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 a Writ of Certiorari, Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C A 819 / 2010 Writ

Kavindra Dasanayake,

Captain, Sri Lanka Army,

317/L/4, Malasinghagoda Road,

Hokandara.

PETITIONER

Vs.

1. Lt. Gen. Jagath Jayasooriya,
   Commander of the Sri Lanka Army,
   Army Headquarters,
   Colombo 3.
   And 17 Others.

RESPONDENTS

BEFORE	:	SATHYA HETTGE, P.C.J. (P/C.A.) And
		UPALY ABEYRATHNE, J.
COUNSEL	:	J . C. Weliamuna for the Petitioner
		Janak de Silva SSC for the Respondents
SUPPORTED ON	:	28.01.2011
DECIDED ON	:	14.02.2011

UPALY ABEYRATHNE, J.

The Petitioner filed this Application seeking to issue mandates in the nature of writs of Certiorari, Prohibition and Mandamus as prayed for in the Petition. When this matter was supported for the issuance of notice and for the interim relief on 16.12.2010 this Court has made an order to issue a stay order restraining the Respondents as prayed for in prayer (i) to the Petition until 10th of January 2011. The Court has further directed the Petitioner to support the Application for interim relief on 10.01.2011 since sufficient notice had not been given to the Respondents. The 1st to 17th Respondents filed a limited statement of objections to the extension of the stay order. Accordingly, this matter was taken up for support for further extension of the interim order on 28.01.2011. The learned SSC vehemently objected to the extension of the interim order.

According to the Petitioner he is a Captain of the Sri Lanka Army. The Petitioner along with 13 other army personnel was taken in to custody upon allegations of murder of 08 civilians in Mirusuvil area. Although the Petitioner was discharged from the proceedings 05 of the other 13 suspects were indicted before Colombo High Court. The Petitioner thereafter was engaged in raising funds in order to meet the legal expenses of the said 05 Accused. Since there were allegations levelled against the Petitioner for misappropriation of funds so collected, a Court of Inquiry had been appointed to inquire in to the said allegations. After inquiry, the Court of Inquiry came to the conclusion that a sum of Rs. 317,000/= had been misappropriated by the Petitioner and ordered to recover the said sum of money from the payments due to the Petitioner from the Army. The Petitioner has stated that due to his military commitments he could not exercise his legal rights against the said decision. Thereafter the Petitioner has tendered a Redress of Grievance (ROG) to the Army Commander. The Petitioner has stated that the 7th Respondent has failed to forward his ROG to the Army

Commander. Thereafter he has been summoned as a witness before another Court of Inquiry. The Petitioner has stated that the 2nd Court of Inquiry too has been conducted contrary to the principles of natural justice and the Army Act. Thereafter on 26.11.2010 the Petitioner has received a decision of the Captain Confirmation Board (CCB) wherein the CCB has recommended discharging the Petitioner from Army on disciplinary grounds with effect from 31.12.2010. The Petitioner has mainly sought a mandate in the nature of writ of Certiorari to quash the said decision of the CCB.

The learned SSC contended that the stay order should not be extended on the ground of suppression of material facts from court. He submitted that although the Petitioner has sought to quash the decision contained in P 8 (decision of the CCB) he has failed to disclose the facts contained in R 9, R 10 and R 11 which had provided a sufficient base for the decision of the CCB. The Petitioner contended that said decision is contrary to section 39 of the Officers Service Regulation (Regular Force) 1992.

The R 8 is an Army Routine Order issued by the Commander of the Army dated 23.02.2010 wherein an Army Advisory Board has been convened to make recommendations to the Commander of the Army in respect of promotion of officers to the rank of Captain and Major. It appears from P 8 that the Army Board has assembled to consider officers for confirmation in the rank of Captain on 13.05 2010 and has arrived at the following conclusion. Namely; "The Board does not recommend the Officer (the Petitioner) to be confirmed due to poor disciplinary record and the Board is of the opinion that the Officer should be recommended for discharge from the Army on disciplinary ground with effect from 31.12.2010 as per section 39 of the Officers Service Regulation (Regular Force) 1992."

In support of said decision the learned SSC has produced the documents R 9, R 10 and R 11. According to R 9 the Petitioner had been charged for 'deficiency in and injury to equipments' an offence punishable under section 115 of the Army Act. The Petitioner had been convicted and sentenced for the said offence upon his own plea of guilt. According to R 10 the Petitioner had been charged for 'conduct prejudicial to military discipline' an offence punishable under section 129(1) of the Army Act. The Petitioner had been convicted for the said offence upon his own plea of guilt and had been punished with forfeiture of seniority of rank by bringing down 100 places in the rank of Captain in the Regular Force and had been placed as immediate junior to one Captain C.T. Siriwardena.

According to R 11 the Petitioner had been charged for 'Neglect to obey any general or garrison or other orders' an offence punishable under section 102(1) of the Army Act. The Petitioner had been convicted for the said offence upon his own plea of guilt and had been punished with forfeiture of seniority of rank by bringing down 100 places in the rank of Captain in the Regular Force and had been placed as immediate junior to one Captain Jayawardena.

Accordingly it is apparent from R 10 and R 11 that the Petitioner has lost 200 positions of seniority in the rank of Captain. The Petitioner has failed to disclose the aforementioned facts in his petition to this court. The Petitioner has sought to quash the decision in P 8 which appears to be the decision of the Captain Confirmation Board. There is no evidence to conclude that the CCB has arrived at the said decision in P 8 solely on the allegation of misappropriation as stated in the petition. Hence the past conduct of the Petitioner is material to this application. It is well settled law that the suppression or nondisclosure of material facts from court is fatal to the application.

It is also to be noted that although the Petitioner, in his Petition, has failed to mention at least a summary of account indicating income and expenditures with regard to the collection of funds, the Respondents in their limited statement of objections have mentioned in detail the total sum of money which had been collected by the Petitioner. The Petitioner, in his petition to this court, has admitted that he informed the 1st Court of Inquiry that as some of the lawyers did not issue receipts he was not in a position to produce documentary proof of payment in respect of a sum of Rs. 192,000/=. The learned SSC submitted that at the conclusion of the said Court of Inquiry, the Petitioner was given a further opportunity to prove the expenses but he had not attempted to explain dubious financial expenses.

The necessity of a full and fair disclosure of all the material facts to be placed before the Court when an application for a writ or injunction is made and the process of the Court is invoked has been laid down in Series of judicial pronouncements. In the case of W. S. Alphonso Appuhamy Vs L. Hettiarachchi 77 NLR 131 it was held that "when an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with *uberrima fides*."

Pathirana, J. in the above case referred to the principles laid down in the case of King Vs The General Commissioner for the Purpose of Income Tax Acts for the district of Kensington - ex parte Princess Edmond de Poignac 1917 - 1 KBD 4864 "it is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge,

and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it".

In the same case Scrutton, L.J. cited the words of Wigram, VC in the case of Castelli Vs Cooke (1848) 7 Hare 89.94. "A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact had been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go".

Ismail J, in the case of Laub Vs Attorney General and Another (1995) 2 Sri LR 88 following the aforesaid judicial pronouncement held that "The Petitioner has not acted with *uberrima fides*, he has suppressed material facts - this application could be dismissed in limine."

In the case of Sarath Hulangamuwa Vs Siriwardena, Principal, Visakha Vidyalaya, Colombo 5 and Others (1986) 1 Sri LR 275 Siva Selliah J stated that "A petitioner who seeks relief by Writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised. In the instant case the fact that the petitioner had a residence at Dehiwela is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory. On this ground too the application must be dismissed for lack of *uberrima fides*."

In the case of Blanca Diamonds (Pvt) Ltd Vs Wilfred Vanels and Two Others (1997) 1 Sri LR 360 Jayasuriya J. held that "When a party is seeking discretionary relief from court upon an application for a Writ of Certiorari, he enters into a contractual obligation with the court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose *uberrima fides* and disclose all material facts fully and frankly to Court. The petitioner company has been remiss in its duty/obligation to court and has failed to comply with that contractual obligation to court."

It must be placed on record that the duty of a party asking for a mandate in the nature of a writ is to bring under the notice of the Court all facts material to the determination of his right to that writ; and it is no excuse for him to say that he was unaware of the importance of any fact which he has omitted to bring forward. Therefore it is crystal clear that every fact must be stated. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination.

For the forgoing reasons I dismiss the Petitioner's application in *limine* without costs.

Application dismissed.

Judge of the Court of Appeal

SATHYA HETTGE, P.C.J. (P/C.A.)

I agree.

President of the Court Of Appeal