



2023 INSC 985

MA 1913/2022

Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Miscellaneous Application No 1913 of 2022

In

Writ Petition (Civil) No 1109 of 2020

Nitisha and Others

Applicant(s)

Versus

Union of India and Others

Respondent(s)

W I T H

Miscellaneous Application No 246 of 2023

In

Writ Petition (Civil) No 1109 of 2020

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

- 1 The issue which has been raised in a clutch of applications pertains to the implementation of the decision of this Court in ***Lieutenant Colonel Nitisha and Others vs Union of India and Others***¹.
- 2 The grievance before this Court is by women officers of the Indian Army, who have been granted Permanent Commission² in pursuance of the judgment of this Court. The issue in dispute relates to their non-empanelment for promotion to the rank of Colonel by selection.
- 3 Before analyzing the factual grievance, it would be appropriate to set out the policy framework.
- 4 On 7 October 2002, a communication was issued by the Military Secretary's³ Branch of the Army Headquarters setting out the basis on which Confidential Reports⁴ would be considered for various Selection Boards⁵. The title of the document is:

“Consideration of CRs for Selection Boards (SBs)”

1 (2021) 15 SCC 125

2“PC”

3“MS”

4“CR”

5“SBs”

- 5 Paragraph 3A of the letter deals with No 3 SB for promotion from the rank of Lieutenant Colonel to Colonel and No 4 SB for promotion from the rank of Major to Lieutenant Colonel. We are concerned with No 3 SB since the dispute pertains to promotion from the rank of Lieutenant Colonel to Colonel. Paragraph 3(a) indicates that "all CRs earned after completion of nine years of reckonable service" have to be considered.
- 6 On 17 March 2011, another communication was issued by the MS Branch of the Integrated Headquarters of the Ministry of Defence (Army) in view of the adoption and implementation of the "Quantified System" for selection. Paragraph 3 of the letter states that paragraph 3 of the earlier letter dated 7 October 2002 was being replaced in the following terms:

"...Consideration of CRs for various Selection Boards will be, as per the policy in vogue at the time of consideration."

- 7 On 31 October 2013, the MS Branch issued a communication to lay down a comprehensive Adequately Exercised (AE) policy for consideration of officers of 2002 and later batches by SB No 3. Appendix A to the circular, *inter alia*, specifies cut offs. Paragraph 4 stipulates that the last report (including Special CRs) is taken into consideration by the SB for promotion to the next higher rank subject to certain conditions. Among the conditions, condition (c) indicates that:

"Cut-off CR in respect of officers of a batch will be promulgated by MS Branch before conduct of Selection Board."

- 8 On 23 December 2017, the MS Branch issued a further communication. The communication provides for the primacy of CRs, vis-à-vis other parameters such as performance on courses and gallantry awards, for Special No 3 SB. It has been stipulated that 89 marks out of a total of 100 would be allocated to the CRs.
- 9 The judgment of this Court in **Nitisha** (*supra*) dealt with the denial of PC to Women Short Service Commission Officers (WSSCOs) of the Indian Army. In order to shed some light on the controversy in the present case, it would be appropriate to refer to the observations in paragraphs 109.5 and 113, which are as follows:

“109.5 It has been admitted in the counter-affidavit that the confidential reports, discipline and vigilance reports if any, and honours and awards as on the *5th or 10th years of service* were considered in the case of the women officers. As a consequence of this, the qualifications, achievements and performance of women officers after the 5th or 10th year of service (as the case may be) have been ignored. At this stage, it is necessary to note that Para 13(b) of AO 18/1988 specifically contemplates the “last ACR before assessment for PC” being taken into reckoning for grant of PC. Similarly MoD's Policy Letter dated 24-2-2012 specifically contemplates that in evaluating the overall performance of the officer, “the average will be worked out for each year as well as for the entire period of officers' services”. Para 4(a) stipulates thus:

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

(emphasis supplied)

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

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

- 10 The nub of the dispute in the present case relates to the manner in which the CRs of the women officers were assessed for the purpose of Special No 3 SB after the decision in the above case.
- 11 In a communication dated 12 December 2022, the MS Branch dealt with the modalities to be followed by Special No 3 SB in respect of the women officers

“post” (that is, after) “the grant of PC”. As regards their CRs, paragraph 2(b) of the letter reads thus:

“CRs. The dates of Cut-off CR for WOs Spl No 3 SB will be same as that of their corresponding male batches, when they were considered by No 3 SB.”

- 12 The grievance of the women officers who are before this Court is that as a result of the above direction, all the CRs of women officers commencing from the 1992 batch onwards until 2005 have not been duly considered and the more recent CRs have been excluded from consideration. This is indicated in the tabulation which is annexed to the application before the Court which is reproduced below:

<u>S No</u>	<u>Batch</u>	<u>Approx Cut off CR Dt</u>	<u>Spl No 3 SB dt</u>	<u>No of years of which CRs not considered for Spl No 3 SB (Approx)</u>
1.	1992	2008	09 Jan 2023	14
2.	1994	2010	09 Jan 2023	12
3.	1995	2011	10 Jan 2023	11
4.	1996	2012	11 Jan 2023	10
5.	1997	2013	12 Jan 2023	09
6.	1998	2014	13 Jan 2023	08
7.	1999	2015	14 Jan 2023	07
8.	2000	2016	15 Jan 2023	06
9.	2001	2017	16 Jan 2023	05
10.	2002	2018	17 Jan 2023	04
11.	2003	2019	18 Jan 2023	03
12.	2004	2020	19 Jan 2023	02
13.	2005	2021	20 Jan 2023	01

- 13 We have heard Mr Huzefa Ahmadi and Ms V Mohana, senior counsel in support of the applications which have been filed by the women officers. Mr R Venkataramani, Attorney General appears for the Union of India with Mr R Balasubramanian, senior counsel.
- 14 The grievance which has been put forth by Mr Ahamdi and Ms Mohana is precisely this:
- (i) In terms of the policy circulars the empanelment of women officers for the rank of Colonel is required to be considered on the basis of all the CRs after the ninth year of service;
 - (ii) In the judgment in **Nitisha** (*supra*), this Court had emphasized the need to consider the entire profile of the women officers *albeit* in the context of the grant of PC;
 - (iii) An anomalous situation has resulted under which though for the grant of PC, the entire reckonable service has been taken into account, yet in the matter of considering them for empanelment as Colonels, a large chunk of their CRs has been excluded from consideration by Special No 3 SB on the basis of bringing about an ostensible parity with male officers; and
 - (iv) The approach which has been adopted by the Army authorities is contrary to the policy circulars as well as to the judgment of this Court.

- 15 Counter affidavits have been filed on behalf of the Union of India in these proceedings. The Learned Attorney General has submitted that 108 women officers have been empaneled for promotion as Colonels on the same basis which would indicate that there has been no discrimination. The Attorney general has relied on the explanation tendered in the Counter Affidavit of the Union of India.
- 16 In the counter affidavit, it has been explained that there is a distinction between the procedure which is followed for the conduct of Special No 3 SB and Special No 5 SB. In the latter, the officer who is considered for the grant of PC gets only one 'look' by the Board. On the other hand, in the case of Special No 3 SB, each officer gets a mandatory three looks (fresh look, first review and final review) by the Board. For each look, there is a cutoff date for the CR. Ordinarily, these three looks in Special No 3 SB are given to the officers of the Indian Army in a span of three years. However, in the case of the women officers in question, the three mandatory looks were given at the same time in January 2023 to ensure that (i) women officers who had just received PC should not wait for another two or three years for being considered for promotion in No 3 SB; and (ii) once they are empanelled, they would be posted to command appointments to enable them to earn requisite experience for being considered for further promotion by No 2 SB. It has been submitted that the profile of women officers has not been compared with the male counterparts, but with women officers who were their batch

mates. In this context, it would be appropriate to extract from the following averments which are contained in the counter affidavit:

“To elaborate, every officer is given three looks for promotion by Selection Board. If an Officer is not empanelled in their Fresh (1st) look, then he/she is considered for promotion in Second look (First Review) with additional input of one more Confidential Report. If again not empanelled, then Third look (Final Review) with one more additional input of Confidential Report is granted to the Officer. It is for this reason that not all the latest CRs are taken into consideration for the reason that the second and third look would then be rendered otiose. If the contention of the Petitioners/Applicants of considering their CRs as on date is accepted, then the review looks (second and third looks) for promotion would not have any additional input and the Special No.3 SB would be considering the same profile all three times and that too, with Confidential Reports covered only in the rank of Lt Col. This would have been contrary to laid down Selection Board policies which mandate additional inputs for second and third look. The authorities were conscious of this fact and it is for this reason the cut off CRs of the Women Officers were corresponding to the male batches and not their latest CRs.”

- 17 Annexure R-8 to the counter affidavit filed by the Union Government contains a comparison between the cut off CRs which have been taken into reckoning for women officers and for male officers of corresponding batches. The tabulated statement indicates the position for various regiments of the Indian Army. Of them, we are concerned with the first, namely, the Army Ordnance Corps (AOC). For the AOC, the tabulated statement indicates the following position:

Ser No	Arm/Services	Batch	Cut-off-CR Wos	Corresponding Male Batch Cut-off-CR
4.	AOC	1995	31 May 12	31 May 12
		1996	31 May 13	31 May 13
		1997	31 May 13	31 May 13
		1998	31 May 14	31 May 15
		1999	31 May 15	31 May 15
		2000	31 May 16	31 May 16
		2001	31 May 17	31 May 17
		2002	31 May 18	31 May 18
		2003	31 May 19	31 May 19
		2004	31 May 20	31 May 20
		2005	31 May 21	31 May 21

- 18 The above tabulation shows that the same cut off has been adopted for batches of the women officers who were considered in Special No 3 SB as for corresponding batches of male officers. For example, for the 1995 batch, the cut off for both the women officers and the corresponding male officers is 31 May 2012. For the succeeding batches right up to 2005, the tabulated chart shows that the same cut off has been applied. The manner in which the cut off has been applied for reckoning CRs of the women officers for empanelment as Colonels is arbitrary because it is both contrary to the principles which were laid down by this Court in its judgment in **Nitisha** and contrary to the policy framework which has been enunciated by the Indian Army itself.

19 We are conscious of the fact that the judgment in **Nitisha** deals with the grant of PC, whereas in the present case the Court is concerned with the empanelment of officers who are granted PC for promotion as Colonels by selection. In that regard, the policy framework which has been set out by the letter dated 7 October 2002 which has been set out in the earlier part of this judgment makes it abundantly clear that CRs after nine years' reckonable service were required to be taken into consideration. Subsequently, after the Quantitative Assessment System came into existence, it was clarified by the policy circular dated 17 March 2011 that the consideration of CRs for various SBs will be as per the policy in vogue at the time of consideration. The policy circular dated 23 December 2017 indicates the primacy which is attributed to CRs, which carry 89 out of a total of 100 marks. This indicates the importance of a correct evaluation and reckoning of the CRs since it forms the basis of promotion which is being considered by Special No 3 SB. The policy document of 31 October 2013 stipulates that the cut off CRs in respect of officers of batch will be promulgated by the MS Branch before the conduct of the Selection Board.

20 In the counter affidavit which has been filed by the Army authorities, it has been specified that for the purpose of the work of Special No 3 SB, an officer is granted three looks, namely, the first look, the first review and the second review. Consequently, it has been stated that if all the CRs up to date were to be considered in the first look itself, the purpose of having a second look and

a final review would be rendered otiose. We are in agreement with this logic. However, this would have perhaps justified the authorities to exclude the last CR which could have been considered at the final look and the CR prior to that, which could be considered at the stage of the first review. However, as the chart which we have annexed earlier indicates, a cut off was applied arbitrarily in the present case ostensibly to equate the women officers with their male counterparts. The arbitrariness of the cutoff is evident from the fact that the CRs for several years were kept out of reckoning altogether. A stray sentence in the judgment of this Court in **Nitisha** cannot be torn out of context.

- 21 We are constrained to observe that the attitude has been to find some way to defeat the just entitlement of the women officers. Such an approach does disservice to the need to provide justice to the women officers who have fought a long and hard battle before this Court to receive their just entitlement under the law. Even after the judgment in **Nitisha**, the women officers have been compelled to move this Court repeatedly for the realization of their rights.
- 22 An alternate ground has been sought to be raised on behalf of the Army authorities to the effect that adequate vacancies were not available for accommodating the officers. In this regard, it is common ground that in an earlier order dated 21 November 2022, the Court recorded the statement of the Army authorities that as many as 150 vacancies were to be made

available pursuant to the judgment of this Court in **Nitisha**. Admittedly, as the counter indicates 108 vacancies have been filled up. The ground of the unavailability of vacancies would therefore not be available at this stage. We are, therefore, clearly of the view that the manner in which the applicants have been denied empanelment for the post of Colonel on a selection basis is arbitrary. Besides being violative of the fundamental principles of fairness embodied in Article 14 of the Constitution, the whole approach has been contrary to both the judgment of this Court in **Nitisha** as well as the applicable policy framework laid down by the Army authorities.

23 We accordingly order and direct that:

- (i) A fresh exercise of reconvening Special No 3 SB shall be conducted no later than within a fortnight from the date of this order for all the women officers who were considered by the earlier Special No 3 SB (except for those officers who have already been empaneled);
- (ii) In the course of Special No 3 SB to be convened in pursuance of the above direction, the Attorney General states that a common cut off of June 2021 shall be taken into reckoning in order to obviate any controversy;
- (iii) Since during the pendency of these proceedings, one of the officers, Colonel (Time Scale) Asha Kale has retired, her case shall also be considered on a similar footing; and

(iv) Those officers who have already been empaneled or promoted as Colonels, shall not be disturbed or affected in any manner nor will their seniority be affected by the implementation of these directions.

24 The Miscellaneous Applications are accordingly disposed of.

25 Pending applications, if any, stand disposed of.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[J B Pardiwala]

.....J.
[Manoj Misra]

New Delhi;
November 3, 2023
CKB