AMERASINGHE

v.

DALUWATTE AND OTHERS

COURT OF APPEAL
U. DE. Z. GUNAWARDENA, J.
C.A.128/98
NOVEMBER 5, 1999
JANUARY 27, 2000
NOVEMBER 8, 2000
JULY 31, 2001

Writ of Certiorari - Army Court of Inquiry - Guilty of Homosexual acts - Natural justice - Regulation 15 - Substantial compliance with the rules of natural justice - right to be present "throughout" - summons - conditions essential to exercise of jurisdiction. Immunity of the President.

The Petitioner sought to quash the proceedings of the Army Court of Inquiry and prayed that the order withdrawing the commission from the Petitioner who was a Temporary Major in the army be quashed. The Court of Inquiry after an inquiry had found the Petitioner guilty of indulging in Homo Sexual acts and practicing sodomy with some of Army Officers/ non commissioned officers. The Commission was withdrawn by Her Excellency the President.

It was contended that the Court of Inquiry had failed to observe the principles of natural justice.

Held :

(i) Out of eight witnesses who gave evidence at the Inquiry only one witness had given evidence in the presence of the Petitioner.

Regulation 15(1) lays down that "whenever an Inquiry affects the character or the Military reputation of an officer or soldier he shall be afforded an opportunity of being present throughout the Inquiry.

Regulation 15(2) Court of Inquiry was under a duty to have acquainted the petitioner of his rights under Regulation 15(1) - the right to be present throughout the Inquiry being only one such fundamental right.

(ii) The jurisdictional fact, i.e. service of Notice or sumons did not - exist before the inquiry commenced, therefore Court of Inquiry lacked the power and authority or the jurisdiction to enter upon the Inquiry because, the condition absolutely essential to the exercise of jurisdiction was the summons or notification to the Petitioner to be

present on an appointed date at a named place. As such the ultimate decision made by the Court of Inquiry is a nullity, although the Petitioner appeared at a later stage of the Inquiry.

(iii) It is an inflexible and deep rooted principle of law that no act or decision which is void at its inception can ever be ratified, there is no scope for the argument that the subsequent appearance of the Petitioner or the fact that he did cross examine witnesses amounted to a confirmation of the act of wrongful assumption of jurisdiction (at the beginning) which was patently void.

(iv) Service of Notice/Summons notifying the Petitioner that an inquiry will be held to inquire into charges against him, at an appointed time and a named place is an out and out jurisdictional fact or a condition precedent i.e. a fact which gives jurisdiction which must of necessity be fulfilled or must exist before the Court of Inquiry could have properly assumed the power or the jurisdiction to inquire into the allegations against the Petitioner.

(v) It is not possible to quash the order withdrawing the commission since the Order has been made by Her Excellency the President, the President's actions or orders cannot be challenged in Court.

APPLICATION by way of a Writ of Certiorari.

Cases referred to :

1. *General Medical Council v. Spackman* - 1943 AC 627.
2. *Earl v. Slater* - 1973 - 1 SLR 51
3. *Chief Constable of North Wales Police v. Erans* - 1982 - 1 WLR 1155.
4. *Agricultural, Horticultural Board v. Kent* - 1970 1 All ER 304
5. *London and Clydeside Estates v. Aberdeen* - DC 99 3 AER 871.
6. *EX Parte Polemis* - 1974 2 All ER 1219.
7. *Gunaratna v. Chandrananda de Silva* - 1998 3 SLR 267
8. *Jayatileka v. Attorney General* - CA 1157/99

R. K. W. Gunasekera with *Rohana Jayawardena* for Petitioner.

Shavindra Fernando, S. S. C for Attorney - General.

Cur. adv. vult.

March 13, 2001.
U. DE Z. GUNAWARDANA, J.

This is an application for a writ of certiorari quashing the proceedings of the Army Court of Inquiry of which the 3rd respondent was the President and the 4th and 5th respondents respectively, were the members. The petitioner had also prayed that the order withdrawing the commission from the petitioner, who was a Temporary Major in the army, which order was published in the Gazette dated 4 - 4 -1996 be also quashed by certiorari. The said Court of Inquiry, after an inquiry, had found the petitioner, who was a Temporary Major in the regular force, guilty of indulging in homosexual acts and practising sodomy with some army officers and with non-commissioned officers, like corporal and riflemen. The Army Commander acting on the report dated 2. 9. 95 of the Court of Inquiry had recommended to Her Excellency the President to withdraw the Commission of the petitioner. Accordingly, Her Excellency had been pleased to do so.

The substantial, if not, the only complaint made by the learned Counsel for the petitioner was that: the Court of Inquiry has failed to observe the principles of natural justice in that the statements of the witnesses had been recorded before the Court of Inquiry in the absence of the petitioner, whose position before the Court of Inquiry was analogous to that of an accused, say in a criminal case. It is appropriate to consider the above submission in the light of the regulation 15 of the Army Courts of Inquiry framed in 1952. The relevant regulation reads thus:

> *"15(1) whenever an inquiry affects the character or the military reputation of an officer or soldier, the officer or soldier concerned shall be afforded an opportunity of being present throughout the inquiry. He shall also be allowed to make a statement, to adduce evidence in his own behalf and to cross-examine any witnesses whose evidence is likely to affect his character or military reputation.*
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> *"15(2) The president of the Court shall take such steps as may be necessary that any person so affected and not*

previously notified receives notice of his rights under this regulation and satisfy himself that that person fully understands them."

The relevant regulation reproduced above is clear. It states that the officer or the soldier whose character or reputation is affected by the statements or evidence led at an inquiry, "shall" be afforded an opportunity to be present at the inquiry "throughout" which literally means that the soldier or officer concerned has a right to be present at every stage of the inquiry, right through, from end to end of it. In his written submissions Mr. R.K.W. Gunasekera, learned counsel for the petitioner, had explained that the term "throughout", that is employed in the above-mentioned regulation, means from "the beginning to the end" of the inquiry.

It is common-ground that out of the eight witnesses who gave evidence at the inquiry, only one witness viz. Capt. Ratnayake had given evidence in the presence of the petitioner. But the fact that all six witnesses who alleged indecent sexual attacks on them (by the petitioner) had all given evidence in the absence of the petitioner calls for remark. The learned Senior State Counsel, who appeared for the respondents, submitted that there was substantial compliance with the aforesaid regulation 15, in that the statements (evidence) of all the witnesses who had given evidence in the absence of the petitioner, were read over to the petitioner, who had been afforded an opportunity to cross - examine them (witnesses). The question is, would substantial compliance suffice? To put the matter in another way, was the requirement in regulation 15, above - mentioned, viz. that the officer or soldier concerned shall be afforded an opportunity to be "present throughout the inquiry," mandatory or directory? If the requirement was mandatory, law demands strict compliance with the regulation, that is, to the very letter. If the regulation 15 is mandatory there should be adherence thereto in both form and substance, on the contrary, if the regulation was intended to be directory it is sufficient if there had been compliance with it in its main points i.e. substantially.

In the conduct of the inquiry, the Court of Inquiry had not complied with, really, two of the conditions or requirements of regulation 15 - although the learned Counsel who appeared for the petitioner touched on or brought into prominence only one of them, that is, that the petitioner was not afforded an opportunity to be present at the inquiry, "throughout". The other requirement, which both the Court of Inquiry and the learned Counsel who appeared before me had overlooked, was that contained in regulation 15(2), that is, that the Court of Inquiry was under a duty to have acquainted the petitioner of his rights under regulation 15 - the right to be "present throughout" the inquiry being only one such fundamental right.

It is common for statutes and regulations to lay down procedures that are to be followed in administrative matters or in conducting inquiries. To take some typical examples: they may provide a right of appeal; that persons should be given notice of action or steps to be taken within a specified period; that particular bodies are to be consulted before a decision is made; that reasons for a decision have to be adduced. The basic difficulty is this: that the Act or the regulation will rarely, if at all, state what should happen or occur, if, in practice, the procedure is not strictly adhered to, which means that the Courts have to decide on the effect of non-compliance. The courts will treat some procedural rules or regulations as mandatory, meaning that, in general, non-compliance therewith will render the decision or the proceedings invalid or void. Other rules, depending on the circumstances, will be interpreted in a permissive sense and so held to be directory, which would mean that these rules ought to be adhered to, but that rigid adherence to them is not insisted upon, so that failure to observe directory rules will not render the resulting decision invalid. Into which one of the categories, described above, a rule or regulation will fall depends upon judicial interpretation of the statutory provisions or the regulations. In this case, one has to weigh the benefits that would accrue by adhering rigidly to the rule, against the inconvenience or disadvantages that would be caused to either of the two parties by not complying with the requirement viz. that the officer, whose conduct was being

investigated by the Court of Inquiry, should be present "throughout" the inquiry.

I cannot bring myself to hold that the mistake that the Court of Inquiry had made in not affording the petitioner an "opportunity of being present throughout" is a trifling one for it is a cardinal right of prime importance designed as a safeguard for individual rights. In not affording to the petitioner an opportunity of being present when seven of the eight witnesses made their statements or gave what, in effect, was evidence - in - chief, the Court of Inquiry had given a hearing to the witnesses, who had made damning allegations against the petitioner, gravely affecting the petitioner's reputation, but behind the back of the petitioner. If the petitioner had been present from the beginning of the inquiry the petitioner could have seen for himself whether or not the evidence or the statements of the witnesses, who made such serious allegations against the petitioner, was given voluntarily. In fact, the petitioner had alleged that the Court of Inquiry was constituted in consequence of a conspiracy against him, taking advantage of the petitioner's absence from Sri Lanka. And, it is not without interest to note, that, at least, one witness viz. Rifleman Thilak, who had, in the absence of the petitioner, given evidence at the inquiry to the effect that the petitioner committed grossly indecent sex acts on him, had tendered affidavit evidence (X19) to the Court of Appeal that he (Thilak) made that statement or gave such evidence implicating the petitioner under coercion or threats.

Regulation 15 must be held to be mandatory because the violation of that regulation by the Court of Inquiry, partial though the violation be, had obviously prejudiced the individual right of the petitioner to be physically present throughout the inquiry. The absence of the petitioner when the evidence, of seven witnesses, out of a total eight, was recorded greatly enhanced the risk of the witnesses perjuring themselves for, human nature being what it is, the witnesses would have felt freer to make false allegations or exaggerate them in the absence of the person whom they were calumniating or whose reputation they were attacking. It is not difficult to visualize that it was to guard against such dangers or risks that the regulation 15

required the Court of Inquiry to ensure that the officer or soldier whose conduct was being investigated, "shall be afforded an opportunity of being present throughout the inquiry." The proceedings in an ordinary Court of Law are held in public because publicity will reduce the scope for misdemeanours and wrongdoing on the part of those who make decisions. Likewise, the presence of the petitioner would have tenderd to remove any suspicion in regard to the regularity and propriety of the proceedings. The presence of the person against whom an inquiry is held will also be, somewhat, of a constraint against false evidence being given. In this case the absence of the accused, perhaps, would have freed, in some measure, the witnesses from all constraints against temptation to lie - if they chose. And there is a real risk, that if witnesses were emboldened to give false evidence by the fact of absence of the accused - they will be bound to stay committed to that false version, to the very end. I think it was to guard against such risks that rule 15(1) sought to ensure to the soldier or officer, whose character was assailed, a right to be present "throughout" the inquiry.

In this case there is a real likelihood of harm or damage or prejudice to the person who is the subject of inquiry by not being afforded an opportunity to be present from the beginning. In fact, no one gains any benefit from holding the inquiry in the absence of the accused, except that the witnesses, as stated above, will feel freer to take liberties with the truth - if they are so inclined. If, in fact, the Court of Inquiry by holding the inquiry in the absence of the petitioner who was out of the country, was aiming at speed of decision - even then, that object could not be achieved for the Court of Inquiry had to necessarily await the return of the petitioner for the petitioner had to be given an opportunity to cross - examine the witnesses and give evidence on his own behalf. No reason has been given by the respondents who constituted the Court of Inquiry as to why they could not have waited till the petitioner arrived from India to start the inquiry.

The inquiry before the Army Court of Inquiry is a veritable trial in secret, in that it is not one that the public is free to attend.

The Court of Inquiry, as a matter of practice holds its proceedings, so to say in secret or in private and such proceedings are intended to be kept from the knowledge or view of the public. Unlike the proceedings in a regular Court of Law, the Court of Inquiry is not freely open to public or spectators. As such, there was a greater reason for, at least, the person accused of committing certain acts or offences to have been afforded an opportunity to be present from the beginning of the inquiry to ensure that nothing untoward or irregular occurs in the course of proceedings and that such proceedings accord with propriety and regularity. Considering the seriousness of the charges or the allegations and the repercussions of the potential penalty that was in prospect or likely, the Court of Inquiry should have made every endeavour to "reach a just end by just means"

The right of the petitioner to have been present at the inquiry at which most serious allegations that can possibly be conceived, were made, is I think, an integral part of the principle of *audi alteram partem* (hear the other side) rule. The principle that no man should be condemned unheard is one regarded with reverence and ought not to be lightly disregarded. There is no point in hearing the other side if the "other side" does not know what the side beginning had said, and unless "the other side" is afforded a reasonable and genuine opportunity to meet and repel the allegations.

It is said: "*qui aliquid statuerit parte inaudita altera acquum licet discerit, hand acquum fecerit*" - which means that he who determines any matter without hearing both sides, though he may have decided right, has not done justice. The absence of the petitioner when the evidence of seven out of the eight witnesses was recorded breaches, at least, to some extent the fundamental principle of *audi alteram partem*" because it is by being physically present at the inquiry that one comes to know the opposing case and consequently, what one has to say in defence of oneself, for it is, somewhat, akin to a futile

proceeding, if not a pretence, to give a hearing to party on whose reputation aspersions were cast, when one was not present nor represented.

It is true, that when the petitioner appeared before the Court of Inquiry - six of the statements that were recorded in his absence were read over to him and that the petitioner cross-examined or rather he was required, to cross-examine the witnesses, be it noted, on the same day i.e. on 30.06.1995. It is to be observed that the six witnesses (who were thus cross-examined by the petitioner on 30.06.1995) were the witnesses who had given evidence on two earlier dates alleging that the petitioner committed on them sex acts of gross indecency. I think the right of the petitioner to be present "throughout" the inquiry was as important, if not, even more important than the other rights conferred upon the petitioner under regulation 15(1) - the other rights being to give or adduce evidence on his own behalf and cross-examine witnesses. The right to be heard in opposition, i.e. the "*audi alteram partem*" rule would not have much efficacy or, for that matter, any efficacy, unless one has the right to be present to know the case against one. In that sense, it could be said that "*audi alteram partem*" rule is based on the right to be present at an inquiry, if, in fact, the right to be present is not an integral part or a constituent attribute of the *audi alteram partem* rule. The petitioner's presence from the beginning was an essential element in the due process. I am not disposed towards relaxation of the requirement viz. that the petitioner should be given an opportunity to be "present throughout the inquiry" - considering the pivotal nature of the principle involved upon which that requirement had been prescribed by regulation 15(1) of the Army Courts of Inquiry. As pointed out above, the Court of Inquiry had devised its own procedure by recording the statements or the evidence of all the witnesses except one (in the absence of the petitioner) and thereafter reading over the evidence to the petitioner and requiring the petitioner to cross- examine the witnesses - thereby neglecting the procedure prescribed by the said regulation 15. To be wiser than the law, said Aristotle, is the very thing which by all good laws forbidden. (*neminem oporter legibus esse sapientiorem* - it is not permitted to be wiser than the laws) It

is worth repeating, however, that the evidence of all the witnesses (six in number) who alleged that the petitioner committed indecent sexual assaults upon them were recorded in the absence of the petitioner who was required as pointed out above, to cross-examine all those six witnesses on one single day i.e. on 30.06.1995. For there to be a fair hearing there is an assumption that there will be sufficient notice or time given to allow the petitioner or any party, for that matter, to be adequately prepared.

To be able to cross-examine, on one single day, six witnesses, at a stretch, whose evidence had been merely read over, one has to be not only a skillful cross-examiner but also has to be exceptionally quick on the uptake. I cannot bring myself to believe that the petitioner who was a soldier or army officer was gifted in these respects to the degree required to accomplish or undertake such a task as he did or was made to assume on 30.06.1995 - as explained earlier.

The learned Senior State Counsel who appeared for the respondents, submitted that even if the petitioner had been afforded an opportunity to be present "throughout" it would not have made any difference to the outcome or the ultimate decision of the Court of Inquiry that the petitioner was guilty of the allegations made against him in the statements or the evidence of the witnesses. I think the answer to that submission is to be found in the judgment of *Lord Wright in the General Medical Council v. Spackman*[1] He said: "If the principles of natural justice are violated in respect of any decision it is indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision." In the case of *Earl v. Slater*[2] it was held that the tribunal had erred in holding that an unfair procedure which led to no injustice was incapable of rendering unfair - a dismissal which would otherwise be fair. In other words, dismissal of an employee without hearing was held to be unfair and therefore invalid, even though the dismissal was fully justified.

Assuming that no prejudice had been caused to the petitioner, even then, the decision or the findings of the Court of Inquiry ought to be quashed, since the Court of Inquiry had been at fault in not ensuring that there was fairness to the petitioner at every stage of the inquiry. As Lord Brightman observes: "***Judicial review is concerned, not with the decision but with the decision making process***" *Chief Constable of North Wales Police v. Evans*[3]

In the case *Agricultural, Horticultural Board v. Kent*[4] a notice was sent out which neglected clearly to indicate that the recipient had a right of appeal or address to which the appeals should be sent. It was held that this failure was sufficient to invalidate the notice as the right of appeal was of first importance. This was again illustrated in *London and Clydeside Estates v. Aberdeen*[5] In this instance, there was a breach of a statutory requirement under the ***Land Compensation (Scotland) Act 1963,*** taken in conjunction with the ***Town and Country Planning Order 1959,*** in that a decision from the local authority contained in a certificate, delivered to the applicant omitted to make any reference to the statutory right of appeal. Despite it being apparent that the company involved was aware that it had a right of appeal, it was held that proper notice of this right was mandatory. The certificate was set aside by the Court on the ground that it was breach of the mandatory requirement, even though no prejudice had been suffered by the applicant. In that case, although the applicant had suffered no detriment as result of the failure to adhere to the procedural requirement, the decision of the local authority embodied in the certificate was quashed because it was not indicated thereon, in compliance with the procedural requirement, that there was a right of appeal against the same because the provision granting a right of appeal, under the statute, was treated as of fundamental importance. None of the authorities referred to above in support of the petitioner's case was cited by the learned counsel for the petitioner. I would have appreciated it very much if the learned counsel had been more helpful. In the case in hand the right of the petitioner, on whose character grave aspersions were cast, to be present when such attacks on reputation were made is no less important, more so as the right

to be present throughout was given to provide a safeguard to the petitioner, whose character was the subject of inquiry, non-observance of which safeguards was fraught with real potential dangers, as indicated above.

One notices other obnoxious features, associated with this inquiry into the allegations against the petitioner, for as indicated above, the Court of Inquiry had not only paid no heed to the requirement in regulation 15(2) which imposed on the Court of Inquiry a duty to apprise or inform the petitioner of his rights under regulation 15(1) but had also failed to afford the petitioner reasonable amount of time to respond to and prepare a case.

If the Court of Inquiry, as was its duty under regulation 15(2), had made it known or acquainted the petitioner with the rights that the petitioner was entitled to under regulation 15(1) - one of such rights being the right to be present "THROUGHOUT" the inquiry, the petitioner, in all probability, would have asked the Court of Inquiry to get the witnesses to make statements or give evidence afresh in petitioner's presence which would have afforded the petitioner greater time to reflect on such evidence and think of how to cross-examine those witnesses. An aspect, a crucial aspect at that, of a fair hearing is having a right to know the opposing case in advance or beforehand. This gives a party to any proceedings the chance to challenge or contradict or correct anything that is presented to a decision maker that might be prejudicial to the party's case. I would further note that the amount of time that a party has been given will be a significant factor. Even if details of the statements of the witnesses were provided, I feel the petitioner had not been afforded sufficient opportunity or rather time, to respond and to prepare a case. Failure to give adequate time to meet the allegations or changes had been central in the decision of the Magistrates' Court, *Exparte Polemis*[6] the facts of which were as follows: the captain of a ship received a summons, to the Magistrates, Court on the day that his ship was due to sail. He was charged with discharging oil into the Thames. An

adjournment was refused by Court and he was found guilty and fined. The conviction was quashed because the defendant had not been allowed sufficient time to respond and as a consequence, there had not been a reasonable opportunity to prepare the defence. ***Lord Widgery CJ*** asserted that in such circumstances the requirements of justice would not have satisfied the test of being manifestly seen to be done, whatever the jurisdiction. Of course, no complaint had been made by the petitioner or his counsel in the case before me, on the basis of insufficient time to prepare. But I, in all conscience, cannot pretend not to notice such a conspicuous fact for on the same day i.e. on 30.06.1995 that the six statements or the evidence of all the six witnesses had been read over to the petitioner, the petitioner had been obliged to cross-examine the six witnesses (who had not given their preliminary evidence in the presence of the petitioner) and who had alleged the Commission of various sex acts on them by the petitioner.

Of course, there is nothing recorded by the Court of Inquiry to show that the petitioner asked for time to get ready to cross-examine or to adduce evidence on his own behalf. Perhaps, the petitioner sensed the atmosphere in the Court and felt that it was futile to ask for an adjournment of the proceedings; or else, the petitioner was not conscious of his rights - the petitioner, being undefended. I think the lawyers are barred from appearing in the Army Court of Inquiry mainly because of a desire to avoid formality and protracted nature of Court proceedings. The lawyers have only themselves to thank. Anyhow, one cannot be oblivious of the fact: *judicia in deliberationibus crebro maturescunt in accelerato processu nunquam* - which means judgments frequently become matured by deliberations and never by hurried process or precipitation. I am stating the obvious when I say that there are many individuals affected by decisions who are not capable of arguing or presenting their case in the most favourable light possible. And I am not treating the fact that the petitioner enjoyed no right to legal representation before the Court of Inquiry as a ground for granting the certiorari or as a breach of the principles of natural justice. But I cannot resist quoting an excerpt from an eloquent

pronouncement of Lord Denning, on the question of access to legal representation. To quote: **"It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his favour or weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses ..... if justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has the right to speak by his own month. He also has a right to speak by counsel or solicitor"**

It is a fact that calls for remark that in consequence of this inquiry the petitioner had lost both his reputation and his livelihood for his commission had been revoked or withdrawn by Her Excellency, presumably, on the recommendation of the Army Commander.

As remarked above, the Court Inquiry was under a duty under regulation 15(2) to have enlightened or informed the petitioner of the petitioner's rights under regulation 15(1) - most fundamental out of them being the right to be present at the inquiry "throughout". The right to be present "throughout" is the most cardinal right because it is that right that serves as the foundation for the other two rights that the petitioner was entitled to, the other two rights under regulation 15(1) being: (a) the right to adduce and give evidence on his own behalf and (b) the right to cross-examine witnesses. As I had said before, the latter two rights, that is the right to adduce evidence in defence and the right to cross-examine are based on the right to be present "throughout" for if the right to be present is denied - the other two rights cannot be exercised at all, which two last - mentioned ought to be treated as lesser rights, arising from the right to be present, more so as legal representation was not permitted before the Army Court of Inquiry. How can such a requirement as that viz. the right to be present "throughout" be considered as directory if the two lesser rights or requirements above - mentioned, cannot be treated as such? This fact serves to highlight or bring into prominence the importance of the

requirement that the soldier or the officer proceeded against, should be present throughout the inquiry. If the requirement that the person whose character or conduct is being inquired into shall be present "throughout" the inquiry is not considered to be a compulsory condition or requirement, then the right to adduce evidence and right to cross-examine (being derivatives from the right to be present) which two rights are lesser rights in relation to the right to be present also cannot be considered to be mandatory requirements. It cannot be againsaid that the right to cross-examination and the right to adduce evidence to meet the opponent's case are significant issues in determining whether or not there has been a fair inquiry or hearing.

There is one other point which is last to be mentioned but not least in importance: that is, that the Court of Inquiry when it commenced its inquiry on 11. 06. 1995 was wholly and absolutely devoid of any power or jurisdiction to record the evidence in the absence of the petitioner. As the Court of Inquiry had no power to determine or jurisdiction at the inception - needless to say, it never did or rather could not ever regain it thereafter. It is to be recalled that out of the eight witnesses who had given evidence against the petitioner, the evidence of seven had been recorded in the petitioner's absence. As had been pointed out earlier on in this order, regulation 15(1), which prescribes and directs the inquiry affecting the character and reputation of an officer or soldier states that the "officer or soldier concerned shall be afforded an opportunity of being present throughout the inquiry" But, in this case the petitioner was not present when the evidence of the first six witnesses was recorded, that is, when the inquiry began or was initiated, (As had been stated above, in addition to the evidence of those six witnesses who alleged that the petitioner committed various indecent sex acts on them, evidence of another witness viz. Major Rupasinghe had also been recorded in the absence of the petitioner on an unknown date). In fact, the petitioner had not even an intimation that any such inquiry was about to begin as against him. Regulation 15(1) presupposes or takes it for granted, that the inquiry cannot commence without the petitioner being notified of the inquiry because the petitioner could have been "afforded an opportunity of being present

throughout the inquiry" only if the petitioner had been noticed or summoned beforehand, to be present at the inquiry. Regulation 15(1) suggests, if not ordains, by necessary implication that the officer or soldier concerned should have been summoned to appear on the date that the inquiry commenced because, that is, perhaps, the only way conceivable of giving an occasion for the petitioner to be present "throughout" the inquiry.

It is too well known to require any mention or emphasis that summons or notice is invariably used to commence an action, any action, for that matter, and it (summons) is defined in the **Blacks Law Dictionary** as a means of the Court acquiring jurisdiction. Service of notice or summons on the petitioner (notifying him that an inquiry will be held to inquire into charges against him, at an appointed time and a named place) is an out and out jurisdictional fact or a condition - precedent i.e. a fact which gives jurisdiction, which must, of necessity, be fulfilled or must exist before the Court of Inquiry could have properly assumed the power or the jurisdiction to inquire into the allegations against the petitioner. It must not be lost sight of that the inquiry before the Court of Inquiry commenced with six witnesses giving evidence on 09.06.95 and 11.06.1995. (One witness had given evidence on 09.06.1995 and another five witnesses on 11.06.1995 who all alleged, it is to remembered that the petitioner committed indecent sexual acts on them and they had not been backward in giving the lurid and vivid details of those acts) But the petitioner did not have the faintest intimation that an inquiry would begin on that date. In fact, the petitioner was outside the shores of Sri Lanka when the inquiry started. But at the argument before me the learned Counsel were oblivious of the fact that the Court of Inquiry did not have the jurisdiction to initiate the inquiry without first serving notice or summons on the petitioner. I am at a loss to understand why the Counsel, the learned Counsel for the petitioner in particular, was not conscious or was impervious to the fact that service of notice or summons was a jurisdictional fact. No argument was put forward on that basis either in the oral or written submissions which are filed of record. Perhaps, as I said in another case, it is not the habit of great men to descend from

their lofty mental pinnacle to the humble level of ordinary minds with the consequence that the rudiments of the law are lost sight of. The arguments of the learned Counsel for the petitioner were made as if the absence of the petitioner, when seven of the witnesses gave evidence was merely an error of procedure. Not a word had been said about the lack of jurisdiction or the power and authority of the Court of Inquiry. The complaint in the submissions was only of the lack of "procedural fairness" when there was a lack of jurisdiction which was of a far more fundamental and overwhelmingly decisive character.

The fact that the jurisdictional fact, that is, the service of notice or summons did not exist before the inquiry commenced, in the circumstances of this case, is important in two directions: (I) in view of the obvious failure to comply with regulation 15(1) the Court of Inquiry lacked the power and authority or the jurisdiction to enter upon the inquiry in question because, as explained above, the condition absolutely essential to the petitioner to be present on an appointed date at a named place. As such, the ultimate decision made by the Court of Inquiry, finding the petitioner guilty, is a nullity - aulthough the petitioner had appeared, at later stage of the inquiry, and even cross-examined the witnesses. I cannot fathom, how a point of such overwhelming significance, which was ineffable, too great for description in words, was lost sight of. I have explained citing authority, the distinction between jurisdictional and non-jurisdictional error in my judgment in *Gunaratna v. Chandrananda de Silva*[7] To quote: "When a jurisdictional error is deemed to have occurred, it means that the decision has always been legally void. It is as if that decision had never been reached in the first place and never existed. A grant of certiorari in these circumstances seeks to put the clock back to how things were before the void decision was made. In contrast, for errors made within jurisdiction, an error on the face of the record does not result in fundamental illegality, and thus a challenge will only overturn the decision and take effect from the moment that certiorari was issued."

I have also emphasized, in the judgment above-mentioned, that it is an inflexible and deep rooted principle of law that no

act or decision which is void at its inception can ever be ratified. So that there in no scope for the argument that the subsequent appearance of petitioner or the fact that he did cross-examine witnesses, amounted to a confirmation of the act of the wrongful assumption of jurisdiction by the Court of Inquiry, (at the beginning) which was patently void.

The assumption of jurisdiction by the Court of Inquiry was void at the beginning because, as explained above, the condition, which was absolutely essential to the exercise of its power and authority, had not been satisfied or fulfilled. The Latin maxim: *Quod initio vitiosum est non potest tractu temporis convalescere,* I think, sums up to the position, fairly accurately although not quite exactly. It means that which is void from the beginning cannot become valid by lapse of time;

(ii) the fact that notice or summons to the officer (petitioner) whose conduct was going to be inquired into on a day named being, as explained earlier, the sole means whereby the Court of Inquiry could have acquired jurisdiction, the requirement in regulation 15(1), that is, that the officer or soldier (whose character or reputation will be affected by the inquiry) "shall be afforded on opportunity to be present THROUGHOUT the inquiry" is, beyond any controversy, mandatory and peremptory and, must of necessity, be interpreted to be so. The term "shall" used in regulation 15(1) as, stated above, must be given a compulsory meaning, in the context, excluding all discretion and has significance of operating to impose a peremptory duty on the Court of Inquiry to afford an opportunity to the officer or soldier concerned, to be present "throughout" which duty, (to repeat what has been stated above as well) could have been performed only by notifying the petitioner, in advance or beforehand, of the date, time and place, at which the Court of Inquiry was going to sit.

The petitioner had also prayed in his petition that order published in the Gazette dated 4/4/1996 whereby commission of the petitioner was withdrawn be quashed. I do not think that it is possible to do so, since the order published in the

gazette withdrawing the commission is one made by Her Excellency the President. The President's actions or orders cannot be challenged in Court as there is, as explained by me in *Jayatilaka v. Attorney General*[8], an inseperable legal bar to the President being made a party to proceedings in Court. To cite the relevant excerpt from my own judgment in the case above-mentioned: "In cases or situations where the law has conferred on the President immunity from legal proceedings, the President has no right to ask that he be heard in defence of his actions or omissions while he still holds office, for that would be a surrender of immunity by the President. And the president has no right to surrender immunity conferred upon him by law because immunity is conferred on him in the public interest and not in his own personal interest. It would have been productive of an intolerable situation, from the stand-point of the President, if legal proceedings can be instituted against the President although the president is not permitted to defend himself for if the President submits to jurisdiction of the Court in order to be able to defend himself, that would be tantamount to a waiver of immunity which the president is prohibited from doing in the public interest. The immunity conferred on the President is not the right of the President alone for it is the right of the public also."

(The above is an excerpt from my own Judgment in *Jayatilake v. Attorney General(Supra)* in which their Lordships' Yapa, J. and de Silva, J. concurred.)

For the foregoing reasons, I do. hereby grant an order of certiorari quashing the decision and the entirety of proceedings of the Court of Inquiry marked X 21.

Application allowed.