

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

In the matter of an application for a Writ of
Certiorari in terms of Article 140 of the
Constitution of the Democratic Socialist Republic
of Sri Lanka.

Arambewelage Don Thilak,
No.01, Pearl Gardens,
Sri Wimala Mawatha,
Kindelpitiya,
Bandaragama.

Petitioner

C.A/WRIT/App/No.566/2008

VS

1.Lt.General Sarath Fonseka,
Commander,
Sri Lanka Army,
Army Headquarters,
Colombo 3.

And six (06) others.

Respondents

BEFORE : **S.SRISKANDARAJAH, J.**
COUNSEL : Upul Kumarapperuma with Suranga Munasinghe
for the Petitioner.
Arjuna Obeysekera SSC
for the 1st to 4th and 7th Respondents.

Ranil Samarasooriya
for the 5th Respondent

Argued on : 18.10.2010
Decided on : 18.01.2011

S.Sriskandarajah. I

The Petitioner is serving as a Major in the Sri Lanka Army. During the relevant period the Petitioner was attached to the 10th Battalion Gemunu Watch. The Petitioner submitted that the Commanding Officer of the battalion is expected to carry out the overall administration of the Battalion the Petitioner was appointed as a 2nd in Command. The 2nd in command is appointed by the Commanding Officer to supervise the handling of the petty cash and funds of the battalion. Petitioner has also submitted that there were several Accounts Officers working under the supervision of the Petitioner carrying out the function of handling and maintaining of accounts. These accounts are regularly audited by the Audit Board of the Sri Lanka Army and the said Audit Boards have never pointed out any irregularity or mismanagement of the accounts of the Battalion. The Respondents contended that the Petitioner was appointed to supervise the petty cash and the accounts of the 10th Battalion Gemunu Watch by the Head quarters of the Sri Lanka Army Volunteer Force. The officers and the non-commissioned officers who served under the supervision of the Petitioner were not qualified Accountants. The Petitioner had been in charge of the following accounts during the relevant period material to this application.

- (i) President-Regimental Institutes (PRI) Accounts,
- (ii) Compulsory Savings Account,
- (iii) Welfare Account
- (iv) Death Donation Account
- (v) Officers' Mess Account

The Military Police of Sri Lanka Army has conducted investigations on allegations of misconduct against the Petitioner including fraud committed in respect of regimental funds of the 10th Battalion of the Gamunu Watch. It revealed in the course of the investigation:

- (a) that cheques drawn on the accounts of the said regiment had been deposited in the personal bank account of the Petitioner;
- (b) a large amount of regimental funds had been misappropriated during the period the Petitioner was in charge of the said accounts ;
- (c) the books and accounts had not been maintained properly and that false entries had been made to enable the funds of the regiment to be misappropriated and the Petitioner was responsible for the misappropriation of the funds of the PRI account and the Compulsory Savings Account.

A Court of Inquiry on the above allegations commenced its inquiry on 12.07.2006. The evidence of 39 witness had been recorded under oath in the presence of the Petitioner . The Respondents submitted that the Petitioner had been permitted to cross examine all the witness and the Petitioner was given an opportunity of examining and studying the Military Police Report during the proceedings of the Court of Inquiry in order to facilitate him in the cross examination. The Petitioner was given an opportunity to call any witnesses of his choice and/or to give evidence on his behalf. The Petitioner gave evidence on his behalf.

The Court of Inquiry after consideration of the evidence and documents submitted their recommendation to the 1st Respondent on 18.02.2008. According to the said recommendation the evidence led before the Court of Inquiry had established that a sum of Rs 2,329,574.72 had been misappropriated from the accounts of the 10th Battalion of the Gamunu Watch during the period the Petitioner was in charge of the accounts of the said battalion. Acting on the recommendation of the Court of Inquiry , the 1st Respondent ,acting in terms of Section 27 (d) of the Army Act and in

terms of paragraph 9 and 10 of the Special Rules ,had directed a sum of Rs.1,709,533.50 be deducted from the monthly pay and allowance of the Petitioner.

The Petitioner in this application is seeking a writ of certiorari to quash the findings and or the report of the Court of Inquiry made against the Petitioner and the decision communicated in the letter dated 04.06.22008 marked P9 suspending the payment of his full salary until the sum of Rs. 1,709,533.50 is fully recovered.

The Petitioner challenged the aforesaid decision on the basis that the decision had been taken without giving the Petitioner an opportunity of facing a proper and fair inquiry and the decision had been made without considering the evidence available against the Petitioner in respect of the alleged act of misappropriation.

The Petitioner's allegations are denied by the Respondents and the Respondents have submitted that the rules of natural justice had been observed and the Petitioner was given an opportunity to cross examine witnesses and the Petitioner was also given an opportunity to give evidence or to call witnesses. This proceedings is a judicial review proceedings therefore this court cannot go into the allegations of disputed questions of facts. 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)Ltd., and Two*

Others v Aboosally, former Minister of Labour & Vocational Training and Others [1997]2 Sri L R 137.

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.

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 sum of Rs. 1,709,533.50 which was misappropriated should be recovered from the Petitioner, and a sum of Rs 569,844.68 should be recovered from Major Srimal Kumara 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.

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.

For the above reasons the application of the Petitioner is dismissed without costs.

Judge of the Court of Appeal