

COLONEL FERNANDO VS. LT. GENERAL FONSEKA

COURT OF APPEAL
SRISKANDARAJAH, J.
LECAMWASAM, J.
CA 611/2007

Army Act Section 42, Section 133 – Court of Inquiry – Warned and recommended for retirement – disciplinary action by way of summary trial – No Court Marshal – scale of punishment – Has the Commander of the Army Authority to direct retirement? When does Mandamus lie?

At a Court of Inquiry it was revealed that the petitioner a temporary Colonel had committed certain military offences. The 1st respondent Commander of the Army directed that, the petitioner should be warned and recommended retirement from service.

It was contended that, the witnesses before the Court of Inquiry did not sign their statements at the time, they were made but had signed subsequently in the absence of the petitioner. It was further contended that the discretion to warn the petitioner and the recommendation of retirement are both ultra vires the powers of the 1st respondent.

Held

Per Sriskandarajah, J.

“A Court of Inquiry is different from a disciplinary inquiry, in a disciplinary inquiry a charge sheet will be served, and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused and no charge sheet, all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry”.

- (1) The impugned decision of the Commander of the Army cannot be considered as punishment, and as they are not punishments the petitioner cannot complain of a fair hearing. The 1st respondent

has the power to warn the petitioner, in exercising his powers in maintaining discipline.

Held further

- (2) The 1st respondent has no authority to direct to retire the petitioner from service – this direction is ultra vires the power of the 1st respondent.

Per Sriskandarajah, J.

“The petitioner is seeking a mandamus to confirm him in the rank of Colonel. The petitioner has not established that he has a legal right to claim that he should be confirmed in the said rank. The confirmation of an officer depends on his performance and other relevant facts and is granted only after the evaluation of his service record. Therefore there is no public duty”.

Per Sriskandarajah, J.

“Petitioner has no right to request that he be retained in service under Clause 3(2) b of the Army Pension and Gratuities Code of 1981. The Court will not grant Mandamus to enforce a right not of a legal but of purely equitable nature however extreme the inconvenience.”

APPLICATION for Writ of Certiorari/Mandamus.

Cases referred to:-

1. *Ratnayake and others vs. C. D. Perera and others* – 1982 2 Sri LR 451
2. *Credit Information Bureau of Sri Lanka vs. M/s Jafferjee & Jafferjee (Pvt.) Ltd* – 2005 – 1 Sri LR 89

Faiz Musthapha PC for petitioner.

Janak de Silva SSC for respondents.

August 27 2009

SRISKANDARAJAH, J

The Petitioner is an officer in the Rank of Temporary Colonel of the Regular Force of the Sri Lanka Army. The Petitioner submitted that on 05.01.2006 as the Commandant

of the Central Arms and Ammunition Depot, he conducted two summary trials against two soldiers (Drivers) attached to the Central Arms and Ammunition Depot, A.S.R. Bandara and J.A. Asanka who had absent themselves from service without leave. Consequent to the summary trial the said two soldiers were found guilty and the Petitioner imposed the punishment of "7 days confinement to barracks" to both the soldiers. On a complaint made by A.S.R. Bandara to the Commander of the Army over the telephone on 05.01.2006, instructions were given to the Central Arms and Ammunition Depot, Kosgama to send three soldiers namely Private Bandara A.S.R., Private Asanka JA and Private Karunaratna HRS to Army Head Quarters and instructions were also given to the Military Police to initiate an investigation into the allegations made by the said three soldiers against the Petitioner. In the Military Police investigation the following allegations against the Petitioner was revealed;

- (i) Employment of Army personal as drivers and escorts as his personal staff exceeding the authorized number detailed for an officer in the rank of Colonel serving outside operational areas as set out in the Army Headquarters letter No. GSB/A/26/P3(38) dated 23.02.2004.
- (ii) Employment of Army personal for domestic work (washing clothes cooking etc) by the wife of the Petitioner resulting in misusing Army resources for personal use.
- (iii) Permitting his wife to use insulting language on the Army personal detailed as his personal staff.

A Court of Inquiry was convened consisting of 2nd to 4th Respondents. The Court of Inquiry recorded statements of approximately 10 witnesses including the said three soldiers, members of the Petitioner's personal staff and the Petitioner. The Court of Inquiry concluded recording evidence in May 2006.

The 1st Respondent submitted that on the perusal of the evidence led in the Court of Inquiry and the report of the Court of Inquiry revealed that the Petitioner whilst he was serving as the Commandant of the Central Arms and Ammunition Depot of the Sri Lanka Army stationed at Kosgama committed the following military offences;

- (i) Employment of Army personnel as drivers and escorts as his personal staff exceeding the authorised number detailed for an officer in the Rank of Colonel outside operational areas as set out in the Army Headquarters' letter No. GSB/A/26/PS(38) dated 23.02.2004.
- (ii) Ill treating soldiers.
- (iii) Employment of Army personal for domestic work (washing clothes Cooking etc) by the wife of the Petitioner resulting in misusing Army resources for personal use.
- (iv) Permitting his wife to use insulting language on the Army personal detailed as his personal staff.
- (v) Parking his staff vehicle and official vehicle at his residence in the night contravening the relevant Army orders.
- (vi) Using his official vehicle and another, vehicle hired by the Army in civil number plates contravening the relevant Army Orders.

The 1st Respondent submitted that after considering the above he directed that:

- (i) The Petitioner should be warned by the Chief of Staff of the Army having marched before him for the offence committed by him abusing his powers as a senior commissioned officer in the Army.
- (ii) The Petitioner should be recommended for retirement from the service on the 1st occasion and steps should be

taken accordingly since his further retention in the Army is not in the best interest of the Army.

The above opinion and direction of the Commander of the Army is in the document marked P17.

The Petitioner challenged the said Court of Inquiry proceedings and its finding on the basis that the witnesses did not sign their statements at the time they were made and they were signed at a later stage in the absence of the Petitioner. This position was denied by the 2nd to the 4th Respondents; the President and the members of the Court of Inquiry and they submitted that all the witnesses including the Petitioner signed their statements at the time they were made. They further said that in the said Court of Inquiry, the Petitioner was afforded the opportunity of being present throughout the inquiry. Further he was allowed to cross examine the witnesses whose evidence was likely to affect his character and military reputation, to make statements and to adduce evidence on his own behalf. In the above circumstances the procedure adopted in the Court of Inquiry is in accordance with law hence a writ of certiorari will not lie to quash the proceedings, conclusions and recommendations of the Court of Inquiry.

The Petitioner submitted that consequent to the Court of Inquiry no disciplinary action was taken against the Petitioner by way of Summary Trial or Court Martial. The Petitioner in this application has also sought a writ of certiorari to quash the decisions or directions of the 1st Respondent contained in P17.

The Court of Inquiry is a fact finding inquiry, it is defined in Regulation 2 of The Army Courts of Inquiry Regulations 1952, it states:

2. Court of Inquiry means as assembly of officers, or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a decision with regard to any matter or thing which may be referred to them for inquiry under this regulation.

Regulation 162 of The Army Courts of Inquiry Regulations provides that "Every Court of Inquiry shall record the evidence given before it, and at the end of the proceedings it shall record its findings in respect of the matter of matters into which it was assembled to inquire as required by the convening authority. The function of the Court of Inquiry is to record evidence and finally to record its findings.

A Court of Inquiry is different from a disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused and no charge sheet all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry. Only in instances where the inquiry affects the character or military reputation of an officer or a soldier the officer or soldier was afforded an opportunity of being present throughout the inquiry and allowed to cross-examine any witness, make statements and adduce evidence on his own behalf. But this opportunity given to an officer or soldier will not change the character of the Court of Inquiry into a disciplinary inquiry.

The Petitioner challenged the decision contain in P17 namely:

- (1) To warn the Petitioner,
- (2) The Petitioner abused the powers of his rank,
- (3) To retire the Petitioner from service on the 1st occasion.

The scale of punishment by Summary Trial under Section 42 or the scale of punishment under the Court Martial under Section 133 of the Army Act does not contain any one of the acts mentioned above. Therefore the above cannot be considered as punishment. As they are not punishments the Petitioner cannot complain of a fair hearing. In relation to (1) and (2) above the 1st respondent is entitled to come to a conclusion from the evidence recorded in the Court of Inquiry that the Petitioner has abused the power of his rank and therefore he should be warned. In terms of Regulation 2 of the Army Discipline Regulations, 1950 the general responsibility for discipline had been vested in the Commander of the Army. The 1st Respondent exercising his powers in maintaining discipline directed that the Petitioner be warned by the Chief of Staff of the Army having marched before him. This order has already been executed and the Petitioner has been warned. In these circumstances a writ of certiorari will not be available to quash the decision of the 1st Respondent that the Petitioner should be warned by the Chief of Staff of the Army for two reasons one is that the 1st Respondent has authority to discipline his officers and he has acted in the evidence available in the Court of Inquiry Proceedings. Secondly quashing this decision is futile as it has been already executed.

The second direction of the 1st Respondent contained in P17 namely: The Petitioner should be recommended for retirement from the service on the 1st occasion and steps should be taken accordingly since his further retention in the Army is not in the best interest of the Army. The Respondents submissions that in terms of regulation 2(1)(a) of the Army Officers Services Regulations (Regular Force) 1992, the authority has been vested in the Commander of the Army to submit recommendations inter alia for removals and resignations of officers in the rank of Major and above to the

Secretary to the Ministry of Defence for the approval of His Excellency the President.

But the above regulation does not apply to retirements. The said regulation in regulation 37 states:

No authority other than the President shall require, persuade or induce an officer to retire or resign his commission, and

Regulations 39 states:

An officer may be called upon to retire or resign his commission for misconduct or in any circumstance which in the opinion of the President, require such action. An officer so called upon to retire or to resign his commission may request an interview with the secretary in order that he may be given an opportunity of stating his case.

From the Regulation 37 and 39 above it is evident that the 1st Respondent has no authority to direct to retire the Petitioner from service on the 1st occasion. Therefore the decision of the 1st Respondent to direct to retire the Petitioner from service on the 1st occasion is ultra vires the powers of the 1st Respondent. Therefore this court quashes that part of the direction contained in document marked P17.

The contention of the Respondents is that the recommendation in P20 is to retire the Petitioner with effect from 1st September 2007 as he has completed the maximum period of service in the rank of Lieutenant Colonel in terms of Clause 3(1) (b) of the Army Pensions and Gratuities Code 1981 which is framed under Regulation made under Section 29 and 155 of the Army Act. This is an administrative action taken in accordance with the said Code and it has no bearing in the out come of the Court of Inquiry proceedings or the finding of the 1st Respondent contained in P17.

The Said Code in Clause 3 states:

3(1)(a) Subject as hereinafter provided, all officers shall retire on reaching the age of fifty-five years.

(b) An officer, other than a Quarter master or a short Service Field Commissioned officer, shall retire on the expiry of such period in the substantive rank he holds as is specified below unless he is promoted to the next higher rank, within that period.

Substantive rank	Period-years
Lieutenant	06
Captain	11
Major	10
Lieutenant Colonel	08
Colonel	05
Brigadier	04

(c)

(d) ...

2 (a) for the purpose of computations of service in the ranks referred to in paragraph (1) (b), the service of an officer in a temporary or acting rank shall be reckoned as service in the substantive rank of such officer during the period he holds such temporary or acting rank.

(b) Notwithstanding anything in this regulation, the Secretary in consultation with the commander of the Army, may retain the services of an officer, other than a short service Field Commissioned officer, in any rank beyond the period specified for that rank in paragraph (1)(b) or beyond the age specified in paragraph (1) (c), if in the opinion of the President, it is essential in the interest of the Army to do so.

The Petitioner submitted that he was due to be confirmed in the rank of Colonel with effect from 31.08.2004 and promoted to the rank of Brigadier with effect from 01.05.2006. He was not confirmed in the rank of Colonel as the Promotion Board which sat in June 2006, did not recommend same in view of the Court of Inquiry proceedings. He was promoted to the rank of Lieutenant Colonel on 31.08.1999. Thereafter on 01.07.2005 he was promoted to the rank Temporary Colonel (substantive rank being Lieutenant Colonel). Thus he would be completing the maximum service 8 years in the rank of Lieutenant Colonel on 31.08.2007. This fact was brought to the notice of the Petitioner by the Director Pay and Records on 26th February 2007 and invited the Petitioner to make an application to continue in service if he so wish. The Petitioner made an application that he be permitted to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981 (which Code is referred to above). As he has not got a favourable reply he has submitted a Redress of Grievance to the 1st Respondent through the proper channels on 22nd May 2007. The findings of the 1st Respondent contained in document marked P17 is dated 30th of May 2007. Therefore it is clear that the findings of the Court of inquiry or the recommendation of the 1st Respondent based on the Court of Inquiry proceedings has no bearing on the retirement notice issued on the Petitioner or on the consequent direction to take action to retire the Petitioner contained in letter marked P20. Hence the decision or direction contained in P20 is in accordance with Clause 3(1)(b) of the Army Pensions and Gratuities Code 1981 and hence it cannot be quashed by a writ of certiorari.

In view of the above the Petitioner is not entitled to a writ of prohibition, prohibiting the 1st, 5th and 6th from retiring and/or recommending the Petitioner to be retired.

The Petitioner in this application has sought a writ of mandamus to take all necessary steps to confirm the Petitioner in the rank of Colonel with effect from 31.08.2004 and a writ of mandamus directing the 1st and 6th Respondents to take all necessary action to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981.

The Petitioner is seeking a mandamus to confirm him in the rank of Colonel. The Petitioner in this application has not established that he has a legal right to claim that he should be confirmed in the rank of Colonel. The confirmation of an officer depends on his performance and other relevant factors and it is granted only after an evaluation of his service record. Therefore there is no public duty on the part of the 1st Respondent to confirm the Petitioner in the rank of Colonel.

The general rule of Mandamus is that its function is to compel a public authority to its duty. The essence of Mandamus is that it is a command issued by the Superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties *Ratnayake and others v. C.D. Perera and others*⁽¹⁾.

The duty to be performed must be of a public nature. A Mandamus will not lie to order admission or restoration to an office essentially of a private character, nor in general, will it lie to secure the due performance of the obligations owed by a company towards its members, or to resolve any, other private dispute, such as a claim to reinstatement to membership of a trade union, nor will it issue to a private arbitral tribunal” de Smith Judicial Review 4th Ed. page 540.

The Petitioner is also seeking a writ of mandamus directing the 1st and 6th Respondents to take all necessary action to allow the Petitioner to continue in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981. The said clause vests discretion on the Excellency the President to retain an army officer beyond the stipulated period of retirement if it is essential in the interest of the Army to do so. The said Clause reads as follows:

The Secretary in consultation with the commander of the Army, may retain the services of an officer, other than a short service Field Commissioned officer, in any rank beyond the period specified for that rank in paragraph (1) (b) or beyond the age specified in paragraph (1) (c), if in the opinion of the President, it is essential in the interest of the Army to do so.

Therefore the Petitioner has no right to request that he be retained in service under Clause 3(2)(b) of the Army Pensions and Gratuities Code 1981. The court will not grant a Mandamus to enforce a right not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put; *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (pvt) Ltd*⁽²⁾.

This court issue a writ of certiorari to quash the decision of the 1st Respondent namely: “to direct to retire the Petitioner from service on the 1st occasion” which is contained in P17 without prejudice to the authority of the 1st Respondent to take action against the Petitioner under Clause 3 (1) (a) or 3 (1) (b) of the Army Pensions and Gratuities Code 1981.

The Application for a writ of certiorari is allowed to the extent stated above. The Court makes no order with regard to costs.

LACAMWASAM, J. – I agree.

application allowed - Partly.