

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

% Reserved on: 14.12.2009
Date of decision: 12.03.2010

+ **WP (C) No.1597 of 2003**

BABITA PUNIYA

...PETITIONER

Through: Ms. Rekha Palli, Ms. Punam Singh &
Ms. Amrita Prakash, Advocates.

Versus

THE SECRETARY & ANR.

...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal,
Advocates.

+ **WP (C) No.16010 of 2006**

MAJOR LEENA GURAV

...PETITIONER

Through: Ms. Rekha Palli, Ms. Punam Singh &
Ms. Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal,
Advocates.

+

WP (C) No.3357 of 2007

WING COMMANDER ANUPAMAN JOSHI ...PETITIONER

Through: Ms. Rekha Palli, Ms. Punam Singh &
Ms. Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

+

WP (C) No.3686 of 2007

SQUADRON LEADER RUKHSANA PARV ...PETITIONER

Through: Ms. Rekha Palli, Ms. Punam Singh &
Ms. Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

+

WP (C) No.9028 of 2008

MAJOR SANDHYA YADAV & ORS. ...PETITIONERS

Through: Ms. Rekha Palli, Ms. Punam Singh &
Ms. Amrita Prakash, Advocates.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

+

WP (C) No.7669 of 2009

MONICA BIJLANI & ORS.

...PETITIONERS

Through: Mr. Arun Monga & Mr. Vivek
Sharma, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

+

WP (C) No.8492 of 2009

WING COMMANDER JASMINE KAUR & ORS. ...PETITIONERS

Through: Mr. Arun Monga & Mr. Vivek
Sharma, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

+

WP (C) No.8495 of 2009

WING COMMANDER URMILA SAHU & ORS. ...PETITIONERS

Through: Mr. Arun Monga & Mr. Vivek
Sharma, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramaniam, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramaniam (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
Ms. Barkha Babbar & Mr. Ravinder
Aggarwal, Advs.

+

WP (C) No. 9264 of 2009

WING COMMANDER PUSHPANJALI SHARMA
& ANR.

...PETITIONERS

Through: Mr. Arun Monga & Mr. Vivek
Sharma, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramian, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramian (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

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WP (C) No. 9367 of 2009

WING COMMANDER RACHNA SHARMA
& ORS.

...PETITIONERS

Through: Mr. Arun Monga & Mr. Vivek
Sharma, Advocates.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Gopal Surbramian, Solicitor
General of India with Ms. Jyoti Singh,
Colonel R. Balasubramian (Retd.),
Mr. Ankur Chhibber, Mr. Atul Nanda,
& Mr. Ravinder Aggarwal, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. *“Nature gave women too much power; the law gives them too little.”* observed Will Henry, American political adviser and columnist. The claim of women to the right to serve in the Armed Forces has been and is a matter of debate in various countries. The denial of such right is pleaded to be a case of gender discrimination. This is more so as the modernization of the Armed Forces has resulted in lesser reliance on a hand to hand combat. The debate in each country is coloured by its own social & cultural norms and ethos. In some of the countries women have now been inducted into combat force while in other countries the induction has been restricted to support services to actual combat.
2. The second limb of the claim is for the right to Permanent Commission (for short ‘PC’). In India the progress in this behalf has been slow on the perceived ground of social norms. There has been induction of women into certain restricted areas of the Armed Forces and that too on a Short Service Commission (for short ‘SSC’) basis. The Government is stated to have carried out studies for grant of PC to women but till date it has not received a favourable response.
3. We are here concerned with women officers who were granted SSC in the Air Force and in the Army and who seek PC. These officers have had long stints albeit on SSC basis extended from time to time to as much as 14 years. The consequence of not being granted PC is that these officers are deprived of certain benefits and privileges,

which would have enured to them in case of grant of PC like pension, ex-serviceman status, medical facilities, etc.

4. We had issued directions from time to time so that the respondents themselves could examine the issue of grant of PC and pursuant thereto a policy decision dated 26.9.2008 was taken in terms whereof the President of India had been pleased to sanction the policy for offer of PC prospectively to SSC (Women) officers in the JAG Department and the Army Education Corps (AEC) of the Army and their corresponding Branch/Cadre in Navy and Air Force, Accounts Branch of the Air Force and Naval Constructor of the Navy in addition to current provisions of grant of PC to SSC (Men) officers. This step undoubtedly was a progressive one but we were of the view that the matter needed to be further examined as to why women personnel who are still in service could not get the benefit of the change of policy as also the women officers who had approached this Court by filing of petitions but retired during the pendency of those petitions. In fact, the learned Solicitor General of India also took up this matter but no solution was found possible and thus the claims of the petitioners are required to be decided on merits.
5. The principles of law governing the cases is identical but the factual matrix is slightly different in respect of women officers on SSC in the Air Force and in the Army. It is, thus, necessary to deal with their factual matrix separately.

AIR FORCE:

6. Our country moved towards the induction of women in the Indian Air Force by a circular dated 25.11.1991 issued by the Ministry of Defence, Government of India, in the Non-Technical Ground Duty Branches (as SSC Officers), which reads as under:

“Sir,

1. I am directed to convey the sanction of the President for inducting women in the officer cadre of Non-Tech Ground Duty branches of IAF from 1992 on an experimental basis for 5 years which is to be reviewed thereafter.

2. The intake of women in the officer cadre would be restricted to 10% of the officer vacancies in respect of Adm, Log., Accts, Met, & Edn. Braches of the IAF.

3. The induction of trainee women officers would be forecast and planned well in time. The women officers would be initially granted SSC for a period of 5 years. At the end of the SSC tenure, PC would be offered to willing officers, subject to their suitability. However, women officers unwilling for PC, but seeking an extension, would be granted extension for six years.

4. The terms & conditions would be so given at the Appendix to this letter.

5. The expenditure involved is debitable to the relevant minor head of the major head 2079-F of the Defence Services Estimates.

6. This is issued with the concurrence of the Min. of Def. (Fin/Air) vide their u.o. No.1029/Org/S/AF dated 10.11.91.”

(emphasis supplied)

7. The terms of engagement as listed in the Appendix are specified as under:

**“TERMS AND CONDITIONS FOR WOMEN IN THE
OFFICERS CADRE OF NON-TECH GROUND DUTY
BRANCHES**

1. Age Limit: 22 to 26 years for Graduates and 20 to 25 years for non-Graduates, relaxable to 27 years for those possessing higher qualification like Ph.D., M.Ed., M. Tech.

2. Entry Qualification: 1st Class Graduation/2nd Class Post Graduation in subject as specified in the Advertisement for selection from time to time.
3. Mode of Selection: Applications would be called for directly by the Air Force through open advertisement, and the candidates selected through AFSU.
4. Commission: Candidates selected under this scheme will be granted provision Short Service Commission on successful completion of 52 weeks at the Air Force Academy. The SSC will be confirmed after a probationary period of one year. Failure to pass the requisite examination etc., during training may result in suspension from course. Also, if in the opinion of the Head of Institution or due to medical reasons, the trainee is unlikely to benefit by further training, she would be suspended from the course.
5. Tenure of Engagement: Initial engagement period would be for 5 years from the date of commissioning. On completion of this period, the officer may opt for PC or another SSC tenure of 6 years. The officers seeking such extension will not be considered for PC. Grant of extension or PC would be subject to suitability and requirement of the Air Force.
6. Permanent Commission: SSC Officers granted PC will be eligible for all benefits/privileges, which are admissible to the regular PC Officers.
7. Seniority: The seniority of SSC Officers will reckon from the date of grant of provisional SSC. So as to place them at par with their contemporary PC Officers. However, the SSC Officers' names will appear in the Air Force List immediately below that of their contemporary PC Officers. They would be eligible for promotion up to the rank as applicable to permanent commissioned officers of Non-Tech GD\\branches.
8. Pay and Allowances: As applicable to permanent commissioned officers. However, SSC Officers will not be entitled to any advance for Car/Motor Cycle/Housing, etc.
9. Other perquisites: SSC Officers will be entitled to all the perquisites of housing, traveling, leave, medical facilities and ration, etc., as applicable to permanent commissioned officers. However, they will not be eligible for Service sponsored Post-Graduate studies or for study leave. Accumulation of leave for the purpose of entertainment will be as applicable to SSC Officers at that time. In addition, maternity leave will be granted as per the existing Government Rules applicable to the lady medical officers of Army Medical Corps.”

(emphasis supplied)

8. The relevant portion of the advertisement which was issued in newspapers is as under:

“A UNIQUE OPPORTUNITY FOR DYNAMIC YOUNG GIRLS: MARCH TO A NEW HORIZON AS A COMMISSIONED OFFICER IN THE INDIAN AIR FORCE

TRAINING:

Successful candidates will undergo 52 weeks training at Air Force Academy.

COMMISSION:

Provisional Short Service Commission in the rank of Pilot Officer will be granted after successful completion of training at Air Force Academy. The Short Service Commission will be confirmed with retrospective effect after completion of probationary period of one year.

TENURE OF ENGAGEMENT:

Initial engagement period would be for five years from the date of commissioning with provision to opt for Permanent Commission or another tenure of six years. Grant of Permanent Commission depend upon vacancy and suitability of the officer.

CAREER PROSPECTS:

SSC Officers will be entitled for promotion under conditions as applicable to Permanent Commissioned officers of Non-Tech Ground Duties Branches.”

(emphasis supplied)

9. The case of the Air Force officers is predicated on what was set out by the Government of India as its policy decision as also the advertisement in pursuant whereto these petitioners applied and were recruited. The reference to the aforesaid was made to emphasize that women officers were to be “initially” granted SSC for a period of 5 years but at the end of that tenure, PC “would” be offered to the willing officers subject to their suitability. The women officers who were unwilling for PC could be granted extension of SSC for 6 years

on making that request. The advertisement published also specifies the same in respect of the tenure engagement. Not only that, while referring to career prospects it was stated that the SSC officers would be entitled for promotion on conditions as applicable to Permanent Commissioned officers of non-technical ground duties.

10. The counsel for the petitioners emphasized that the SSC women officers were given training for a period of 1 year and such training took place along with the male Permanent Commissioned officers for the same period of time in the same class room with the same test and both sets of persons passed out together. On the other hand, insofar as the male Short Service Commissioned officers are concerned the training period was only 3 months. It was, thus, emphasized that the training of women officers and of the male Permanent Commissioned officers was done simultaneously as the advertisement itself envisaged the terms of engagement where such women officers at their option were entitled to be absorbed as PC subject to their fitness.
11. The petitioners also stated that they did apply for PC (request placed on record) but only the SSC was extended. There was no issue of fitness as the officers have annexed commendation certificates of their performance. In any case they were never found unfit and the SSC could have been extended only on their being fit.
12. A change of policy, however, took place as per circular of the Air Headquarters Human Resources Policy dated 25.5.2006. This is stated to be in the context of the larger question as to whether SSC

officers male or female should be granted PC. This circular notes that SSC was first introduced in the AE Branch in the year 1985 and was subsequently made applicable to other branches and extended to women aspirants vide Government of India letter dated 23.4.2001. It notes that the IAF does not have a requirement to grant PC to SSC officers and guidelines are, therefore, laid down for extension of Commission to SSC officers.

13. The aforesaid change of policy has been challenged by the petitioners. Without prejudice to the same, the contention is that in any case the petitioners were recruited before this change of policy and thus this change of policy cannot prejudice them as they are entitled to PC as per the original policy and the original advertisement issued pursuant whereunto the petitioners had applied for the post SSC Officers in the IAF.
14. The respondents in their defence have raised a plea that the absorption on PC basis was as per service exigency and that the same is a policy matter.
15. We may note at this stage itself that the policy decisions and the advertisements are not in dispute. The petitioners making an application for PC is not in dispute. The suitability of the petitioners is also not in dispute in view of the commendation certificates but in any case that aspect has not even been examined by the respondents. If the advertisement in pursuance whereunto the petitioners applied is taken into consideration then the grant of PC was dependent only upon two factors; viz. (i) vacancy; & (ii) suitability of the officers.

The respondents, thus, seek to introduce new factors contrary to the advertisement to deny the women officers the PC since their suitability is not in issue and SSC male officers were inducted on PC basis which shows that vacancies had existed at the relevant stage of time.

16. The facts sheet shows that the petitioners were not even considered for grant of PC even though they underwent the same training of one year as the male PC officers whereas 10 batches of male SSC officers who had undergone training of a much lesser period of only three (3) months in the Air Force Administrative College were considered and granted PC in the same period when women SSC officers continued to work in that capacity.

ARMY

17. The position in respect of SSC officers in the Army is slightly different. This is so since no such specific policy decision was taken for grant of PC and thus the plea is predicated only on the fact that there was no reason why a different view should be taken in respect of the SSC officers in the Army once such a route of PC is available in the Air Force.
18. The plea as advanced by learned counsel for the petitioners is that they are not seeking induction into combat which is a policy matter but when in certain fields where women officers had been inducted in SSC and their performances have been found up to the mark, there is no reason to deny them a PC especially when the Government has taken a policy decision for PC to such SSC women officers in certain departments like the JAG & AEC branches prospectively.

19. It is not disputed that there has been some difference in training as the training period is 6 months for SSC women officers while 9 months for men officers against a training of 18 months for the Permanent Commissioned officers. It is, however, pleaded that both for men and women SSC officers the classes are common and the syllabus is the same and have been performing exactly the same kind of duties.
20. The SSC for women officers is initially for a period of 5 years extendable for two further terms of 5 years and 4 years respectively to a maximum of 14 years. In the Air Force the period is initially for 5 years followed by a term of 6 years and a further 4 years extension(s). When the male SSC officers are granted PC there is no further training but the seniority is dropped by the difference in the training period. It is, thus, the submission that a similar pattern can be conveniently followed in the case of women officers and their seniority may also be dropped, which may be more than what is for the male Short Service Commissioned officers on account of differential in training period. This plea is further supported by the treatment meted out to the SSC officers both male and female while granting them promotion. A policy decision was taken on 20.7.2006 by the respondents whereby women officers who were earlier being released from the Army in the substantive rank of Captain irrespective of their length of service were given the option of revised terms of SSC under which the women SSC officers were made eligible for substantive promotion up to the rank of a Major (after six

years of service) and Lieutenant Colonel (after 13 years of service) but the seniority was suppressed by the period corresponding to the difference in training period between the SSC commissioned course and the equivalent PC course. Thus, the plea of the respondents based on a difference in training and consequently the decision of PC being applied prospectively is negated.

21. We may notice that on behalf of the respondents the plea of lesser training was advanced as a ground for non-grant of PC apart from the fact that there was no offer by any letter/advertisement as in the case of Air Force which is a matter of a policy decision. The respondents also pleaded that if PC was granted to women officers there was a danger of coming in contact with the enemy but then this plea has no basis since the women officers are not being inducted in combat.
22. A further aspect raised by the respondents is that after the war of Kargil, Ajai Vikram Singh Committee was set up to look into several aspects of Cadre Management and the said Committee recommended a lean PC Cadre and a large Cadre support comprising of SSC officers. It is in view thereof that a decision was taken vide Air Headquarters Human Resource Policy dated 25.5.2006 that SSC officers are not to be granted PC and this is across the board for both men and women.
23. Learned counsels for the parties relied upon a number of authoritative pronouncements to advance the case. Broadly speaking, the cases cited by the petitioners are to advance the plea that any gender discrimination should be frowned upon and must be struck down as

ultra vires in view of the provisions of Articles 14, 16 & 21 of the Constitution of India and going against the very theme and ethos of our Constitution. On the other hand, the respondents have sought to emphasize that the matters in issue are really dealing with the policy domain which should be best left to the executive to decide, more so when such policies are in respect of a sensitive issue of induction of women in the armed forces.

24. Learned counsel for the petitioners invited our attention to the observations of the US Supreme Court in Korematsu Vs. United States 89 L Ed 194 where Jackson, J. observed as under:

“...A judicial construction of the due process clause that will sustain this order is far more subtle blow to liberty than the promulgation of the (military) order itself. A military order, however, unconstitutional, is not apt to last longer than the military emergency. ...Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

25. Learned counsel for the petitioners also drew strength from the observations made in Boumediene Vs. Bush 553 US (2008) where Kennedy, J. observed as under:

“Our basic charter cannot be contracted away like this... To suggest that political branches have the power to switch the Constitution on or off at will permit a striking anomaly in our tripartite system of Government leading to a regime in which Congress and the President and not this Court would say that the law is.”

26. Learned counsel for the petitioners also referred to the observations of the Israeli Supreme Court in Public Commission against Torture Vs. Government of Israel 33, 53 (4) PD 817, 845 where it was

observed as under:

“Preserving the rule of law and recognition of individual liberties constitute an important component of its (of democracy) understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.”

27. Learned counsel for the petitioners emphasized that the principle of promissory estoppel would come into play as at the time of initial appointment in SSC for the Air Force the respondents had represented that subject to performance and vacancies existing such SSC officers who opted for PC would be entitled to be so appointed. It is on such a promise that the candidates submitted their applications and opted for PC at the end of their initial SSC tenure.
28. Linked to the aforesaid issue is also the plea arisen from the principle of legitimate expectation that once the SSC candidates were found fit and despite their request for PC, their SSC tenure was extended, the petitioners expected that such extended SSC tenure would be converted into a PC as the same was in accordance with the initial terms & conditions of appointment and they fulfilled the requirement for PC. In this behalf learned counsel referred to the observations of the Supreme Court in Ram Pravesh Singh & Ors. Vs. State of Bihar & Ors. (2006) 8 SCC 381 where it was observed as under:

“14. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term “established practice” refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in

administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a “legitimate expectation” of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above “fairness in action” but far below “promissory estoppel”. It may only entitle an expectant: (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the “legitimate expectation”. The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognised legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.

15. In *Union of India v. Hindustan Development Corporation* (1993) 3 SCC 499 this Court explained the nature and scope of the doctrine of “legitimate expectation” thus:

“For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. *The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.*”
(emphasis supplied)

This Court also explained the remedies flowing by applying the principle of legitimate expectation:

“[I]t is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words where a person’s legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. *A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil.* The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors.”

(emphasis supplied)

29. Learned counsel also invited our attention to the observations of the Supreme Court in Jitendra Kumar Vs. State of Haryana (2008) 2 SCC 161, where it was observed as under:

“58. Application of doctrine of legitimate expectation or promissory estoppel must also be considered from the aforementioned viewpoint. A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. [See *Chanchal Goyal (Dr.) v. State of Rajasthan* (2003) 3 SCC 485 and *Union of India v. Hindustan Development Corpn.* (1993) 3 SCC 499] It is grounded in the rule of law as requiring regularity, predictability and

certainty in the Government's dealings with the public. We have no doubt that the doctrine of legitimate expectation operates both in procedural and substantive matters.”

30. Learned counsel for the petitioners also advanced their pleas on the provisions of Articles 14, 16 & 21 of the Constitution of India frowning upon gender discrimination and referred to the observations of the Supreme Court in D.S. Nakara & Ors. Vs. UOI AIR 1983 SC 130, which are as under:

“12. After an exhaustive review of almost all decisions bearing on the question of Article 14, this Court speaking through Chandrachud, C.J. in *In re Special Courts Bill*, (1979) 2 SCR 476 at p. 534: (AIR 1979 SC 478 at p. 509) restated the settled propositions which emerged from the judgments of this Court undoubtedly insofar as they were relevant to the decision on the points arising for consideration in that matter.

.....

(4)The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.”

31. Learned counsel for the petitioners also referred to the observations of the Supreme Court in A. Satyanarayana & Ors. Vs. S. Purushotham & Ors. (2008) 5 SCC 416 where it was observed as under:

“34. A statutory rule, it is trite law, must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The legislature, it is presumed, would be a reasonable one. Indisputably, the subordinate legislation may reflect the experience of the rule-maker, but the same must be capable of being taken to a logical conclusion.”

32. Learned counsel for the petitioners further drew strength from the observations of the Supreme Court in Anuj Garg & Ors. Vs. Hotel Association of India & Ors. (2008) 3 SCC 1, which are as under:

“21. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefor would be on the State. While considering validity of a legislation of this nature, the Court was to take notice of the other provisions of the Constitution including those contained in Part IV-A of the Constitution.”

.....

“25.Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor.”

.....

“37. Instead of putting curbs on women’s freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf.

38. Also with the advent of modern State, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the State and the employer.

39. Gender equality today is recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.”

.....

“43. Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State’s duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other *policy inference* (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the *privacy rights*.”

33. It was also emphasized on behalf of the petitioners that various

countries have inducted women officers. In USA, after initially the women being inducted for a limited role in the Air Force since 1948, the separate status of women Air Force officers was abolished in 1976 and they were accepted on the same basis as men. The women officers have, thus, risen to important positions including of a Major General. The services of women are being utilized in Canada, Australia & UK including in auxiliary forces. In the Indian context, it has been emphasized that the denial of PC to women implies that the experience of more than a decade is brought to naught without any pensionary benefits.

34. It can, however, hardly be doubted, in our considered view, that such recruitment of women in armed forces has gone through a process of evolution largely dependent on the social norms of the country. In the US, strength of women officers in the military rose from two per cent in 1967 to eleven per cent in 1993. Almost 90 per cent posts have slowly become open to women officers except in the field of Infantry, armour and special operations. The increase in the strength of women officers was also the direct result of the traditional distinctions between combat and non-combat or combat support roles having become blurred with the introduction of deep battlefield and over-the-horizon weaponry as observed by Dr. Jakkie Cilliers, Co-Director, Institute for Defence Policy in an article published in the South African Defence Review Issue No.9, 1993 "Feminism and the Military, Developments in the United States of America". The opponents of combat role for women seek to emphasize firstly the

effect on readiness and efficiency of sexually integrated combat units and the impact of a female presence in the 'fighting components' and secondly the social impact of female mass casualties which would follow commitment of a fully integrated military force to conventional military combat. The resolution of competing claims of the two sides propagating and opposing induction of women in combat is a resolution of competing claims involving constitutionally protected rights which appear to be an exercise in line-drawing.

35. The question of grant of PC to women officers has, thus, been dependent on a broader policy initiative and a conclusion to be arrived at whether the time was ripe to induct women as permanent commissioned officers. Despite this, middle ground solutions were found in India with induction of women into Army Education Corps and legal branches. The Hon'ble Defence Minister, in fact, gave an assurance in the Parliament that the Ministry would look into aspects of non-combat streams to begin with, and the commitment that the executive must honour an endeavour to achieve this objective on priority. The reports in India have found a reluctance on the part of the armed services and have even found gender discrimination in the forces.
36. Our focus has been to look into specifically the aspects of grant of PC to women officers where they already stand admitted to the SSC and have served honourably for a number of years so that there is no discrimination based on gender. We may observe that in the Ministry of Defence Vs. Armstrong (2004) IRLR 672 EAT (DG), the

Employment Appeal Tribunal in the United Kingdom held that female army career officers whose inferior pay was the result of a lack of a pension, were entitled to a pay equal to male soldiers undertaking similar work. In the aforesaid judgement, it was held that the Employment Tribunal was justified in coming to the conclusion that the female officers were paid less for gender-based reasons.

37. Learned counsels for the respondents referred to the observations of the Supreme Court in the Union of India Vs. S. Vinod Kumar (2007) 8 SCC 100 to canvass that once candidates have taken part in selection process knowing fully well the procedure laid down therein were not entitled to question the same. It was, thus, urged that there could be no legitimate expectation since they knew that the induction of women officers in the Air Force was on an experimental basis for five years to be reviewed thereafter and the admission to PC was subject to suitability and requirement of the Air Force.
38. We may point out here itself that the claim of the petitioners is actually predicated on the fact that the continuation of women officers in SSC itself envisages that the experiment of induction of women in the Air Force was successful and the extension of their SSC tenure was granted only when they were found suitable for service. In any case, it has nowhere been observed that they were not suitable. The Air Force cannot say that the requirement was not there when men SSC officers were being inducted on PC. To do so is pleaded to be discriminatory and the direct result of gender bias.

39. Learned counsels emphasized that the concept of legitimate expectation has no role to play where such action is a public policy and thus no interference is called for on that action in view of the observations in Sethi Auto Service Station Vs. DDA (2009) 1 SCC 180 and Punjab Communications Limited Vs. Union of India (1999) 4 SCC 727.
40. Insofar as the right of a Government to change a policy is concerned, it is stated that the same is unfettered though the Government cannot act arbitrarily as it functions within the constitutional framework. The fixing of a policy were pleaded to be matters of highly technical and scientific nature and thus in cases of promotional chances in Air Force it was observed that the matter should be left to the Air Force in Union of India Vs. S.L. Dutta (1991) 1 SCC 505. Learned counsel also drew strength from the judgement of the Supreme Court in Colonel A.S. Sangwan Vs. Union of India 1980 Supp. SCC 559.
41. The last aspect emphasized was that the Government was well within its right to give benefits prospectively as the question whether policy is to apply prospectively or not depends on a cutoff date to be fixed and it is permissible for the authorities to do so, so long as the cutoff date is not arbitrary or out of the hat as observed in Major Jatinder Preet Kaur Vs. Union of India by this Court.
42. We have examined the factual contours of the present dispute as also the legal pleas advanced by learned counsels for the parties based on the aforesaid precedents.

43. It is no doubt true that the courts are slow to interfere in policy matters. This is more so where the Armed Forces are involved which have their own peculiar requirements and norms. However, the pleas of the petitioners cannot be brushed away under generalizations as the Constitution of India mandates equity and fairness in view of Articles 14, 16 & 21.
44. The Air Force after due sanction of the President of India itself brought a policy into force for recruitment of women. Similarly, the Army also recruited women though there was no such policy decision as in the Air Force. Thus, the policy decision was that women personnel should be recruited in certain areas of operation of the Armed Forces which are not in combat and other such services. As to whether women ought to be recruited or not into the Armed Forces and if so then in which areas of operation, does fall within policy domain. There are countries which have given opportunity to women even in combat areas but there are social and cultural ethos which vary from country to country. There has been continued debate and analysis on induction of women in Armed Services even in India. Thus, we are clearly of the view that it is not for the Court to decide as to which areas of operation of the Armed Forces should women be employed.
45. We are, however, simultaneously of the view that once a decision is taken on a policy initiative that there are areas where women can be employed such as JAG then a different situation prevails. There cannot thereafter be discrimination on the ground of gender in terms

of opportunities. We may again note that subsequently a policy decision has been taken that persons granted SSCs should not be given PC across the board irrespective of whether they are male or female. This is on the larger aspect of cadre review and man management which is left best to be decided by the concerned authorities. The Government has taken certain steps on account of some prodding in these proceedings for recruitment of women officers on PC basis prospectively. Thus, these would fall outside the pale of judicial scrutiny.

46. The area of judicial scrutiny would arise where both men and women officers are taken on SSC pursuant to a policy decision and while men have been offered PC, a similar privilege has not been extended to the women officers.
47. The advertisement in case of Air Force officers itself envisages absorption on PC. In our considered view, it is not open for the respondents to plead that even if a woman officer performs as well as a man officer, still whether to grant PC or not to such women officers would remain within the domain of policy matters not to be interfered by this Court. The initial advertisement itself envisaged grant of PC, of course subject to vacancy and suitability. The suitability has never been examined and is hardly in question because these are all meritorious officers as per the documents annexed. No comparison was made of performance of male and female officers. The fact that male officers were taken on PC itself means that there were vacancies.

48. We are unable to accept the plea of the learned counsels for the respondents that since these women officers accepted the extension of SSC, they are precluded from now raising the issue of grant of PC. The documents placed on record show that these officers did make a request for PC. They were, thus, willing for PC and in terms of the advertisement had made such a request. The respondents, however, granted only an extension of SSC. No doubt the petitioners could have approached the Court at the stage of expiry of the first period of their SSC but in matters of such nature dealing with gender discrimination a more liberal view on this aspect of delay and laches has to be taken.
49. We, thus, find force in the contention of learned counsels for the petitioners that the petitioners did not rush to Court and were hoping that better sense would prevail on the concerned authorities of the respondents to grant due of the petitioners.
50. We have already discussed in the factual matrix the nature of training which was imparted to these women officers which was at par with the male PC officers while the male SSC officers were granted training for a lesser period of time. If these officers have performed equally well in their task which are non-combat in nature and on that basis respondents have extended their period of SSC more than once, it would be gross violation to Articles 14, 16 & 21 of the Constitution of India to accept a situation where such women officers are deprived of a PC while male officers are granted this PC. If this is not

discrimination what would be discrimination based on gender and denial of equal opportunity of employment to these women?

51. The women Air Force officers joined the service on the assurance as held out to them in terms of the Circular dated 25.11.2009 read with its appendix and as advertised for their recruitment. A representation was made to them that though they were initially to be granted a SSC for a period of 5 years, they were entitled to a PC so long as they were willing and subject to their suitability. The women officers opted for PC but despite this fact only their SSC was extended.
52. As noticed above neither is the question of suitability nor the absence of requirement in doubt which was the twin condition even as per clause (v) of the appendix. Once male officers who had been granted PC, there could be no question of absence of requirement of officers for PC. The advertisement also held out a promise to the women Air Force officers of grant of PC depending upon two factors, which are :
- i. Vacancy
 - ii. Suitability of the officers.
53. The officers thus joined the Air Force on the promise of these terms of their recruitment apart from other terms and conditions of service and the respondents cannot now introduce an alien element other than these two conditions.
54. Once these two conditions are satisfied, which is so in the present case, the women Air Force officers cannot be denied PC on the specious plea that the SSC was only on experimental basis and there

was no entitlement to PC despite satisfaction of the two terms and conditions.

55. No doubt the position in the Army is slightly different as the plea is not based on specific advertisement but the fact remains that in certain areas of operation it was deemed appropriate to have women SSC officers like the JAG Branch. There were also male SSC officers performing the same task. If the male officers can be granted PC while performing those tasks there is no reason why equally capable women officers cannot be granted PC. It is not a charity being sought by the women officers but enforcement of their own constitutional rights.
56. We have taken note of the fact that Army women officers are placed on a different footing as there was no such direct assurance of grant of PC held out to them. These officers were, however, aware of such a promise held out to the women Air Force officers. The branches in which SSC was granted were also similar, if not, identical. These branches are non-combatant in nature. Would it be not reasonable for these women officers of the Army to expect that they would be treated at par with the women Air Force officers and legitimately expect a fair treatment at the hands of the Government? The answer would be in the negative.
57. The doctrine of legitimate expectation as observed in various judgments referred to aforesaid is granted on the rule of law as requiring regularity, predictability and certainty in Government dealings with the public, operating both on procedural and

substantive matters. The fair play would be the expectation from the Government.

58. We are of the considered view that the women officers of the Army can be treated no differently from the Air Force women officers even though there is no specific policy decision in their case as they are at par with the women Air Force officers.
59. The methodology adopted by the Army in dropping seniority for any differential of training *inter se* male officers or *inter se* female and male officers as discussed in the factual matrix can equally apply for fixing seniority once PC is granted to the women officers.
60. A PC carries with it certain privileges of rank including pension. These women officers have served well the Armed Forces of the country in the areas of operation they were recruited for and have worked in this capacity for 14 to 15 years. They deserved better from the respondents. There is no reason why these persons who have knocked the door of the court should be deprived of their benefit and the benefit extended only in future for grant of PC to women. It is not as if a complete chapter can be opened by persons who have chosen to accept the SSC and on completion of period decided to go out of service. The benefit is only available to serving officers and the ones who knocked the court but during the period of consideration of the matter retired from service. It would have been in the fitness of things if the respondents having taken the decision to offer PC prospectively should have favourably examined as a policy itself, the plea of the petitioners who were in service or retired from

service during pendency of petition to grant them an equivalent benefit. In matters of gender discrimination a greater sensitivity is expected and required.

61. We are, thus, of the considered view that the following directions are required to be issued:

- 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 at 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.

62. We end this judgement with the hope that with the expanding horizon of women participation in different walks of life, the respondents would be encouraged to have larger participation of women in more areas of operation both for SSC and PC.

63. The petitions are accordingly allowed in the aforesaid terms leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

MARCH 12, 2010
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MOOL CHAND GARG, J.