ABEYNAYAKE
v.
LT. GEN. ROHAN DALUWATTE AND OTHERS

SUPREME COURT
FERNANDO, J.,
ANANDACOOMARASWAMY, J. AND
GUNAWARDENA, J.
SC APPLICATION NO. 412/97
JANUARY 15TH, 1998

Fundamental rights – Termination of active service in the Sri Lanka Army Regular Reserve – Removal of an officer from active service for want of physical fitness – Duty to give reasonable notice of termination – Reserve Regulation 13 – Article 12 (1) of the Constitution.

The petitioner was an officer on active service in the Sri Lanka Army Regular Reserve. He was subject to heart disease from 1990, and was once classified for light duties. Such duties have to be performed anywhere. He was later classified as being fit for normal duties but continued to be subject to heart disease on account of which the cardiologist treating him certified that as emergency treatment which he may require is available only at the cardiology unit, he should be stationed in Colombo; whereupon he was permitted to serve in Colombo. Presumably as a matter of discretion for Army order No. 55, section 36 (C) which prescribed different categories of fitness for service did not provide for a category of officers entitled to serve only in Colombo. The petitioner continued to be ill even in 1997 when by an order dated 25.4.1997 he was transferred to Vavuniya. The petitioner appealed to the Army Commander against the transfer. In response, the Army Commander decided that the petitioner be released from active service with effect from 31.5.1997 and placed on the Regular (General) Reserve.

Held:

The petitioner did not have the level of fitness required by section 36 (*c*); and that the Army Commander had the power under Reserve Regulation 13 to remove him from active service on that ground. But his summary release from active service without reasonable notice was arbitrary and unreasonable. Such notice is one of the legal protections implied in Article 12 (1).

APPLICATION for relief for infringement of fundamental rights.

Mohan Peiris with *Miss Nuwanthi Dias, Miss Nirosha Jayamaha* and *Miss Sajani Ranathunga* for the petitioner.

Shavindra Fernando, SSC for the respondents.

Cur. adv. vult.

February 12, 1998

FERNANDO, J.

The petitioner alleges that his fundamental right under Article 12 (1) has been infringed by the 1st respondent, the Commander of the Army, by "the termination of [his] services in the active service of the Sri Lanka Army Regular Reserve".

Having joined the Sri Lanka Army Regular Force in 1960 as a private, the petitioner retired in 1981 with the rank of Lieutenant. Thereafter he was commissioned into the Volunteer Force and posted to the Sri Lanka Army General Service Corps (Volunteer) with effect from 11.3.85. By the Sri Lanka Army Regular (General) Reserve Regulations, 1987 ("the Reserve Regulations"), the "Regular Reserve" of the Sri Lanka Army was set up, consisting of the "General Reserve" and the "Unit Reserve". It is common ground that by virtue of a new Regulation 16, introduced in 1989, the petitioner was deemed to have been transferred to the "Regular (General) Reserve": it is not clear whether that was the "General Reserve" or the "Unit Reserve", but nothing turns on that. The old Regulation 16 (now 17) makes those provisions of the Army Act and the Regulations made thereunder, which are applicable to the members of the Regular Force, applicable also to every officer in the General Reserve during the period of his service.

The petitioner was in charge of the Special Investigation Branch of the Military Police, Southern Province, from 1988 to 1991, during which period he detected and / or investigated a number of offences committed by Army officers; and he also arrested several officers for offences. While some were convicted, others are yet awaiting trial. In his petition, he did not even suggest that the impugned order was made because of the influence of those affected by his work. However, in his counter-affidavit he claimed that he had "incurred the displeasure of several senior army officers as a result of [his] investigating into the misconduct of some officers of high rank". Inexplicably, he failed to identify the officers, to specify their misconduct, and to explain how such displeasure was manifested. The 1st respondent could not reasonably have been expected to answer such vague allegations, which I therefore disregard.

The pleadings do not give particulars of the petitioner's work before 1988, and from 1992 to 1994. He was appointed Officer Commanding

the Training Branch. Military Police, Colombo, in December, 1994, and Chief Instructor, Military Police, Colombo, in November, 1996. The respondents accept that his work was quite satisfactory.

It is quite clear that impugned order was not made because of any shortcomings in his work or conduct, but because of questions about his physical fitness arising from his medical history.

Army Order No. 55 deals with "medical procedure". Section 36 (*C*) provides for assessment and certification of physical fitness after a medical examination every two years. There are three categories of fitness:

> " (1) **FE (FORWARD EVERYWHERE)** – Employable on full combatant duties in any area in any part of the world.
>
> (2) **LD (LIGHT DUTIES)** – Employable in any area in any part of the world but will not be employed in a primarily fighting role. They may be permitted to carry arms.
>
> (3) **SD (SEDENTARY DUTIES)** – Employable in any part of Sri Lanka only . . . will not be employed in a primarily fighting role. They may be used for duties not involving strain but not permitted to carry arms.
>
> (4) Restrictions special to ailments may be specified after the two letter code, e.g. SD X Field Duties, etc.
>
> (5) Persons categorized LD or SD for two years or more will require approval of Dte of PA for retention in service".

Section 36 neither recognises nor authorises the recognition of any other category of fitness.

It is not disputed that the petitioner's classification or "categorization", when he was recalled to active service in 1985 was FE, and that this was reduced to SD in November, 1993 (or perhaps even earlier, in January, 1992). That reduction was on account of illness, to which I will refer in a moment. Despite deterioration in his condition he was again categorized as FE in February, 1994. There was no formal re-categorization thereafter.

The petitioner developed a chest pain in August, 1990, and was referred by the Army Medical Officer to Dr D. P. Atukorale, Senior Consultant Cardiologist, General Hospital, Colombo, who diagnosed "hypertrophic cardiomyopathy", and treated him. However, by September, 1992, his condition had deteriorated, and Dr. Atukorale advised treatment abroad; and in March, 1994, he underwent heart surgery at the Apollo Hospital in Madras. His condition needed to be reviewed periodically, and by February, 1997, he had made six visits to the Apollo Hospital.

There is no doubt that the petitioner's medical condition affected the nature of the duties he could perform, and – more important – the places to which he could be posted. The recommendation which the Cardiologist of the Apollo Hospital made in August, 1994, was that "he should not be transferred to any station outside Colombo where adequate cardiac care is not available because he is a high risk candidate who may need emergency treatment". Accordingly, when he was transferred to Ampara by an order made on 28.10.94 (effective 1.11.94), he immediately asked the Director, Army Medical Services (AMS), to advise the authorities whether he was fit to proceed. He was referred to Dr. Atukorale, who advised that "in view of his cardiac complications he should be stationed in Colombo as [the necessary facilities are only available at] the Institute of Cardiology, Colombo, and he is also a high risk candidate who may need emergency treatment", and that "he is fit to be employed on his normal Military Police duties while under medication for his cardiac lesion". The Director, AMS, recommended accordingly. The transfer was cancelled, and as already stated he received another posting in December 1994 in Colombo.

A subsequent transfer to Welikanda in December, 1996, was similarly cancelled.

On 24.4.97, Dr. Atukorale issued another certificate, addressed to the Director, AMS, to the effect that the petitioner "is not fit to serve in outstations as facilities for treatment are available only in Colombo Cardiology Unit", but that he was fit for normal duties while under medication for his cardiac condition. The next day the petitioner received a third transfer order posting him to Vavuniya. By letter date 2.5.97 to the 1st respondent, he referred to his medical history and medical certificates. He pleaded that he was still a high risk heart

patient having to visit the Cardiology Unit regularly, and that it would be a risk to his life if he had to serve away from Colombo, and he therefore asked that the transfer be cancelled. He averred in his pleadings that his Regimental Commander wrote to the 1st respondent that he was gainfully and usefully employed in the Training Wing of the Military Police and that his knowledge and experience could not be matched by that of any other Military Police Officer, including some of the Commanding Officers of the Unit: none of that was denied by the 1st respondent.

The 1st respondent's reply of 7.5.97 is the decision now impugned: that the petitioner "be released from active service with effect from 31 May, 1997 and placed on the Regular (General) Reserve".

Learned counsel for the petitioner contended that by virtue of section 3 of the Army Act and Reserve Regulation 17, the petitioner was entitled to the same rights and privileges as officers in the Regular Force; that the impugned order resulted in the petitioner being placed on the Reserve without any remuneration; that before the 1st respondent made an order having such drastic consequences, the findings of a medical board, set up under and in terms of section 74 of the Army Order No. 55, should have been obtained; that the petitioner's categorization remained as FE, and that his superiors had failed to have him medically examined and assessed even though two years had elapsed after his last categorization in February, 1994; that the petitioner had an exemplary and impeccable record of service; and that the impugned decision was arbitrary, capricious and unreasonable.

In his counter-affidavit, the 1st respondent sought to justify his order on the following basis. A person in the Regular Reserve must be medically fit to continue in that Reserve; since the petitioner was absorbed into active service from the Regular Reserve, he had to be medically fit to continue on active service; since the petitioner himself claimed to be medically unfit to serve in any area outside Colombo, and therefore failed to report for duty in Vavuniya, the 1st respondent was satisfied that he was not physically fit for the duties of an Army officer on active service, and therefore released him from active service; and, furthermore, although the 1st respondent had even the power to remove him from the Regular Reserve itself on account of ill-health and/or failure to report and carry out the duties assigned to him, yet he had refrained from taking that extreme step.

In reply, the petitioner made a new allegation. He named twelve officers who, he claimed, were similarly situated: they had been recalled for active service after retirement, and had been classified as FE, but had been continued in service in Colombo. The 1st respondent countered that in fact one of those officers had served in operational areas for three years, that another was serving in an operational area, and that none of the others had "been recommended or confined to Colombo due to medical reasons". I hold that the material available does not support that plea of unequal treatment. In any event, for the reasons I set out below, the petitioner cannot be treated as if he had been categorized as FE at the material time.

I have first to consider several issues connected with the petitioner's health, his fitness for duty, his physical fitness classification, and the need for further medical examination.

Section 36 (*c*) deals with two aspects of fitness; **what** duties an officer is capable of performing (combatant duties, primarily non-fighting duties, or sedentary duties not involving strain), and **where** he is capable of performing those duties (in any part of the world, or only in any part of Sri Lanka, or only in one part of Sri Lanka). There is no doubt that an officer able to serve only in Sri Lanka (and not elsewhere in the world) cannot be categorized as FE or LD, and that an officer able to serve only in one part of Sri Lanka cannot be categorized even as SD. Section 36 (*c*) (5) imposes a limitation on the fitness for service of those categorized LD or SD: they may serve for two years, but their retention in service thereafter requires specific approval. The necessary implication appears to be that an officer who fails to obtain an SD categorization is not entitled even to that limited right.

It is quite clear that – whatever the nature of the duties he was able to perform – the petitioner was fit to serve only in Colombo, and not in any other part of Sri Lanka. That was due to the lack of medical facilities outside Colombo, but it would have made no difference if it was because of any other reason (e.g. climate). Therefore he could not possibly have been classified even as SD. Section 36 (*c*) (4) does not help him, because that applies only where an officer falls within one of the three prescribed categories, in which event some restriction might have been placed on the duties which he could have been required to perform.

However, there was no formal assessment and recategorization after February, 1994. But the petitioner himself says that he had been examined by Dr. Atukorale, upon reference by the Director, AMS, in October, 1994, December, 1996 and April, 1997; and that the Director AMS, agreed with Dr. Atukorale. The irresistible conclusion from Dr. Atukorale's certificates is that the petitioner could only serve in one part of Sri Lanka, namely Colombo, and at no stage did the petitioner contest that. He could not possibly have been categorized even as SD. The purpose of assessment under section 36 is to enable the Army to ascertain an officer's level of physical fitness, and athough the prescribed procedure was not followed, what was done achieved the very same purpose in an equally satisfactory manner.

Learned Counsel for the petitioner strenuously submitted that the 1st respondent should have complied with section 74 of Army order No. 55:

"INVALIDING AN OFFICER ON MEDICAL GROUNDS

74. When an officer sustains any injury or develops illness of a severe nature and is unable to perform military duties, he will be categorized for the injury or the illness for a stipulated period of time and thereafter periodically reviewed by a medical board. After a considerable period of treatment if the officer does not show signs of improvement of his condition, the CO of the Unit should request DAMS . . . for a medical board to ascertain his/her fitness to continue in service or otherwise if he feels that such officer cannot be gainfully employed in [the] Unit in whichever capacity . . . DAMS will then appoint a medical board in order to determine whether the officer concerned is fit to continue in service or otherwise. If the medical board recommends that the officer be invalided from service, medical board proceedings will then be submitted to DAMS for his approval, [and] the quantity of disability will be considered depending on his/her progress of recovery and rehabilitation. On receipt of the medical board proceedings from DAMS the Unit will take appropriate action to discharge the officer as per regulations."

Section 70 (a) provides that a medical board may be held for the "recategorization of officers", and in such cases section 71 requires the board to consist of three persons, with the possibility of co-opting a civilian specialist through the Director, AMS. The power of a medical

board to ascertain an officer's fitness is not unfettered: it must be considered in the light of section 36. Section 36 (*c*) recognises only three acceptable levels of fitness: FE, LD and SD; and if an officer is categorized LD or SD for two years or more, he can be retained in service thereafter only with the approval of some designated body (the "Dte of PA"). The board's power to "recategorize" means to place an officer in another of the three recognized categories (FE, LD or SD) if in the board's opinion that is justified; that is only a power "to *ascertain* fitness", and not to create new categories of fitness – which, indeed, would amount to amending section 36 (*c*). Hence the board cannot authorize the retention in service of an officer who failed to be categorized even as SD. The only exception would seem to be where the board is of the view that an officer's condition may improve with treatment: in that event, retention in service for a reasonable period for that purpose would be proper. Section 36 (5) suggests that two years is a reasonable period, and the petitioner had more than that for recovery.

Here it was clear at least from August, 1994 that the petitioner could not have been classified even as SD. Two years and eight months later not only had the position not changed but there was no prospect of a change for the better. Further, the petitioner never disputed that position; throughout, his position was that he could not serve outside Colombo, thus accepting that he could not be classified even as SD. Where there was no dispute as to his condition, and where the medical board could not have formed any different opinion as to his standard of fitness, not convening a medical board was at most an irregularity.

I must now turn to the 1st respondent's power to make the impugned order. He relies on the Reserve Regulations 13 and 15, which provide:

> "13. No officer shall be called out on active service unless the Commander of the Army is satisfied as to the physical fitness of such officer.
>
> 15. Any officer of the General Reserve may be removed therefrom by the Commander of the Army on the ground of proved misconduct, ill-health rendering him unfit to continue to serve in the General Reserve, or failure to report for active service when called out so to do."

Under Regulation 13, if the Commander of the Army is not satisfied as to the physical fitness of an officer, he may – or rather, he must – refrain from calling him out on active service. The reason is obvious; active service is for those fit for active service. While Regulation 13 does not expressly deal with situations in which an officer, though initially fit for active service, subsequently becomes physically unfit for active service, yet it can hardly be argued that such an officer should continue in active service – for that would be in the interests of neither the Army nor the officer himself. Physical fitness is therefore a continuing precondition for active service, and it is reasonable to interpret Regulation 13 as conferring an implied power on the Commander to determine an officer's fitness at any time after the initial call to active service – of course, after appropriate medical examinations, assessments and reports.

That conclusion makes it unnecessary to consider the 1st respondent's contention that the petitioner's "ill-health" was such that he could have been removed from the Reserve: and that, a *fortiori,* he was entitled to make the less drastic order of removing him from active service while allowing him to remain in the Reserve, because the greater power necessarily includes the lesser. While that is superficially attractive, I doubt whether "ill-health" can always be equated to failure to obtain an SD categorization, and it is arguable that removal from the Reserve may require a much greater lack of physical fitness than the mere failure to obtain an SD categorization, and that compliance with the *audi alteram partem* rule is necessary. Further, the petitioner could not have been regarded as having failed to report for active service, because the circumstances known to the Army revealed that he was not fit for active service.

I hold that the petitioner did not have the level of fitness required by section 36 (*c*) and that this was never disputed; that despite his retention in service for well over two years his condition did not improve; and that the 1st respondent had the power under Reserve Regulation 13 to remove him from active service on that ground. It may be that the 1st respondent had some residual discretion – particularly because of the acute need for competent and experienced officers, and the petitioner's indisputably long, unblemished and exemplary service – to retain the petitioner in service, giving him sedentary duties in Colombo, similar to those which he had performed since December, 1994. Assuming that there was such a discretion,

if might well have been exercised in favour of the petitioner: yet there is nothing which supports the petitioner's allegation that when the 1st respondent decided otherwise, he acted unreasonably, or arbitrarily, or through any improper motive. The petitioner has therefore failed to establish that the decision to remove him from active service was contrary to Article 12. However, although the decision itself cannot be impugned, the 1st respondent was not free to act arbitrarily, capriciously or unreasonably even in implementing it. Having regard to the length and quality of the petitioner's service, I am of the view that his summary release from active service was arbitrary and unreasonable. Reasonable notice of termination is one of the legal protections implied in Article 12 (1); it is in the interests of the individual and the public; and removal from active service without reasonable notice would seriously undermine morale in the Army. Reserve Regulation 13 confers an implied power to release an officer from active service; there is no justification to treat as an arbitrary and unfettered power, and in the absence of compelling reasons or express provision to the contrary, reasonable notice must be implied. In my view, in this instance at least three months' notice should have been given.

I therefore order the State to pay the petitioner three months' salary (including all allowances), and costs in a sum of Rs. 3,000 and dismiss his other claims.

ANANDACOOMARASWAMY, J. – I agree.

GUNAWARDANA, J. – I agree.

Relief granted.