



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 08, 2024

+ W.P.(C) 15908/2023 & CM APPL. 64038/2023

MS-16517P MAJ VISHAL (NOW LT COL) Petitioner
Through: Mr. Ankur Chhibber, Adv.

Versus

UNION OF INDIA AND ORS Respondents
Through: Mr. Manish Mohan, CGSC
with Mr. Jatin Teotia, Adv.
Lt. Col. Ashish Chadha, AAG
AFMS (Legal)

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed by the petitioner with the following reliefs:

“In view of the above-mentioned facts of the case, it is most respectfully prayed to this Hon'ble Court to:

(a) issue a Writ of Certiorari thereby quashing and setting aside the impugned Judgement dated 14.09.2023 passed by Ld. Armed Forces Tribunal, Principal Bench, New Delhi in O.A. No. 538 of 2018 filed by the Petitioner;

(b) issue a Writ of Mandamus thereby directing the Respondents to declare the results of complete 50 vacancies including the reserve list for which the Petitioner herein was considered for grant of Permanent Commission during the conducting of DPC Board in June, 2012 and thereafter grant Permanent Commission to him



if found fit therein with effect from the dates his batch-mates were granted Departmental Permanent Commission in June, 2012 itself alongwith all such consequential benefits as per his entitlement;

(c) Pass any such orders as the Hon'ble Court may deem fit in the light of above mentioned facts and circumstances of the case.”

2. The challenge of the petitioner in this petition is to an order of the Armed Forces Tribunal ('Tribunal', for short) in OA 538/2018 whereby the Tribunal dismissed the OA filed by the petitioner by stating in paragraphs 13 and 14, as under:

“13. Analyzing the facts and circumstances of the case in the backdrop of the aforesaid legal principle, we find that in this case the applicant claims, right based on the judgment rendered by this Tribunal on 15th October, 2015 in the case of Maj Mallikarjun (supra). As indicated in the preceding paragraph, the Board that was held in June 2012 considered all the candidates who had appeared before the Selection Board and based on the merit, approved 50 candidates as per merit for appointment or grant of Permanent Commission. This Tribunal in the aforesaid judgment in Para 14 has held that the applicant who appeared before the Selection Board had a legitimate expectation of being selected if they on the basis of their merit occupied a position in the top 50 in the DPC held in June 2012. It was found by this Tribunal that in the merit list of the 50 candidates prepared the applicant in the case of Maj Mallikarjun (supra) were at serial number 34, 32, 39 and 22 respectively that fell within the vacancy notified, i.e. 50. It was because of this reason that the Tribunal in Para 16 held that a legitimate expectation was available to the 50 candidates and the Tribunal did not find any reason for not granting Permanent Commission to the 50 most meritorious persons selected by the Promotion Board. It is, therefore, clear from a combined reading of the judgment and Para 16 and 17 as reproduced hereinabove that it was only with regard to 50



candidates that the legitimate expectations theory and principle was applied and they were granted the benefit of appointment based on the selection held in June 2012. The applicant cannot claim the benefit of legitimate expectation as this Tribunal with regard to the same selection has dearly held that it is only the 50 most meritorious candidates who had the legitimate expectations that being so the applicant who was not within the 50 meritorious candidate instead was on Serial no. 53 cannot have the legitimate expectation and, therefore, the judgment in the case of Mallikarjun (supra) does not help the applicant and based on that judgment, applicant cannot claim appointment based on the contention that he is at serial no. 53 of the waitlist and only 33 appointments were made.

14. Accordingly, we are of the considered view that the contention of the applicant that he is entitled to be granted appointment based on the principles laid down in the case of Maj Mallikarjun (supra) is wholly misconceived and cannot be accepted even otherwise, if the general principles for seeking appointment as detailed by us hereinabove is applied. The respondents can fairly refuse to appoint a candidate who may be in the panel or in the waitlist even if vacancies exist, the law does not mandate the respondents department to fill up all the vacancies. Filling up a vacancy being discretion of the respondent no such directions can be issued. That apart as already held, the applicant being the 53rd candidate cannot claim appointment in the facts and circumstances as detailed herein above, accordingly, we find no reason to grant any indulgence into the matter.”

3. The facts as noted from the record are that the petitioner is a Short Service Commissioned (SSC) Medical Officer who joined the Army Medical Corps (AMC) on February 14, 2010. In OA, the petitioner had sought his appointment as a Permanent Commissioned Officer (PCO) based on the Departmental Permanent Commission (DPC) held in the month of June, 2012, when he was in 2nd year of



service as SSC Officer.

4. It was the case of the petitioner that, for the last few years number of vacancies were created for grant of Permanent Commission ('PC', for short) to SSC Officers and in terms of letter of the Ministry of Defence dated September 3, 1998, 115 vacancies were to be filled in the category of PC from SSC Officers in the Armed Force Medical Corps ('AFMC', for short) and also from open market through Armed Forces Medical Services ('AFMS', for short). The said vacancies were reduced to 100 for the year 2012 with 50 vacancies in each of the selection to be held in June / December of the year 2012.

5. On February 14, 2012, the petitioner being eligible for the PC, participated in the selection process and his case was considered in the DPC held in the month of June, 2012. The result was declared in the month of November, 2012. The petitioner was placed at Serial No. 53 of the merit list, but only 15 candidates were appointed as PCO, after the DPC held in June 2012.

6. It was the case of the petitioner that he was kept in the waiting list. In March, 2014, similarly placed SSC Officers who were also aggrieved by the action of the respondents, having filled only 15 vacancies instead of 50 vacancies, approached the Tribunal in *OA 262/2014* titled as *Major Mallikarjun S Biradar v. Union of India and Ors.* challenging the reduction in the number of vacancies from 50 to 15 in the DPC held in June, 2012, as their merit was within 50.

7. Suffice to state that the OA was decided on October 15, 2015 by the Tribunal wherein it held that the reduction of vacancies from 50 to 15 is illegal. The 50 vacancies sanctioned in the DPC held in June,



2012 were directed to be filled up by candidates, who appeared in the DPC held in June, 2012.

8. The case of the petitioner before the Tribunal was, that as the Tribunal in *Major Mallikarjun S Biradar (supra)*, directed the respondents to fill 50 vacancies but only 33 vacancies were filled leaving 17 vacancies unfilled and as the name of the petitioner appeared at serial no. 53 and he being at waiting list no.3, he should be granted the PC.

9. The case of the respondents before the Tribunal was that even if it is accepted by virtue of the order passed by the Tribunal on October 15, 2015 that vacancies were to be filled as per merit, the same does not contemplate if 50 vacancies are not filled then the so-called waiting list needs to be operated. The plea of legitimate expectation, even if available, the same is only for the first 50 selected candidates as per the merit. It was their stand that the petitioner being beyond the list of 50 persons as his name appears at Serial No. 53, he being low in the merit, could not have been selected in the DPC and waitlist person does not have the right to be selected, thus, no grievance can be made by the petitioner. It was also their stand that, it is well within the discretion of the respondents not to fill up the vacancies, even if the vacancies are available. We have already reproduced above the reasoning given by the Tribunal while rejecting the OA filed by the petitioner.

10. The submission of Mr. Ankur Chhibber, learned counsel appearing for the petitioner is that the impugned order of the Tribunal is erroneous as the respondents have no right to refuse the grant of PC to a candidate who may be in the panel or in the waitlist if the vacancies



exist. According to him, such candidates have a legitimate expectation that, if in the eventuality, the vacancies earmarked are not filled on any ground including, the ground of unwillingness / invalidation / death / resignation, the candidates in the waiting list shall be included in the PC.

11. He stated that, as it is a fact, 17 vacancies have not been filled for the aforesaid reasons, the respondents were bound to operate the waiting list, otherwise, it is a travesty of justice that when candidates are available for PC, they are overlooked and the left out vacancies are allowed to go waste. In fact, much reliance has been placed by Mr. Chhibber on the Standing Operating Procedure, 2009 ('SOP', for short) to contend that the SOP nowhere mentions if the DPC held for 50 vacancies only top 50 candidates will be considered for grant of PC and unfilled vacancies will be allowed to lapse. On the contrary, it specifically mentions that, if the approved vacancies are not filled from the first list of shortlisted candidates due to above reasons, they will be filled from waitlisted candidates or will roll-over to the next Board.

12. He contended that the Tribunal somehow erred to consider that giving free hand to the competent authority to decide the number of vacancies to be filled as per the whims and fancies may result in total collapse of the functioning of an important organisation like AMC. In fact, the Authority ought to have acted, keeping in view the laid down provisions, Rules and Regulations. He also submitted that the Tribunal erred in not considering that post pronouncement of the judgment dated October 15, 2015 in *Major Mallikarjun S Biradar*, the applicants were given PC only in the year 2017.



13. He stated that the Tribunal has failed to consider that the present instance is not a case of fresh appointment / commission. The petitioner herein is an already appointed commissioned officer on February 14, 2010 and has been performing service since then, as per Army Act 1950. He stated that even the Army Act, 1950 does not discriminate between PC and SSC Officer. In other words, there is no differentiation as far as service profile, risk and responsibilities are concerned.

14. He stated, it is a case of mere Intra-Departmental conversion from SSC to PC through a DPC Board after putting minimum 2 years of service and fulfilling other eligibility criteria. The petitioner has already put in more than 13 years of service. He has also stated that the date of commission and seniority remains the same throughout the service and the direct PC happens only in case of AFMC Graduates. As the petitioner has already served for more than 13 years and is still serving, it will be both unethical and against the principles of natural justice to deny him PC.

15. He has also relied upon the judgments of this Court in the case of *Chairman, Delhi Subordinate Services Selection Board and Anr. v. Ms. Rajni and Ors., W.P.(C) 2552/2012* decided on March 5, 2013; *Union of India v. Shreya Bajajaj, W.P.(C) 11739/2016* decided on December 16, 2016; *Vikram Singh and Ors. v. Union of India and Ors., W.P.(C) 9723/2019*, decided on October 24, 2019 and the judgment of the Supreme Court in the case of *Dinesh Kr. Kashyap and Ors. v. South East Central Railway and Ors., (2019) 12 SCC 798* to contend that where vacancies are unfilled, employer must give cogent



reasons for not appointing selected candidates through refreshment panel. He also relied upon the judgment of this Court in batch of petitions, the lead matter being *W.P.(C) 5211/2022*, titled as *Subhash Chhilar and Ors. v. Union of India and Ors.*, decided on December 21, 2022 in support of his submission.

16. On the other hand, Mr. Manish Mohan, learned CGSC appearing for the respondents Union of India submitted that the petitioner was granted SSC in AMC on February 14, 2010 in the rank of Captain under the provisions contained in AI 75/78, as amended. The SSC Officers of the AMC are eligible for grant of PC upon fulfilling the eligibility criteria provided they are successful in the DPC Selection Board which is contingent upon the vacancies as decided by the DGAFMS, who is the Cadre Controlling Authority of all AFMS personal and has been delegated with administrative powers which includes grant of all type of commission in AFMS.

17. He submitted that the petitioner applied for DPC Board held in June, 2012. The decision taken by the then DGAFMS was to sanction 30 DPC vacancies in a year i.e. fifteen (15) for June 2012 DPC Board and fifteen (15) for December 2012 DPC Board. The result of the DPC Board was declared vide O/o DGAFMS letter dated October 1, 2012 wherein 12 Officers were granted PC and further 3 Officers were granted PC vide letter dated December 5, 2012, i.e. a total of 15 Officers were granted PC. In March 2014, certain Officers who were part of the June 2012 DPC Board challenged the selection process on the ground that after the decision of the Board, the respondents have arbitrarily reduced the vacancies from 50 to 15. The Tribunal vide order



dated October 15, 2015 in *Major Mallikarjun S Biradar (supra)* granted relief to the four (04) petitioners who were at merit position 34, 33, 39 and 22.

18. He submitted that the Department approached the Supreme Court against the said order of Tribunal. The Supreme Court vide order dated February 29, 2016, declined to interfere, on the ground that, no substantial question of law of general public importance arises for consideration. Thereafter, the four (04) applicants were granted PC in compliance of the order of Tribunal in OA No. 262/2014. Subsequently, to avoid further litigation, the benefit of the order of the Tribunal passed in OA No. 262/2014 was extended to Officers of the DPC Board of June, 2012 who were in the top 50 of the merit list and were still in service. He submitted that, since some of the candidates of the top 50 had already proceeded on release or were otherwise not eligible, a total of 33 Officers from the DPC Board for the June 2012, were granted PC. The vacancy for the June 2012 DPC Board as approved by the DGAFMS remained fifteen (15) only and the benefit to the other Officers granted by the respondents, as a model employer, as per the spirit of the Tribunal order dated October 15, 2015 in OA 262/2014 was an extraordinary benefit carved out specifically to avoid litigation. There was no duty cast whatsoever upon the DGAFMS to fill up 50 vacancies in the June 2012 DPC Board as a consequence of the Tribunal's order.

19. He stated that, after being unsuccessful in the June, 2012 DPC Board, the Petitioner participated in the December 2012 DPC Board wherein he was again unsuccessful. It was only thereafter in the year



2017, that the Petitioner, for the first time, sought to take the benefit of *Major Mallikarjun S Biradar (supra)*, which in any case was not applicable to him. Therefore, the present writ petition is liable to be dismissed on the ground of acquiescence, delay and laches. In support of his submission, he has relied upon the judgment of the Supreme Court in the case of *Brijesh Kumar and Ors Vs State of Haryana and Ors., SLP (C) No 6609-6613 of 2014*, decided on March 24, 2014, wherein the Supreme Court has held that:

“12. It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.”

20. Mr. Mohan stated that the entire case of Petitioner before the Tribunal and now before this Court is based upon the premise that the Tribunal in *Major Mallikarjun S Biradar (supra)* had directed that, 50 vacancies of June 2012 DPC Board should have been filled. However, a bare perusal of the judgment in the case of *Major Mallikarjun S Biradar (supra)* would clearly establish that the decision of the then DGAFMS on July 12, 2012 to reduce the number of vacancies, which was taken in furtherance of the policy direction of the Govt. of India to achieve 60:40 ratio in PC : SSC was not quashed.

21. He submitted that, it was only on the basis of "*legitimate expectations*" of the top 50 candidates whose selection had already been approved by the previous DGAFMS; the Tribunal granted the relief in *Major Mallikarjun S Biradar (supra)*, as the Applicants were ranked



within the top 50 (being at S.No.22, 32, 34& 39). He stated that, it is in such circumstances the decision of the DGAFMS extending the benefit of the judgment to the four (04) applicants in the OA. Hence the Petitioner, who was ranked 53 in the Merit List, was not eligible to seek the benefit of the judgment in the case of *Major Mallikarjun S Biradar (supra)*. He also stated that the judgment was in respect of the applicants therein and was not an order *in rem*. It was extended to the top 50 candidates in tune with the observations of the Tribunal. Whereas, the petitioner was not within the 50 of Merit List and also chose not to agitate the matter till 2017. In support of the said proposition, he has relied upon the judgment of the Supreme court in *State of Uttar Pradesh v. Arvind Kumar Srivastava, Civil Appeal No 9849/2014* and the Supreme Court's order dated August 13, 2013 in *Writ Petition (Civil) Nos. 73 and 77 of 2013, Raj Rishi Mehra and Ors. v. State of Punjab and Ors.*

22. He stated that the Ministry of Defence vide letter dated September 03, 1998, had clearly directed that the exact vacancies in a year will be decided by the DGAFMS. Further, the DGAFMS is the Cadre Controlling Authority of all Armed Forces Medical Services (AFMS) personal and has been delegated with administrative power which includes grant of all types of commission in AFMS. He also stated that the then DGAFMS had reduced the number of vacancies from 50 to 15 for the June 2012 DPC Board in furtherance of the Ministry of Defence directions issued on June 17, 2008. He stated that, a decision taken in order to achieve the Policy Directives cannot be held to be illegal. In support of the said proposition, he has relied upon



the judgment of Constitutional Bench of the Supreme Court in *Shankarsan Dash v. Uol* in *Civil Appeal No 8613/1983* dated April 30, 1991.

23. Having heard the learned counsel for the parties and perused the record, the short issue which arises for consideration in the writ petition is, whether the Tribunal was justified in dismissing the OA filed by the petitioner seeking his Permanent Commission in AMC by operating the waitlist prepared by the respondents beyond 50 vacancies as his name was at serial no. 53.

24. At the outset, we may state here that a reference has been made to the SOP for grant of PC for the years 2009 and 2017. Since the issue in this case is concerned with the process of DPC Board held in the year 2012, it is the SOP of the year 2009, which shall be considered for deciding the issue in question. It may be stated here that, though 50 vacancies were earmarked in the Board held on June, 2012, they were reduced from 50 to 15 that too after the Board was held. The relevant provisions of the SOP, 2009 which needs to be considered by this Court are the reproduced as under:

“Time Frame

8. Two selection Boards will be held every year for selection of serving AMC (SSC) officers for grant of Departmental Permanent Commission. The following time frame will be adhered to:-

<i>S.No.</i>	<i>Event</i>	<i>Last date for Jun Interview</i>	<i>Last date for Dec interview</i>
<i>(a)</i>	<i>Date of submission of Application CO</i>	<i>01 Mar</i>	<i>01 Sep</i>
<i>(b)</i>	<i>Date of receipt of DGsMS</i>	<i>01 Apr</i>	<i>01 Oct</i>



(c)	Date of receipt of DGAFMS	01 May	01 Nov
(d)	Initial Scrutiny	20 May	20 Nov
(e)	Final Scrutiny	10 June	10 Dec
(f)	Interview	In June	In Dec

Eligibility Criteria

9. The eligibility criteria for grant of DPC has been laid down vide paras 1 to 5 of Annexure to AI 74/76 as amended from time to time as given below-

(a) **Age Limit**

(i) **MBBS-** Candidates, having MBBS degree should not have attained 30 years of age as on 31 Dec of year of receipt of application from them for Departmental Permanent Commission

(ii) **PG Diploma-** Candidates having PG Diploma should not have attained 31 years of age as on 31 Dec of the year receipt of application from them for Departmental Permanent Commission

(iii) **PG Degree-** Candidates having PG degree should not have attained 35 years of age as on 31 Dec of the year of receipt of application from them for Departmental Permanent Commission

(b) **Service Limit**

(i) **Minimum-** Serving AMC (SSC) officers will be eligible for grant of Permanent Commission through DPC Selection Board on completion of minimum 02 years of service;

(a) As on 31 Mar for the 1st Selection Board to be held in June of the year.

(b) As on 30 Sep for the 2nd Selection Board to be held in Dec of the year.

(ii) **Maximum-** To be eligible for grant of PC the serving SSC officers should not exceed maximum 9 years and 06 months of service.

(a) As on 30 Sep for the 1st Selection Board to be held in June of the year.

(b) As on 31 Mar for the next year for the 2nd



Selection Board to be held in Dec of the year.

(iii) **Chances:** *As per GOI MoD letter No. 3569/DGAFMS/DG-IB(i)1347/06/D(Med) dated 05 may 2006 officers granted SSC are to be given three chances for taking up Departmental Examination for Permanent Commission at any time after completion of 02 years of SSC service and before completion of 09 years and 06 months of SSC service provided they fulfill the conditions of eligibility laid down in AI 74/76 as amended subject to the condition that not more than two chances shall be given in one tenure of 05 years. During second or subsequent tenure, if not done in continuation of the first tenure, no chance for Departmental Permanent Commission will be given.*

iv) **Medical Category:** *The SSC officers appearing before the Selection Board for grant of Departmental Permanent Commission should be in SHAPE-1, In the case of those who have suffered disability owing to war causality, the medical category up to grade two under any of the SHAPE will be acceptable.*

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Processing of Deferred Cases.

27. CRD Cell will be pursued for making available ACR Dossiers in respect of serving SSC Officers whose cases have been deferred for want of ACR Dossier. Deferred Case will be processed for the approval of DGAFMS after receipt. Of ACR Dossiers in respect of affected SSC officers. If consequent to grant of PC by the Selection Board, a candidate expresses his/her unwillingness and if such an unwillingness of the candidate is accepted by the DGAFMS, such vacancy arising out of unwillingness/invalidation/death/resignation of any selected candidate would be utilized by the waiting list candidate on merit and if there is not such candidate available the vacancy would roll over to next Board within the same year. On no account will a vacancy be carried forward to the next year."

(emphasis supplied)



25. There is no dispute that, as per the decision of the then DGAFMS, 30 PC vacancies for the year 2012 were sanctioned, i.e., 15 for June, 2012 DPC Board and 15 for December, 2012 DPC Board. The result of the DPC Board was declared on October 01, 2012, wherein 12 officers were granted PC and further 3 officers were granted PC vide letter dated December 5, 2012, i.e., total 15 officers were granted PC against the Board held in June, 2012.

26. We must state here that, we are not concerned with the Board held in the month of December, 2012 except to state that the petitioner was not found eligible in the Board held in the month of December, 2012, as his position in the merit was at 37, i.e., much beyond 15 vacancies earmarked for December, 2012.

27. Having said that, the Judgment of the Tribunal in *Major Mallikarjun S Biradar (supra)* was upheld by the Supreme Court. The Tribunal inter alia holds that the reduction of the vacancies from 50 to 15 after the Board was held is arbitrary as the candidates appearing before the Selection Board had a “*legitimate expectation*” of being selected if they on the basis of merit occupied a position in the top 50 of the Board held in June, 2012. It is on this principle that the Tribunal allowed the OA and directed that the applicants in the OA, who qualified on the basis of comparative merit, may be considered for PC based on the sanctioned number of 50 vacancies as approved by DGAFMS on June 21, 2012, based on which the PC was granted in respect of all those applicants. In this regard, we may reproduce relevant paragraphs 15 to 17 of the Tribunal order dated October 15, 2015 as under:



“

15 The decision of allotment of 50 vacancies were taken by Lt. Gen. III. Kakria, DGAFMS on June 21, 2012. Without reflecting on the merit of the decision, the records show that the decision was changed on July 12, 2012 and the number reduced to 30 from 100 by the new DGAFMS after the selection Board has already been held based on the decision of the earlier DGAFMS on June 21, 2012. This reduction seems to have been based on the decision taken by the DGAFMS on July 12, 2012 to reach the ratio of 60:40 between PC and SSC by the year 2018. Contrary to the stand taken by the respondents in their counter affidavit, the year 2018 does not find a mention in any of the directives/policies issued by the Govt. of India. To implement such a decision retrospectively, after the Selection Board was held based on a valid decision taken by the then DGAFMS who was the competent authority in accordance with the laid down policy, would be unfair and in direct conflict with the legitimate expectations of the applicants.

16. Hon"ble Apex Court in the case of **Suseela Vs. UGC (2015, 8 SCC 129, Para 21)** have stated, "A legitimate expectation must always yield to larger public interest." In the present case, we do not find any reason to infer that giving PC to 50 most meritorious doctors selected by a Promotion Board who have already served the army with distinction and proved themselves by their performance can be considered as a decision against larger public interest.

17. In view of the above, we allow the petition. The applicants who qualify on the basis of comparative merit may be considered for Permanent Commission based on the sanctioned number of 50 PC posts as approved by the DGAIMS on June 21, 2012 based on which the Selection Board was held in respect of the applicants."

28. Having noted the direction of the Tribunal, it is clear that the Tribunal has *inter alia* directed that the applicants in the OA who qualified on the basis of comparative merit may be considered for PC



based on the sanctioned 50 vacancies as approved by DGAFMS on June 21, 2012, and the direction is not to fill all the 50 vacancies.

29. The plea of Mr. Chhibber that, since all the 50 vacancies need to be filled and the candidates within the merit of 50 who have shown their unwillingness to join the PC; the waitlist needs to be operated, is an unsustainable argument. The order of the Tribunal was clear, inasmuch as, it intended to give relief to those applicants who had a legitimate expectation being within the merit list of 50 and not beyond that. In this regard, we agree with the findings of the Tribunal in paragraph 13 of the impugned order which we have reproduced above, more specifically the following portion:

“The applicant cannot claim the benefit of legitimate expectation as this Tribunal with regard to the same selection has dearily held that it is only the 50 most meritorious candidates who had the legitimate expectations that being so the applicant who was not within the 50 meritorious candidate instead was on Serial no. 53 cannot have the legitimate expectation and, therefore, the judgment in the case of Mallikarjun (supra) does not help the applicant and based on that judgment, applicant cannot claim appointment based on the contention that he is at serial no. 53 of the waitlist and only 35 appointments were made.”

(emphasis supplied)

30. So, it follows that the list beyond 50 which includes serial no. 53, where the name of the petitioner was mentioned could not have been operated.

31. In fact, the petitioner could not have filed the OA on the strength of the direction given by the Tribunal in **Major Mallikarjun S Biradar (supra)**, as such a direction had not given cause of action for



him to approach the Tribunal to state that, as the vacancies pursuant to the directions of the Tribunal in *Major Mallikarjun S Biradar (supra)* have not been filled, the waitlist needs to be operated; as no such direction was given by the Tribunal.

32. In any case, in view of the direction of the Tribunal in *Major Mallikarjun S Biradar (supra)*, the Tribunal has rightly rejected the OA filed by the petitioner. Additionally, this Court is of the view that the upper age limit for PC being 30 years and the petitioner having availed the last chance in the month of December, 2012, no direction for PC can be given. Moreso, the maximum service for grant of PC to SSC Officer should not exceed 9 years and 6 months, whereas the petitioner has already put in more than 13 years of service.

33. In so far as the judgments relied upon by Mr. Chhibber in the case of *Chairman, Delhi Subordinate Services Selection Board and Anr. (supra)* for the proposition that every endeavour should be made to fill up the vacant posts, it has no applicability in the facts of this case because in *Major Mallikarjun S Biradar (supra)* the grant of PC was only to those applicants whose name featured in the merit list of 50, which has attained finality on the dismissal of the SLP by the Supreme Court. The petitioner's merit being beyond serial no. 50, he had no right to seek the benefit of the said judgment.

34. In so far as the reliance placed by Mr. Chhibber on the judgment in the case of *Shreya Bajaj (supra)*, to contend that unfilled vacancies need to be filled by creating a panel or waitlist and non-creation of the same is arbitrary, suffice to state in the facts of this case, the issue of operating a waitlist does not arise in view of the judgment of the



Tribunal in *Major Mallikarjun S Biradar (supra)* which having attained finality is no more *res interga*. More so, the claim of the petitioner is based on the Judgment of the Tribunal in *Major Mallikarjun S Biradar (supra)* which nowhere states the list beyond 50 needs to be operated. Therefore, the relief granted to the applicants therein was because they were within the list of 50 candidates who were found fit for permanent commission on merit.

35. In view of the above, we are of the view that the Tribunal is justified in rejecting the OA. The petition is dismissed.

CM APPL. 64038/2023

Dismissed as infructuous.

V. KAMESWAR RAO, J

SAURABH BANERJEE, J

FEBRUARY 08, 2024/jg