

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

In the matter of an application for mandates
in the nature of Writs of Certiorari and
Mandamus under Article 140 of the
Constitution of Sri Lanka.

H.K.U.P.Kavikeshawa, Lieutenant Colonel,
30/9, Yahampath Mawatha, Maharagama.

Petitioner

C.A/WRIT/260/2011

VS

1. Lt.Gen.Jagath Jayasooriya, Commander of
the Sri Lanka Army,
Army Headquarters Colombo 03.
And ten (10) Others.

Respondents

BEFORE : S.SRISKANDARAJAH, J (P/ CA).
COUNSEL : J.C. Weliamuna with Maduranga Rathnayake
for the Petitioner.
Anusha Fernando, Senior State Counsel
for the Respondents.
Preliminary Objection on : 25.05.2012
Written Submission on : 10.07.2012 (Petitioner)
16.07.2012 (Respondent)
Order on : 03.09.2012

S.Sriskandarajah, J.

The Petitioner's promotion to Lieutenant Colonel was not granted and he was compulsorily retired from service as he has completed 20 years in the Sri Lanka Army. This is an application for a writ of certiorari to quash these decisions of the Commander of the Sri Lanka Army. When this application is pending in this court for determination, His Excellency the President being the Commander-in-Chief of the Sri Lanka Army have approved the retirement of the Petitioner with effect from 08.03.2011.

The learned Senior State Counsel for the Respondent raised a preliminary objection that it would be futile to proceed with this application as His Excellency had approved the above decisions of the Army Commander and the decision of His Excellency the President is not amenable to writ jurisdiction in view of Article 35(1) of the Constitution.

The learned Counsel for the Petitioner contended that despite the approval of His Excellency the President, the Petitioner could still challenge the impugned decisions of the 1st Respondent Commander marked P8 not to grant further promotions to the Petitioner and the decision of the Regimental Council to compulsorily retire him as he has completed 20 years of service.

The decision of His Excellency to approve the retirement of the Petitioner is based on the recommendation and the documents and other material submitted to His Excellency. This decision was taken after careful consideration of those materials and it is presumed that all official acts are done in accordance with law. The Petitioner has not sought to challenge the decision of His Excellency even though he claims that the immunity provided under Article 35 of the Constitution is a shield for the doer and not for the act; *Karunathilake v Dayananda Dissanayake* 1991 1 Sri L.R 157. When the order of His Excellency communicated by letter dated 24.05.2011 (1R1) stands unchallenged the quashing of the orders or decisions made by the Respondents will not have any impact on the said decision of His Excellency.

It could be argued that the decision of the Respondents could be considered on its merit and an appropriate order be made by this court. The Court of Appeal in *Rathnayake v Air Martial Donald Perera (CA/Writ/104/2005 CA Minutes of 28.02.2007* followed this course of action and issued writs. But there is no material placed before this court to show that after the said decision of the Court of Appeal His Excellency has reconsidered his decision.

In the above circumstances this court is of the view that issuing orders quashing decisions that had been superseded by subsequent orders or decisions which are not challenged is futile. This court is also wish to observe that the Petitioner had ample opportunity to challenge the orders made by the Respondents. The first order that was challenged is an order of the Commander of the Sri Lanka Army not to grant promotion to the Petitioner (P8) was made on 25.11.2008. This order is the basis of other consequential orders that were challenged. But the Petitioner challenged this order only by this application filed on 14.03.2011 and the Petitioner had also failed to obtain an interim order restraining the Respondent from taking any steps pursuant to the said decision. His Excellency's Order was made only on the 24th of May 2011. The Petitioner has to blame himself for this plight. Jurisdiction of this Court under Article 140 to issue writs is discretionary and it will not issue the same if it is futile: *PS Bus Company Ltd v Members and Secretary of Ceylon Transport Board (1958) 61 N.L.R 491*.

For the above reasons this court dismisses this application without costs.

President of the Court of Appeal