

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

In the matter of an application for writs of certiorari
and Mandamus in terms of Article 140 of the
Constitution read with Section 79 of the Army Act
No.17 of 1949.

Lt.Col.Semasinghe Wanninayake Tikiri Bandara
Hulugalle,
Hulugalla, Nikaweratia.

Petitioner

C.A/WRIT/App/No.338/2008

VS

1.Secretary,
Ministry of Defence,
Colombo 3.
2.Commander of the Army,
Army Headquarters,
Colombo 03.
And five (05) others.

Respondents

BEFORE : **S.SRISKANDARAJAH, J (P/C)**
D.S.C. LECAMWASAM, J
COUNSEL : Mervin Samarakoon
for the Petitioner.
Vikum de Abrew SSC
for the Respondents.

Argued on : 10.12.2010
Written submission filed on: 01.02.2011 (Petitioner)
08.06.2011 (Respondents)
Decided on : 12.07.2011

S.Sriskandarajah. J

The Petitioner was a Lt.Col in the Sri Lanka Army (Volunteer) Force and attached to the Sri Lanka Light Infantry Regiment. He functioned as the Commanding officer of 14th (V) SLLI Unit located at Usan Mirisuvil in Jaffna from 1996 to 2002. The Military Police commenced an investigation in 2004 into certain irregularities that were said to have taken place in 1998 in the said unit. Subsequently a court of inquiry was conducted and the Petitioner submits that he reliably understands that the court made recommendation that the Petitioner be made to refund a sum of Rs.32,282.82. After the Publication of the Court of Inquiry Report the Court of Inquiry was reconvened and recorded further evidence and thereafter it had recommended a sum of Rs. 976,115.28 be recovered from the Petitioner. The Petitioner further submitted based on the Court of Inquiry report, the 2nd Respondent has made an order that a sum of Rs. 976,115.28 be recovered from the Petitioner and various other sums from several other officers. The 2nd Respondent in addition to the above order had made a further order that papers be prepared to withdraw the commission of the Petitioner. The said order is marked as P9.

The Petitioner in this application has sought a writ of certiorari to quash the decision of the 2nd Respondent to recover any money from the Petitioner and a writ of certiorari to quash the decision of the 2nd Respondent to withdraw the commission of the Petitioner. The learned counsel for the Petitioner while making submission and in his written submissions that the Petitioner is not discharged from service but he is released from service without Pay(RASWP) under Section 68(1) of the SLAVF regulations of the Government Gazette dated 20.10.1997 with effect from 14.01.2009. In these

circumstances the Petitioner in this application is only seeking a writ of certiorari to quash the 2nd Respondent's decision to recover a sum of Rs.976,115.28.

The Petitioner contended that the court of inquiry was inquiring into a case of alleged malpractices involving funds in respect of which four audits were conducted , but non of them were produced before the court for examination by the witness. The Petitioner further contended that not a single document was submitted to demonstrate fraud but only the report of the Military police was led in evidence. Petitioner's request to call witnesses of his own was rejected. In view of the illegal procedure adopted by the court of Inquiry the entire proceedings are a nullity.

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 an 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 or 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 or 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 in this application has sought to quash the decision of the 2nd Respondent to recover any monies from the Petitioner. The Petitioner submitted based on the Court of Inquiry report, the 2nd Respondent has made an order that a sum of Rs. 976,115.28 be recovered from the Petitioner and various other sums from several other officers.

The Petitioner challenged the aforesaid decision on the basis that the evidence led before the Court of Inquiry did not prove that the Petitioner has misappropriated the said sum.

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 2nd Respondent after the receipt of the findings of the Court of Inquiry has decided that a total sum of Rs. 976,115.28 be recovered from the Petitioner and various other sums from several other officers in accordance with the degree of responsibility.

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 settled 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)Ltd., 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 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. The Petitioner has not shown that the decision of the 2nd Respondent is unlawful. In these circumstances this court cannot grant the relief sought by the Petitioner. Hence this Court dismisses this application without costs.

Judge of the Court of Appeal

D.S.C. Lecamwasam, J

I agree,

Judge of the Court of Appeal