

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

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

C A 54 / 2011 Writ

Don Thilak Jayashantha Dahanayake,
No. 121, Pragathipura,
Madiwela, Kotte.

PETITIONER

Vs.

1. Lieutenant General Jagath Jayasuriya,
Commander,
Sri Lanka Army,
Army Headquarters, Colombo 3.

And 03 Others

RESPONDENTS

BEFORE : SATHYA HETTGE, P.C.J.(P/C.A.) And
UPALY ABEYRATHNE, J.

COUNSEL : Ranil Samarasuriya for the Petitioner
: Farzana Jameel DSG with T Tilakawardene
SC for the Respondents

SUPPORTED ON : 04.03.2011

DECIDED ON : 16.03.2011

UPALY ABEYRATHNE, J.

The Petitioner was a Corporal of the regular force of the Sri Lanka Army. He had joined the Sri Lanka Army as a Private on 21.4.1989 and had been attached to Sri Lanka Army Ordnance Regiment on 30.11.1990. Thereafter the Petitioner had been attached to the Sri Lanka Army Foreign Travel Directorate with effect from 21.12.1998 and he had discharged the duties of the subject clerk. The Petitioner stated that when he was in the Sri Lanka Army Foreign Travel Directorate, which was the period material to this application, his superior officer was one Major Tivanka Hettiarachchi and thereafter Captain S.P. Lokuhennadige became the superior officer of the Petitioner with effect from 01.01.1999.

The Petitioner stated that on an investigation initiated by the Sri Lanka Army Military Police in to an air ticket fraud which had taken place in the Sri Lanka Army Foreign Travel Directorate the Petitioner and his superior officer Captain Lokuhennadige were taken in to military custody on 28.04.2000. After the conclusion of the military police investigation in relation to the said incident a Court of Inquiry was appointed on 02.05.2001 to inquire in to the said incident. The Court of Inquiry commenced its proceedings on 24.05.2001 and after the completion of the proceedings the Court of Inquiry forwarded its findings to the Commander of Army.

The Petitioner further stated that thereafter action was taken to cancel the said Court of Inquiry and by order dated 21.05.2004 a fresh Court of Inquiry was convened to inquire in to the incident. The 2nd Court of Inquiry commenced its proceedings on 27.08.2004 and continued till 06.12.2005. After receipt of the observations and opinion of the 2nd Court of inquiry the Commander of Army decided that the total amount that had been misappropriated should be recovered

from the Petitioner and two others namely Major L.P.T.I. Hettiarachchi and Captain S.P. Lokuhennadege. Accordingly it had been decided to recover a sum of Rs.1,036,858.00 from the Petitioner and to discharge the Petitioner from the Sri Lanka Army. The Petitioner has produced the said decision along with the Petition marked P 3.

Being aggrieved by the said observations and opinion of the 2nd Court of Inquiry and the decision of the Commander of Army, the Petitioner had instituted C A Application No. 708 / 2006 seeking the following reliefs from court.

- A mandate in the nature of a writ of certiorari quashing the proceedings, observations and opinion of the said 2nd Court of Inquiry.
- A mandate in the nature of a writ of certiorari quashing the decision of the 1st Respondent (Commander of the Army).
- A mandate in the nature of a writ of certiorari quashing the decisions of the 7th and 8th Respondents to deduct the entire monthly salary of the Petitioner.

When the said CA Application was mentioned before court on 29.01.2009, the court has made the following order.

“The Petitioner is absent even though the Petitioner was noticed by letter dated 19.12.2008. The counsel who appeared for the Petitioner informs court that all efforts by the counsel to contact the Petitioner was futile, and as such she has no instructions from the Petitioner.

As the Petitioner has not pursued this application with due diligence the application is dismissed without costs.”

The Petitioner has stated that he thereafter made an Application to Court of Appeal seeking to re-list the CA Application No. 708 / 2006. The said application also was dismissed by the Court of Appeal. But the Petitioner has failed to produce any documentary proof to establish the fact that he made a re-listing application to the Court of Appeal. In any event, now, the said allegations of the Petitioner stands adjudicated and a final judgement of this court pertaining to the said allegations of the Petitioner is in force.

The Petitioner has further stated that in August 2009 he was transferred to the Regiment Headquarters for the purpose of discharging him from Sri Lanka Army. At the Regiment Headquarters a summary trial was held by the 3rd Respondent against the Petitioner. At the summary trial a charge sheet with three charges was read over to the Petitioner. He pleaded not guilty to the charges and requested a Court Martial. But the Petitioner had been informed that he would be found guilty for all three charges based on the decision of the then Commander of Army and money would be deducted from his salary. The Petitioner objected to the said decision of the summary trial and insisted for a Court Martial. In consequent to the said request the Regiment Headquarters informed the Petitioner they would obtain instruction from the legal department and the same would be conveyed to the Petitioner.

But the Petitioner has failed to produce any of the documents pertaining to said facts.

The Petitioner has stated that Captain Lokuhennadege who was also affected by the decision contained in P 3 instituted a writ application No.1274/2006 seeking a mandate in the nature of a writ of certiorari. The Petitioner submitted that the Court of Appeal, by the judgement dated 09.07.2009,

quashed the decision contained in P 3. The said judgement has been produced by the Petitioner marked P 11. I carefully examined the said judgement. It states that "Therefore this court issues a writ of certiorari to quash that part of the decision contained in the decision of the 1st Respondent in document marked X 6 dated 14.01.2006." It is clear that in that case the court has considered a document produced marked X 6. The Petitioner has not produced the said document X 6 or the petition and affidavit filed in CA 1274/2006 along with the present petition to this court. Therefore the court is unable to find without X 6 whether X 6 and P 3 are one and the same document. Hence X 6 too is a material document to this application.

It is well settled law that non-production of the material documents is fatal to the application. Hence the present application of the Petitioner can be dismissed on this reason alone.

In the present application, the Petitioner has sought a writ of certiorari quashing the decision of the 1st Respondent as evident from the document produced marked P 16. The Petitioner has not produced the alleged decision of the 1st Respondent with his petition to this court. The document P 16 does not contain a decision. It is a mere report titled 'proceedings on transfer to the army reserve and discharged.'

It is well settled law that for certiorari to issue, there must already be a determination of rights. If at the time certiorari is applied for there is no order to be quashed, that remedy will be refused for that reason alone.

In the case of *Ex Parte Pritchard (1953)* All E. R. 766 at 772 As observed by Parker, J. "It cannot be too clearly understood that the remedy by way

of Certiorari only lies to bring up to this Court and quash something which is a determination or a decision."

In the case of Appapillai Amirthalingam Vs. M.A. Priyasekera Commissioner of Elections and Another (1980) 2 SLR 285 it was held that "There has necessarily to be a formal decision or determination by the Commissioner requiring the Secretary of a political party to nominate a member of that party to fill a vacancy in Parliament before a writ of certiorari could issue quashing that decision or determination. As that situation has not yet arisen, the application is premature."

In the aforesaid circumstances I am of the view that the Petitioner cannot have and maintain the present application before this court. Therefore I refuse to issue notice and dismiss the Petitioner's application for writ 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