Citizen-Soldiers*” training afforded by the VMI.

12. In a decision of the United States District Court for the District of Columbia reported at 455 F. Supp. 291 (D.D.C. 1978), *Owens v. Brown* [enclosed herewith as **Appendix F**], the court decided that the absolute prohibition that prevents the Secretary from exercising the discretion to assign female personnel to duty at sea is violation of the Fifth Amendment of the Constitution.
13. Reliance is also placed on a decision of the Supreme Court of Israel reported at HCJ 4541/94, *Alice Miller v. Minister of Defence* [enclosed herewith as **Appendix G**], which held that the budgetary and planning considerations did not justify a general policy of rejecting all women from being trained as Air Force pilots.
14. In a decision of the Court of Justice of the European Communities in case C-285/98, *Kreil v. Germany* [enclosed

herewith as **Appendix H]**, it was decided that on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military music services.

15. In the decision reported at (1989) C.H.R.D. No.3, *Gauthier v. Canadian Armed Force*, the Canadian Human Rights Tribunal held that there is no risk of failure of performance of combat duties by women sufficient to justify a general exclusionary policy in respect of their entry to the Canadian Armed Forces. A policy of this sort cannot constitute *bonafide* constitutional requirement and is deemed to be discriminatory on the grounds of sex.
  
16. Allowing distinguished women to hold Command positions and even their recruitment in combat roles, does not actually impact operational effectiveness of the armed forces. The following tabulation of countries which allow women to serve in Command, even in combat roles in its defence forces, along with the year from which they were so allowed:-

S.No.	Countries	Year from which women were allowed in combat roles
(i)	North Korea	1950
(ii)	Netherlands	1979
(iii)	Sweden	1989
(iv)	Canada	1989
(v)	Denmark	1988
(vi)	Norway	1985
(vii)	Spain	1999
(viii)	Eritrea	1998
(ix)	France	1998

(x)	Israel	1995
(xi)	Finland	1994
(xii)	Lithuania	2000
(xiii)	Germany	2000
(xiv)	New Zealand	2001
(xv)	Romania	2002
(xvi)	Poland	2004
(xvii)	Australia	2011
(xviii)	Belgium	2010
(xix)	Estonia	2013
(xx)	United States	2015
(xxi)	United Kingdom	2016
(xxii)	Brazil	2016"

17. In the light of the foregoing submissions and overwhelming statistics, the serving women officers of the Indian Navy, most respectfully beseech this Hon'ble Court, to grant Permanent Commission to the Women Officers who have been serving since prior to 2008, without any discrimination and fetters, on the basis of their demonstrated service record, their suitability as already assessed and affirmed at the time of their considerations for extensions and also during their long standing service and experience.

New Delhi  
Date: 12.02.2020

Settled by:  
**Ms. Aishwarya Bhati**  
**Senior Advocate**

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