Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos 841-843 of 2022

Cdr Amit Kumar Sharma etc **.... Appellants**

Versus

Union of India & Ors etc **....Respondents**

WITH

Civil Appeal No 846 of 2022
(@ Civil Appeal Nos 845-846 of 2022)

WITH

Civil Appeal No 2457/2022

WITH

Civil Appeal Nos 2059-2060/2022

WITH

Civil Appeal No 2216/2022

WITH

Civil Appeal Nos 856-858/2022

WITH

Civil Appeal No 855/2022

WITH

Civil Appeal Nos 852-854/2022

WITH

Civil Appeal Nos 844/2022

WITH
Civil Appeal Nos 847-851/2022

WITH

Civil Appeal No of 2022
(Diary No 20730/2022)

AND WITH

Civil Appeal No of 2022
(Diary No. 23503/2022)

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. Leave to appeal under Section 31(1) of the Armed Forces Tribunal Act 2007 is granted.

2. Delay condoned.

3. This batch of appeals arises from a judgment dated 3 January 2022 of the Principal Bench of the Armed Forces Tribunal[1]. The AFT dismissed the applications challenging the denial of Permanent Commission[2] in the Indian Navy. The principle issue is whether the AFT could have adjudicated on the validity of the selection proceedings when relevant material was disclosed only to the AFT in a sealed cover.

The Facts

4. On 26 September 2008, the Ministry of Defence notified that women Short Service Commission[3] Officers would be eligible for grant of PC prospectively. In **Union of India** v. **Lieutenant Commander Annie Nagaraj**[4], the issue for consideration before this court was whether women who were inducted in various branches of the Indian Navy prior to 2008 were entitled to the grant of PC. By its judgment dated 17 March 2020, this Court observed, *inter alia,* that[5]:

(i) As a result of the policy decision of the Union Government dated 25

[1] "AFT"
[2] "PC"
[3] "SSC"
[4] (2020) 13 SCC 1
[5] Paragraphs 109.5, 109.6 and 109.7 of the judgment in **Annie Nagaraj.**

February 1999, the terms and conditions of service of SSC Officers including women with regard to the grant of PC were governed by Regulation 203 of Chapter IV of Part III of the Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963[6];

(ii) The stipulation in the policy letter dated 26 September 2008 making it prospective and applicable only to specified branches/cadres of the Indian Navy (Education, Law and Naval Construction) was not enforceable;

(iii) All SSC Officers in the Education, Law and Logistics cadres, who were "presently in service" shall be considered for the grant of PCs;

(iv) The officers were entitled to the grant of PC in view of the policy letter of the Union Government dated 25 February 1999 read with Regulation 203;

(v) SSC women officers in the batch of cases before the High Court and the AFT who are "presently in service" shall be considered for the grant of PC on the basis of the vacancy position as on the date of the judgment of the Delhi High Court and the AFT or as it "presently stands", whichever is higher;

(vi) The applications of the serving officers for the grant of PC shall be considered on the basis of the norms contained in Regulation 203, namely,

(a) availability of vacancies in the stablised cadre at the relevant time;

(b) determination of suitability;

(c) recommendation of the Chief of Naval Staff; and

[6] "Regulations"

(d) empanelment shall be based on the inter-se merit evaluated on the ACRs of the officers under consideration, subject to the availability of vacancies.

5. There are three points in time, which were taken into consideration by the authorities for the determination of vacancies, namely

(i) August 2015, when the judgment of the High Court in **Annie Nagaraj** (supra) was pronounced;

(ii) September 2016, when the decision of the AFT in **Commander Priya Khurana v. Union of India** [7] was pronounced; and

(iii) March 2020, when the decision of this Court in **Annie Nagaraj** (supra) case was pronounced.

6. Following the above directions, the process for implementing the judgment was carried out. The respondents worked out a total of 88 vacancies. 306 officers were considered for PC against the 88 vacancies after which 80 of them were granted PC. The second respondent (Integrated Headquarters of Ministry of Defence (Navy)) issued a signal order releasing many SSC officers from service on the ground that they had not obtained PC. The Signal order only notes the date of commission, date of release and the Unit of the officer without any reference to the process of selection that was undertaken or the relative merit. Many of the SSC officers, both men and women, who were not granted PC filed writ petitions before this Court challenging the rejection of their claim for PC. In the alternative, they sought directions for the grant of pension.

[7] OA No 143 of 2016

7. By an order dated 24 August 2021, this Court dismissed the writ petitions on the ground that the Court had already laid down the principles for granting PC in **Annie Nagaraj** (supra) and **Lt. Col. Nitisha** v. **Union of India**[8]**.** It was observed that the officers who were denied PC would assail the decision on the basis of individual facts and thus, it would be necessary for them to claim their reliefs before the AFT. The relevant observations are extracted below:

> "12 The petitioners who are considered for the grant of PC and were denied it would have to assail the decision not to grant them PC **on the basis of the individual facts in each case.** Bearing this in mind, it would be necessary for them to pursue their remedies before the AFT where the facts of each case can be scrutinized. If the petitioners were to succeed on their plea for the grant of PC, the alternative claim for invoking the jurisdiction under Article 142 would cease to have any practical significance. It is only if the denial of PC is upheld that the alternate plea can be pressed and this can be pursued after the decision of the AFT, by following the remedies available under the statute. Hence, on a considered view of the matter we are inclined not to entertain the petitions under Article 32 on merits."
>
> **(emphasis supplied)**

8. The second respondent, in the written submissions before the AFT, filed in **Cdr AK Sharma** v. **Union of India**[9] submitted that the vacancy calculation is more than an exercise of simple mathematics and that the "minute details of vacancy calculation cannot be put in the open domain for the obvious reasons. Accordingly, this Hon'ble Tribunal will be provided with a detailed note with respect to vacancy calculation in a sealed envelope (as and when sought)." It was also submitted that the fairness of the selection process "would be amply clear from the selection Board Proceedings which would be provided to this Hon'ble Tribunal for perusal in the sealed cover, if need for the same arises." Similarly, in the counter affidavit filed in **Commander Barsha**

[8] (2021) SCCOnLine SC 261
[9] O.A 2167 of 2021

Agrawal v. **Union of India**[10] , it was submitted:

> "Accordingly, this Hon'ble Tribunal has been provided with a detailed note with respect to vacancy calculation in a **sealed envelope"**.
>
> **(emphasis supplied)**

9. The AFT by the impugned judgment dated 3 January 2022 disposed the cases transferred to the AFT pursuant to the order of this Court along with cases where the denial of PC was challenged before the AFT. The impugned judgment of the AFT in paragraph 54 indicates that the respondents submitted :

(i) All the files connected with the Selection Board convened in December 2020;

(ii) The previous Selection Boards held for the grant of PC;

(iii) The management of SSC Officers; and

(iv) The dossiers containing the confidential reports of 32 applicants before the AFT.

10. In addition to the above, the AFT noted in paragraph 81 that on a perusal of "various records and files submitted by the respondents", the second respondent had considered the following issues:

(a) Selection Boards held prior to 2020;

(b) Baseline for consideration and batches to be considered;

(c) Categorization of officers for consideration;

(d) Determination of vacancies;

(e) Suitability criteria;

(f) Inter-se merit criteria;

[10] OA 2008 of 2021

(g) Conduct of Board and results; and

(h) Analysis of the Selection Board Proceedings.

11. In paragraph 99 of the judgment, it is observed that the Board conducted its proceedings on 18 December 2020 according to the criteria approved in the Approach paper. Paragraph 37 of the impugned judgment extracts the selection procedure that was adopted by Indian Navy. Paragraph 37 of the judgment is extracted below:

> "37. The Counsel then took us through the criteria for selection and said that marks were apportioned as given below to work out inter-se merit. He added that there was no 'Value Judgment' mark as was applicable in promotion boards. He also stated that no one has been rejected based on medical criteria and all had been recommended by the CNS. He further added that the merit list was computer generated based on the criteria mentioned below; and that out of a total of 381 officers, 80 had been granted PC (41 women and 39 male officers). The counsel then elaborated on the factors and their weightage.

Ser	Factor	Weightage	Unsuitability Criteria
(a)	ACR Merit	90%	
(b)	SLt Seniority	04%	
(c)	War	02%	Officer should not have been recommended G and below any time in the last five CR cycles held on record
(d)	Peer	02%	Officer should not have been recommended G and below any time in the last five CR cycles held on record
(e)	Recommendation for PC	02%	Officer should not have been graded 'No' in recommendation for PC thrice or more in the last five CRs

12. On perusing the records disclosed in a sealed cover, the AFT recorded the status of the remaining applicants as follows:

Ser	OA Case Ref	Applicants	Current Status	Relief sought	Merit 1st Consideration	Merit 2nd Consideration	Disposal
1	OA 433/ 2016 SLP (C) 834-36/ 2021	Lt Cdr Ravinder Pal Singh Engineering/NC Batch- 2005 Service- 16	Retired Released 31.12.2020	PC/Pension	5/6 Low merit	No vacancy	Was considered only for first look. To be given second look
2	OA 435/2016 SLP (C) 834-36/2021	Lt Cdr Amit Khajuria Engineering / NC Batch-2005 Service -16	Retired Released 31.12.2020	PC/Pension	6/6 Low merit	No vacancy	Was considered only for first look. To be given second look
3	OA 436/2016 SLP (C) 834-36/2021	Lt Cdr Manish Kumar Singh Engineering/ NC Batch- 2005 Service- 16	Retired Released 31.12.2020	PC/ Pension	3/6 Low merit	No vacancy	Was considered only for first look. To be given second look
4	OA 1203/2017 WP 1471/2020 (Tfr-Rajkumar)	Cdr Saroj Singh Exec/gs Batch- 2003 Service- 18	Released 31.12.2020 Rel stayed in service	PC	5/10 Low merit	4/9 Low merit	Not eligible for PC Already Granted Pension
5	OA 838/2018 WP 1471/2020 (Tfr-Rajkumar)	Cdr Swati Bhatia Education/ GS Batch -2004 Service- 17	Released 31.12.2020 Rel stayed In service	PC	12/14 Low merit	18/20 Low merit	Not eligible for PC Already Granted Pension
6	OA 840/2018 WP 1478/2020 (Tfr-Rajkumar)	Cdr Vijayeta Education GS Batch-2004 Service – 17	Released 31.12.2020 Rel stayed In service	PC	8/14 Low merit	14/20 Low merit	Not eligible for PC Already Granted Pension
7	OA 1959/2018 Old matter	Cdr Kumar Dhiraj Batch- 2007 Service- 14	Released 9.01.2019 Retired	PC	Not considered since not in service on date of judgment	Not considered since not in service on date of judgment	Not eligible for PC and not granted pension being inadmissible under Para 96(x) and (xi) of the judgment
8	OA 2118/2018 WP 1478/2020 (Tfr-Rajkumar)	Cdr Mandip Kaur Exec/Lgd Batch -2005 Service- 16	Released 31.12.2020 Rel stayed in service	PC	7/9 Low merit NR for PC in ACR	10/12 Low merit NR for PC ON acr	Not eligible for PC Already Granted Pension

9	OA 816/2019 WP 1269/2020 (Tfr-Rajkumar)	Cdr YK Singh Education/GS Batch- 2005 Service – 16	Released 31.12.2020 Rel stayed in service	PC/Pension	15/20 Low merit	10/13 Low merit	Not eligible for PC and not granted pension being inadmissible under Para 96(x) and (xi) of the judgment
10	OA 1361/2021 Fresh case	Cdr Sarita Nagayach Exec/ Lgs Batch- 2007 Service -14	Released 05.08.2021 Retired	PC/Pension	07/15 Low merit NR for PC in ACR	13/20 Low merit NR for PC in ACR	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
11	OA 1454/2021 WP 646/2021 Dismissed as withdrawn by applicant.	Cdr Sandeep Singh Exec/Lgs Batch-2007 Service – 14	Rel Order 24.03.2021 Released 06.08.2021	PC/Pension	4/15 Low merit	8/20 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
12	OA 1964/2021 WP 1471/2020 (Tfr-Rajkuamr)	Cdr Pooja Rajput Exec/Lgs Batch- 2002 Service- 19	Released 31.12.2020 Rel stayed in service	PC	5/7 Low merit	7/14 Low merit	Not eligible for PC Already granted pension
13	OA 2008/2021 WP 703/2021 (Tfr-Rajkumar)	Cdr Barsha Agarwal & 03 Ors Education/GS Batch- 2007 Service- 14	Rel Order 05.08.2020 Released 05.08.2021	PC/Pension / Permit to service till 20 yrs (Ref BP/ N case)	9/11 Low merit	7/9 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
14	Joint with Ser 13	Cdr Shweta Kapoor Education/ GS Batch- 2007 Service- 14	Rel Order 5.8.2020 Released 05.08.2021	PC/Pension / Permit to service till 20 yrs (Ref BP/ N case)	11/11 Low merit	09/09 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the

							judgment
15	Joint with Ser 13	Cdr Sapna C Lanjewar Education/GS Batch- 2007 Service- 14	Rel Order 05.08.2020 Released 05.08.2021	PC/Pension / Permit to service till 20 yrs (Ref BP/ N case)	7/11 Low merit	05/09 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
16	Joint with Ser 13	Cdr SS Naik Education/GS Batch- 2007 Service-14	Rel Order 05.08.2020 Released 05.08.2021	PC/Pension / Permit to service till 20 yrs (Ref BP/ N case)	8/11 Low merit	06/09 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
17	OA 2064/2021 WP 1471/2020 (Tfr-Rajkumar)	Cdr Annie Nagaraja Education/GS Batch- 1999 Service- 22	Released 31.12.2020 Rel stayed- SC order 24.08.2020 In service	PC Reframe guidelines of 15.10.2020?	5/8 NR for PC in ACR	6/9 NR for PC in ACR	Not eligible for PC Already granted pension
18	OA 2065/2021 WP 1471/2020(Tfr-Rajkumar)	Lt Cdr Barkha Rathore Exec/Lgs Batch- 2003 Service- 18	Released 31.12.2020 Rel stayed In service	PC Reframe guidelines of 15.10.2020?	10/10 Low merit NR for PC in ACR	9/9 Low merit NR for PC in ACR	Not eligible for PC Already granted pension
19	OA 2066/2021 WP 1471/2020 (Tfr-Rajkumar)	Cdr Urmila Bhat Education/Met Batch- 1999 Service- 22	Released 31.12.2020 Rel stayed In service	PC	7/8 Low merit NR for PC in ACR	8/9 Low merit NR for PC in ACR	Not eligible for PC Already granted pension
20	OA 2067/2021 WP 507/2021 (Tfr-Rajkumar)	Cdr Puneet Pal Kaur Exec/Lgs Batch-2006 Service- 14	Released 12.05.2021 Rel stayed in service	PC/Pension	5/12 Low merit	6/15 Low merit	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
21	OA 2068/2021 WP 1471/2020	Cdr Shruti Dhawan Education/GS	Released 31.12.2020	PC	6/8 NR for PC in ACR	7/9 NR for PC in ACR	Not eligible for PC Already

	(Tfr-Rajkumar)	Batch- 1999 Service- 22	Rel stayed in service				granted pension
22	OA 2069/2021 Fresh case	Cdr Bhanu Pratap Singh Exec/Lgs Batch- 2007 Service- 14	Released 31.12.2020 Retired	PC/ Pension	10/15 Low merit NR for PC in ACR	15/20 Low merit NR for PC in ACR	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
23	OA 2167/2021 (Tfr-RB Mumbai) WP No. 1269/2020 (Tfr-Rajkumar)	Cdr Amit Kumar Sharma Education/GS Batch- 2003 Service- 18	Released 31.12.2020 Rel stayed in service	PC/Pension	2/3 NR for PC in ACR	9/14 Low merit NR for PC in ACR	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment
24	OA 2168/2021 (Tfr-RB Mumbai) Old matter, transferred from AFT (RB0 Mumbai	Lt Cdr Yogita Rani Education/GS Batch- 2003 Service- 18	Released 31.12.2020	PC/ Pension	3/3 Low merit	14/14 Low merit	Not eligible for PC Already granted pension
25	OA 2169/2021 (OA 105/2017 RB Mumbai) WP 1269/2020 (Tfr-Rajkumar)	Cdr PS Soodan Education/ GS Batch- 2004 Service- 17	Released 31.12.2020 Rel stayed In service	PC/ Pension Permit to serve till 20 yrs (Ref BP/N case)	13/14 Low merit NR for PC in ACR	19/20 Low merit NR for PC in ACR	Not eligible for PC and not grated pension being inadmissible under Para 96(x) and (xi) of the judgment

13. On an examination of the Board proceedings, the AFT observed that there were no mala fides in the parameters which were prescribed or the procedure adopted. It was also observed that the officers were not granted PC because of their comparative merit against limited vacancies and, in certain cases, the officers were not found suitable. The relevant observations are extracted below:

> "110. Having heard all parties and examined various records, it is well established that the IN has formulated a proper procedure

> with suitable parameters, and has applied it uniformly to all eligible SSCOs, both men and women, of all affected Branches/Cadres in their consideration for grant of PC. We find no mala fide in the parameters laid down or the procedure adopted. No gender discrimination has been observed in the Selection Board held in Dec 2020 and those held prior to the decision of the Hon'ble Supreme Court in *Annie Nagaraj* (supra).
> […]
> 121. The merit position and status of the rest of the applicants are given below. The inputs on recommendations for PC; Peer and War Report entries have all been verified from the CRs. It is seen from the records that the applicants have not been granted PC only because their comparative merit against limited vacancy and in certain cases, not being found suitable as per the laid down criteria."

14. The decision of the AFT has led to the institution of twelve Civil Appeals before this Court. Twenty-six officers of the Indian Navy are appellants before this Court in the Civil Appeals. Of these twenty six officers, thirteen are still in service pursuant to interim orders. The remaining thirteen officers are out of service since varying dates in 2020, 2021 and 2022. Apart from the twenty six officers who are appellants before this Court in the twelve civil appeals, eight officers have filed IAs for intervention. Seven out of eight officers are protected by interim orders while the tenure of the eighth officer (Commander Navneet Sharma) is to end in the month of December 2022.

15. Notice was issued in this batch of Civil Appeals on 31 January 2022. The grievance of the appellants is that the sealed cover procedure, which was followed by the AFT, has resulted in substantial prejudice.

The Submissions

16. Mr Huzefa A Ahmadi and Mr C U Singh, senior counsel appearing on behalf of

the appellants together with the other counsel - Ms Kamini Jaiswal, Ms Haripriya Padmanabhan and Ms Puja Dhar have submitted that the AFT, in the course of its decision, has extensively relied upon material which was submitted by the Naval Authorities in a sealed cover. It has been urged that this material was never disclosed to the appellants and if the material had been disclosed to them, they would have been in a position to demonstrate that much of the data which has been relied upon is seriously in dispute and is not reflective of the correct position. Mr. R. Balasubramaniam, senior counsel appearing on behalf of the respondent, submitted that it is not as if the respondents voluntarily chose to place the data in a sealed cover and the files which were produced were on the directions of the AFT.

17. During the course of hearing, three principal submissions have been urged by Mr. Huzefa A Ahmadi, senior counsel:

(i) In its decision in **Annie Nagaraj** (supra), this Court directed that the highest number of vacancies were to be considered in determining the claims of the SSC officers for the grant of PC but this has not been done;

(ii) Several batches have been clubbed together as a consequence of which vacancies have not been considered batch-wise and inter se merit has been skewed; and

(iii) Consideration for the grant of PC was effected on the basis of ACRs which were written casually at a time when the officers concerned were not eligible for the grant of PC as observed in a subsequent decision of this Court (albeit in the case of the Army) in **Nitisha** (supra).

18. While formulating the objections to the findings of the AFT on merits, it has been submitted by the counsel for the appellants that:

(i) The respondents have made no distinction between officers who were inducted prior to 2008 and those inducted after 2008;

(ii) Data submitted by the Navy shows that vacancies at the material time were not properly calculated;

(iii) There is sufficient data to indicate that many more vacancies exist in most cadres than what is depicted in the impugned order;

(iv) The adoption of the 60:40 ratio (PC: SSC Officers) based on the AV Singh Committee report is flawed since various other aspects of the report are yet to be implemented by the Naval Authorities including the disbursal of monetary benefits;

(v) The computation of yearly vacancies has proceeded on an arbitrary basis of 15 years' distribution;

(vi) The methodology of dividing the total number of vacancies by 15 is arbitrary;

(vii) The chart which has been set out in paragraph 95 of AFT's decision shows that as many as 14 batches were considered together; and

(viii) The grievances of individual officers have not been adjudicated. For instance, in the case of Commanders Annie Nagaraj and Amit Sharma, though they were recommended for the grant of PC and would fall within the existing vacancies, they have been denied PC on the ground that they were not recommended.

19. On the other hand, Mr R Balasubramaniam, senior counsel appearing on behalf of the respondents made the following submissions:

(i) While computing the vacancies, the Naval Authorities have correctly borne in mind:

(a) The overall cadre structure of the Indian Navy;

(b) The policies which have been consistently followed; and

(c) The pattern of future inductions and retirements; and the need to maintain a youthful profile in the Indian Navy and a balanced cadre structure.

(ii) Grant of PC is governed by Regulation 203 according to which the availability of vacancies should be in the stabilised cadre;

(iii) While the stabilised cadre normally comprises only of government sanctioned posts in the permanent cadre, in the spirit of the judgment of this Court, temporary vacancies and Training Drafting Leave Reserve (TDLR) vacancies were also added to the stabilised cadre;

(iv) The vacancies of the stabilised cadre were worked out with reference to August 2015, September 2016 and March 2020;

(v) The ratio of 60:40 (PC:SSC) has been approved by the Government of India on 3 November 2008 based on the AV Singh Committee report;

(vi) Based on the above, the deficiencies in each stream were divided by a 15 year cycle which is the difference between the life of a PC Officer and SSC Officer in service;

(vii) The deficiencies in manning strength cannot be given to any particular

batch or a few batches because of the policy of the Navy to have a balanced cadre structure, a youthful profile and a proper induction/retirement pattern in the long run;

(viii) The vacancies assigned to each batch worked out in terms of the above model provided the maximum vacancies as on March 2020, the date of the judgment of this Court;

(ix) Pursuant to the directions given by the AFT, the Navy carried out a fresh exercise and allotted seven more vacancies to the Naval Construction Cadre and seven officers were approved for the grant of PC;

(x) In regard to the clubbing of batches, each SSC Officer was given two 'looks' (the first and the second 'look') pursuant to consistent practice. The first look is with officers of the preceding batch, who were not granted PC in their first look and the second look is with the available next fresh batch. Hence, each batch was given consideration separately and it would not be correct to postulate that 14 batches of the Logistics Cadre were clubbed together. The distribution of vacancies per batch on the basis of a 15 year cycle is justified;

(xi) The manner of writing ACRs is not erroneous. The judgment in **Nitisha** (supra) pertained to the Indian Army which is distinguishable since :

(a) Unlike the Indian Army where male officers were being granted PC, in the case of the Indian Navy neither men nor women officers were granted PC;

(b) The ACRs written by officers in the last five years preceding the conduct of the Board were taken into consideration which had a specific column on whether or not a recommendation was being made for PC, since 2015; and

(c) If an officer has not been recommended for PC in three or more ACRs, it would be a disqualification and hence an officer would not be eligible for grant of PC, even if higher in merit.

20. The second respondent in the written submissions before this Court submitted that (i) it is a norm for the Board proceedings to only be provided to the AFT in a sealed cover; (ii) the AFT on a perusal of the proceedings of the Selection Board as well as confidential dossiers of the individual applicants found that the Navy had considered the claims of the officers for PC based upon the parameters laid down by this Court in **Annie Nagaraja** (supra).

The Analysis

21. The AFT, *inter alia*, had to determine if (i) the Naval Authorities had correctly computed the vacancies against which the claims of the SSC Officers would be considered for the grant of PC; and (ii) the Selection Board considered the applications for the grant of PC fairly. The judgment of the AFT indicates that in assessing the validity of the exercise undertaken to determine vacancies and the fairness of the selection process, it placed extensive reliance on material drawn from the data emerging from the files which were submitted by the Union Government and the Naval Authorities in a sealed cover. The judgment of AFT sets out in paragraph 92, a summary of the cadre-wise strength and vacancies to be considered for granting PC to the affected SSC officers. In paragraphs 93 and 94, the AFT has set out, in a similar manner, tabulated statements in regard to the utilisation of vacancies. This data did not

form the subject matter of deliberations before the AFT. In fact, the counter affidavits in **Commander Barsha Agrawal (supra)** and **Commander AK Sharma** (supra) indicate that the data was submitted in the form of a sealed note.

22. Similarly, the Board proceedings were not disclosed to the appellants. The written submissions before this court and the submissions in **Commander AK Sharma** (supra) before the AFT indicate that the Board proceedings were not disclosed to the officers and were submitted to the AFT in a sealed cover. The AFT on a perusal of the Board proceedings has observed that the second respondent had adopted proper procedure and suitable parameters that it had uniformly applied. It was also observed on a perusal of the documents that there was no gender bias and that the appellants' applications for PC were rejected only because they were lower in *inter se* merit.

23. This Court in **Annie Nagaraj** (supra) had directed that the applications of the serving officers for PC shall be considered on the basis of norms in Regulation 203 and paragraph 4 of the implementation guidelines. The parameters that were directed to be considered were: (i) availability of vacancies in stabilized cadre at the material time; (ii) determination of suitability; and (iii) recommendation of the Chief of Naval Staff. In terms of paragraph 4 of the implementation guidelines, the empanelment has to be based on inter-se merit evaluated on the ACRs of the officers. The Tribunal in paragraph 105 of the judgment observed that on a perusal of record it was evident that the Indian Navy had considered the SSC officers for PC based on the parameters laid down in **Annie Nagaraj** (supra). However, the material that has been relied on to arrive at the finding that there was no infirmity in the process has not been disclosed to the appellants. The AFT observed that the weightage to the individual parameters in the selection process for PC is the same as it existed before the judgment of this Court in

Annie Nagaraj (supra). Even if the parameters for selection and the weightage of the individual parameters have been in the public domain, there is no material on record to determine if the selection has been made in accordance with the criteria. The AFT has recorded that there are 'no mala fides' and 'no gender bias' in the selection process. However, there is no material available to the appellants to challenge these findings since the material was disclosed to the AFT in a sealed envelope. The orders granting PC to other officers also did not contain any reasoning on the inter-se merit of the applicants. The AFT on a perusal of the files submitted in a sealed cover recorded the status of the applicants in a tabular format that has been extracted in the earlier part of the judgment. However, the appellants were not privy to such information.

24. Material prejudice has been caused by the process which has been followed of disclosing the information of vacancies and the board proceedings to the AFT in a sealed cover. In **Khudiram Das** v. **State of West Bengal**[11], this Court held that the test for determining if material must be disclosed is whether in all 'reasonable probability', the material would influence the decision of the authority. Ruling in the context of preventive detention, a four-Judge Bench of this Court observed:

> "15. **Now, the proposition can hardly be disputed that if there is before the District Magistrate material against the detenu which is of a highly damaging character and having nexus and relevancy with the object of detention, and proximity with the time when the subjective satisfaction forming the basis of the detention order was arrived at, it would be legitimate for the Court to infer that such material must have influenced the District Magistrate in arriving at his subjective satisfaction and in such a case the Court would refuse to accept the bald statement of the District Magistrate that he did not take such material into account and excluded it from consideration.** It is elementary that the human mind does not function in compartments. When it receives impressions from different sources, it is the totality of the impressions which

[11] (1975) 2 SCC 81

> goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the decision making process. Therefore, in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention."
>
> **(emphasis supplied)**

25. In **T. Takano** v. **Securities and Exchange Board of India**[12], a two- Judge Bench of this Court held that the all relevant information must be disclosed. In this case, the issue for consideration before this Court was whether an investigation report under Regulation 9 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations 2003 must be disclosed to the person to whom a notice to show cause is issued. SEBI had not disclosed the investigation report. It was the contention of SEBI that it had not relied on the investigation report to issue the show cause notice. The two Judge Bench observed that disclosure of information to the parties to the adjudication serves three purposes: (i) Reliability: The possession of information by both the parties can aid the courts in determining the truth of the contentions; (ii) Fair Trial: There is a legitimate expectation that parties are provided all the information for them to effectively participate in the proceedings; (iii) Transparency and accountability: It is necessary that the adjudication is not opaque but transparent. Transparency aids in establishing accountability. The observations on disclosure of information and its impact on

[12] Civil Appeal Nos. 487-488 of 2022

transparency are extracted below:

> "22. […] Keeping a party bereft of the information that influenced the decision of an authority undertaking an adjudicatory function also undermines the transparency of the judicial process. It denies the concerned party and the public at large the ability to effectively scruitinise the decisions of the authority since it creates an information asymmetry."
> 23. The purpose of disclosure of information is not merely individualistic, that is to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the *outcome* (reliability) and the *process* (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure, only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed.

26. This court observed that the right to disclosure is not absolute. Portions that involve information on third-parties or confidential information on the securities market may be withheld by SEBI. The court directed that the Board is duty bound to disclose parts of the investigative report that concern the specific allegations that have been levelled in the show cause notice. However, the court also observed that it does not entitle a person to whom the notice is issued to receive unrelated sensitive information. The court held that it must first be *prima facie* established by SEBI that the disclosure of the information would affect third party rights. Once a prima facie case of sensitivity is established, the onus would then shift to the appellant to prove that the information is *necessary* to defend his case appropriately. The conclusions are extracted below:

> 51 […]
> (v) The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is necessary to defend his

> case appropriately; and
>
> (vi) Where some portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.
>
> 52 The Board shall be duty-bound to provide copies of such parts of the report which concern the specific allegations which have been levelled against the appellant in the notice to show cause. However, this does not entitle the appellant to receive sensitive information regarding third parties and unrelated transactions that may form part of the investigation report."

27. The elementary principle of law is that all material which is relied upon by either party in the course of a judicial proceeding must be disclosed. Even if the adjudicating authority does not *rely* on the material while arriving at a finding, information that is *relevant* to the dispute, which would with 'reasonable probability' influence the decision of the authority must be disclosed. A one-sided submission of material which forms the subject matter of adjudication to the exclusion of the other party causes a serious violation of natural justice. In the present case, this has resulted in grave prejudice to officers whose careers are directly affected as a consequence.

28. The non-disclosure of relevant material to the affected party and its disclosure in a sealed-cover to the adjudicating authority (in this case the AFT) sets a dangerous precedent. The disclosure of relevant material to the adjudicating authority in a sealed cover makes the process of adjudication vague and opaque. The disclosure in a sealed cover perpetuates two problems. *Firstly*, it denies the aggrieved party their legal right to effectively challenge an order since the adjudication of issues has proceeded on the basis of unshared material provided in a sealed cover. The adjudicating authority while

relying on material furnished in the sealed cover arrives at a *finding* which is then effectively placed beyond the reach of challenge. S*econdly,* it perpetuates a culture of opaqueness and secrecy. It bestows absolute power in the hands of the adjudicating authority. It also tilts the balance of power in a litigation in favour of a dominant party which has control over information. Most often than not this is the state. A judicial order accompanied by reasons is the hallmark of the justice system. It espouses the rule of law. However, the sealed cover practice places the process by which the decision is arrived beyond scrutiny. The sealed cover procedure affects the functioning of the justice delivery system both at an individual case- to case level and at an institutional level. However, this is not to say that all information must be disclosed in the public. Illustratively, sensitive information affecting the privacy of individuals such as the identity of a sexual harassment victim cannot be disclosed. The measure of non-disclosure of sensitive information in exceptional circumstances must be proportionate to the purpose that the non-disclosure seeks to serve. The exceptions should not, however, become the norm.

29. During the course of the hearing, it has clearly emerged before this Court that material which was relied upon by the AFT for determining the vacancies which were available and for assessing as to whether they were utilised correctly has not been disclosed to the appellants. Similarly, the Board proceedings that were relied upon by AFT to determine if the selection for PC was fair have not been disclosed to the appellants. We are cognizant of the wide range of sensitive information in the records of board proceedings. The respondents are not required to disclose the deliberations on the selection for PC within the closed Board setting. While the AFT on a perusal of the

records concluded that there was no gender bias or mala fides in the grant of PC, it must be borne in mind that the officers do not possess the material to challenge this observation. The respondents while protecting the confidentiality of the proceedings of the Board must disclose the position in merit of the appellants vis-à-vis the parameters and their weightage devised by the respondents.

30. We permitted counsel to address the Court briefly on the nature of objections which arise on the basis of the data as disclosed. Counsel for the appellants submitted that instead of a remand to AFT, this Court may carry out the exercise. We are not inclined to do so for two reasons. *Firstly*, a primary fact-finding role is entrusted to the AFT under the Armed Forces Tribunal Act 2007. While exercising its appellate jurisdiction, it would be appropriate if this Court has the benefit of a considered view of the AFT. To decide the issues for the first time in appeal, as a matter of first impression, would not be appropriate. *Secondly*, the issues which arise before the AFT primarily turn upon the determination of vacancies, the manner of utilising them and the fairness of the selection process. This is an exercise which had to be carried out by the Naval Authorities while implementing the judgment of this Court. The correctness of that determination fell for consideration before the AFT. In arriving at its conclusion upholding the determination, the AFT has not had the benefit of considering the objections of the appellants to the manner in which the exercise was carried out by the authorities. The objections of the appellants noted above would have been set out before the AFT if the material was disclosed to the appellants. The failure to disclose relevant material has caused substantial prejudice to the appellants. This case exposes the danger of following a sealed cover procedure.

31. For the above reasons we are of the view that a remand to the AFT would be necessitated. We are conscious of the fact that the AFT carried out a painstaking exercise while disposing of the OAs but there has been a clear breach of the principles of natural justice. We are of the considered opinion that the AFT should be directed to reconsider the entire matter afresh.

32. We accordingly allow the appeals and set aside the impugned judgment of the AFT. The OAs corresponding to the appeals which are filed before this Court are restored for fresh adjudication by the AFT. During the pendency of these proceedings, as already noted, some of the officers in this batch of appeals including some interveners have continued in service as a result of the protective orders operating in their favour while the tenure of one officer is to end in December 2022. We direct that the officers who are protected by interim orders of this Court shall continue to have the benefit of those orders pending the disposal of the proceedings before the AFT and thereafter for a period of eight weeks from the date of the decision of the AFT should it become necessary for them to assail the judgment before this Court in appeal. The officer whose tenure is to end in December 2022 shall also be entitled to the benefit of the same protection.

33. We request the AFT to dispose of the OAs which have been restored to the file of the AFT expeditiously and preferably by the end of February 2023.

34. Pending applications, if any, including applications for impleadment/intervention, stand disposed of.

……..…..….....…….....J.
[Dr Dhananjaya Y Chandrachud]

…..…..…...….....…….….....J.
[Hima Kohli]

New Delhi;
October 20, 2022
-GKA-