IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for writs in the nature of Certiorari, Mandamus and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

K. Sumathipala,

No.135, Bogahalanda,

Mahiyangana Road, Bibila.

Petitioner

C.A/WRIT/App/No.1042/2008

Vs

1. Lt. General Sarath Fonseka
   Commander of the Sri Lanka Army,

   Army Headquarters

   Colombo 03.

And nine (09) others

Respondents

BEFORE	:	**S.SRISKANDARAJAH, J (P/CA)**
COUNSEL	:	J.C.Weliamuna with Pasindu Silva, for the Petitioner
		Vikum de Abrew SSC for the Respondents.
Argued on	:	03.03.2011
Decided on	:	30.01.2012

S.Sriskandarajah.J

The Petitioner joined the Sri Lanka Army on the 6th of February 1987 as a soldier in the Volunteer Service. He was elevated to Lance Corporal in 1990 and as a Corporal in 1994.The Petitioner was posted to 410 Squadron Sri Lanka Army Service Corp in Batticaloa as a driver in 1995. He served in this position till 2001. Thereafter he was enlisted to the regular force of the Sri Lanka Army on or about 6th April 2001, and was functioning as a Store-keeper in the 4th SLASC Sri Lanka Army Service Corp. The Petitioner submitted that in or about June 2006, while serving at the Kattaparichchan Camp as a store supplier, he had brought to the notice of Captain Alexander, the Officer Commandant of the said camp about the inadequate supply stored commodities in the stores, but no action was taken to rectify this position. Therefore, he complained about the same to the Officer Commandant of the 420 Squadron Sri Lanka Army Service Corp. Consequently, Captain Alexander instituted disciplinary action against him for revealing the shortcoming of the camp without his authority to higher officials. As a result of the disciplinary action, the Petitioner was demoted to the rank of Lance Corporal, and he was posted to the 4th Sri Lanka Army Service Corp. On the 7th of March 2007, the Petitioner submitted that he was taken to Sri Lanka Corp of Military

Police, Giritale, on an allegation that the Petitioner was a party to a fraud that was said to have been committed by some servicemen of the 420 Squadron of Sri Lanka Army Service Corp. When he was taken into custody, the servicemen of Sri Lanka Corp of Military Police informed him that several servicemen in the 420th Squadron of the Sri Lanka Army Service Corp are suspected for issuing rations to civilians and offering bribes to higher officials of Sri Lanka Army to carry out the said fraud. The Petitioner further submitted that he and the other servicemen were tortured and forced to sign a statement under duress, which had been to the best of the knowledge of the Petitioner, prepared by some Sri Lanka Army personnel at the Sri Lanka Corp of Military Police, Giritale. The Petitioner also submitted that the said documents were neither read to him nor was he allowed to read the contents of the same. The Petitioner and the other detainees submitted a request to the Commanding Officer of Sri Lanka Army Service Corp of Panagoda to release them and, consequently, on or about 12th of April 2007, the Petitioner and the other detainees were released. The Petitioner also submitted that consequent to the inquiry conducted, a Court of Inquiry was held. The Petitioner pleaded not guilty for the allegation leveled against him, and the Petitioner's denial was recorded by the Members of the Court of Inquiry, and the Petitioner signed the recorded statement of the Court of Inquiry. The officers who conducted the said inquiry had submitted their opinion to the 8th Respondent and the 8th Respondent forwarded her recommendation to the 1st Respondent.

The 1st Respondent by his determination contained in document dated 09.09.2008 marked P1 requested the Petitioner to pay a sum of Rs.132,750.45 and further, to be discharged from the Army. The Petitioner challenged this decision as the said decisions were arbitrary.

The Petitioner has not challenged the constitution of the Court of Inquiry. The Special Rules made under Note 2 of Financial Regulation No.102 Relating to Losses of Three Armed Forces, in Rule 3 provides:

3. Responsibility for loss:

(a) Members of the Service shall be held personally responsible for any loss caused to the Service/Government by their own delay, negligence, fault or fraud and shall make good such loss. A member of the service will similarly be responsible if he/she allows or directs any action to be performed:-

(1) without proper authority or

(2) without complying with the relevant service regulations, orders or other appropriate instructions or regulations or

(3) without exercising reasonable care, or

(4) fraudulently

(b) Every member shall at all times be responsible for the safe custody, proper use and due disposal of any property issued to him/her or placed in his/her temporary or permanent custody. In case of loss or damage to them, or in case of failure to account for them, whenever called upon to do so such member shall be surcharged.

Disciplinary action shall in addition be taken against him/her for any carelessness, negligence or non-compliance with any regulations, rules or instructions.

Rule 4 provides for Inquiry and fixing Responsibility:

4(a) provides that as soon as a loss occurs, Inquiries should be instituted as laid down by the Board/ Court of Inquiry regulations by the appropriate service authority to ascertain the extent and the cause of loss and to fix responsibility where necessary.

Rule 6; empowers the Service Commanders to determine the degree of responsibility for the loss, from any servicemen concerned and the amount to be recovered from each of them and to authorise the recovery of such amount.

In the instant case the Court of Inquiry was held to ascertain the cause of loss and to fix responsibility. The 1st Respondent after the receipt of the findings of the Court of Inquiry has decided that a total sum of Rs. 132,750.45 should be recovered from the Petitioner.

The 1st Respondent under Section 27(d) of the Army Act read with Rule 6 mentioned above has the power to deduct the said sum from the pay or allowance due to the officer. The burden of proof as to the recovery of this sum is stipulated in the said Section. It provides that after due investigation if it appears to the Commander of the Army that it had occurred by any wrongful act or negligence of the officer he could deduct the sum lost from the pay or allowance due to the officer. The Commander of the army had arrived at the aforesaid decision after considering the Court of Inquiry proceedings and findings. When an authority empowered by law to arrive at a decision after consideration of the material before it this court cannot in these proceedings interfere in that decision. It is settle law that the remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In judicial review the court is concerned with its legality. On appeal the question is right or wrong, on review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not; *Best Footwear (pvt)Lltd., and Two Others v Aboosally, former Minister of Labour & Vocational Training and Others [1997]2 Sri L R 137.*

In view of the above the decision to recover the said sum from the salary of the Petitioner cannot be challenged by a writ of certiorari. The said recovery or deduction of the said sum from the salary of the Petitioner is not a punishment imposed on the Petitioner but it is to make good the loss incurred by the Army; in other words it is only a surcharge. As provided by Rule 8 of Note 2 of Financial Regulation No.102 Relating to Losses of Three Armed Forces the maximum recoverable value will be the actual loss involved. This indicates that the sum recovered under these rules is not a punishment.

The Petitioner challenged the recommendation of the 1st Respondent to discharge the Petitioner from the army. In considering the subsequent proceedings it appears that the said recommendation was not acted upon and the recommendation if any to discharge the Petitioner is not based on the above recommendation. Therefore I am not considering the said recommendation as a decision or determination that affects the Petitioner's rights to issue a writ of certiorari to quash the said recommendation.

The Petitioner was subjected to a summary trial on or about the 7th of November 2008, which was conducted by the 7th Respondent. The 7th Respondent read out the charges against the Petitioner at the summary trial. The Petitioner's position was that the summary trial was contrary to the rules in the Army Disciplinary Regulations of 1950 and the provisions of the Army Act No.17 of 1949, as amended. The Petitioner alleged that he was not given the Charge Sheet and the summary of evidence 24 hours before the trial, and he was not given an opportunity to call witnesses in the summary trial. In the summary trial no evidence of witnesses were led nor was any evidence recorded against the Petitioner. When the charges were read to the Petitioner the Petitioner pleaded not guilty. The summary trial was concluded within 10 minutes and, thereafter, a punishment was ordered demoting the Petitioner to the rank of soldier. The Petitioner also submitted that he had requested for a Court Marshal, and his request was refused.

The Respondents submitted that a summary trial under Section 42 of the Army Act was conducted on the 7th of November 2009. The Charge Sheet was served on the Petitioner 24 hours prior to the conducting of the summary trial and, as set out in the document marked R4, the Petitioner has pleaded guilty to the charge against him, and on the basis of pleading guilty to the charges, the punishment set out in the document R4 was enforced on the Petitioner. The request of the Petitioner for a Court Marshal was turned down because the Petitioner is not legally entitled to a Court Marshal under Sections 44 and 45 of the Army Act No.17 of 1949, as amended.

The Petitioner and the Respondents are giving different versions of the proceedings of the summary trial. The Petitioner submits that he pleaded not guilty to the charges, the Respondent submits that he pleaded guilty to the charges. As the Proceedings were reduced in writing the Petitioner cannot challenge documentary evidence by his oral testimony. The contradiction between the Petitioner and the Respondents are based on facts this court cannot determine the correctness of the said version in these proceedings. As there is no illegality or procedural irregularity in the summary trial as

per the proceedings before this court this court cannot quash the said proceedings or the findings of the Summary Trial.

The Petitioner submitted that on or about the 20th of December 2008, on a movement order, together with a sick report, he was subjected to a medical test called "pulheems". A pulheems test is generally done for recruitment, promotion or discharge of army soldiers or officers. The Medical Officer who was to conduct the pulheems test informed the Petitioner that he was unable to conduct the same since the medical condition of the Petitioner had been categorized previously and thereby he was categorized under a lower medical category. The Petitioner was further informed that he will have to subject himself to a medical examination on 19th January 2009 to determine his medical condition. The Petitioner submitted that there is an imminent possibility that he could be discharged from the Army as soon as the aforesaid medical examination is conducted on 19/1/2009 without any prior notice in respect of the same.

In this application the Petitioner challenges the process commenced by the Respondents to discharge, removal and/or retire the Petitioner from the Sri Lanka Army. The Petitioner in his prayer has sought, a writ of certiorari to quash a decision taken by any one or more of the Respondents to discharge the Petitioner as reflected in document marked P1 and a writ of prohibition on the Respondents prohibiting the Respondents from retiring, discharge or removing the Petitioner from the Sri Lanka Army.

The Respondents' position is that the Petitioner is to be discharged on the basis of his service no longer being required by the Sri Lanka Army and in accordance with a soldier's service regulation No.1 of 1994, that the Sri Lanka Army is entitled to discharge a soldier.

The discharge of the Petitioner is not a punishment arising from the Court of Inquiry or Summary Trial, but the discharge is based on the Sri Lanka Soldiers' Service Regulation No.1 of 1994 on the basis that his service is no longer being required by the Sri Lanka Army. In these circumstances the Petitioner's allegation that the said discharge is

arising from the summary trial and the summary trial was not conducted according to law are not substantiated by the Petitioner. In view of the above, the Petitioner is not entitled to seek the remedies that has been sought by the Petitioner in this application. Therefore, I dismiss this application without costs.

President of the Court of Appeal