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

S. M. Mangala Pushpakumara
"Wewagedara", Hindagolla.
Kurunegala.

PETITIONER

C. A. 448/2009 (Writ)

Vs.

1. Air Chief Marshal Roshan Gunathilake
   The Commander of Air Force
   Air Force Headquarters,
   Colombo 2.

2. Air Vise Marshal Karannagoda
   Director (Administration) of Sri Lanka
   Air Force, Air Force Headquarters,
   Colombo 2.

3. Squadron Leader K.W.M.P.K. Wijekoon
   Deputy Director (Administration) of Sri
   Lanka Air Force, Air Force Headquarters,
   Colombo 2.

4. Group Captain D.G.C. Weerakoon
   Group Commander,
   Air Force Camp, Parawasakulama,
   Vavuniya.

5. Honourable Attorney General
   Attorney General's Department
   Colombo 12.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J.. Perera J.

COUNSEL: J. M. Wijebandara for the Petitioner
Vikum de Abdrew Senior State Counsel

ARGUED ON: 28.01.2013

DECIDED ON: 28.03.2012

GOONERATNE J.

The Petitioner who joined the Sri Lakna Air Force on or about 1988 and who was subsequently promoted as a Flight Sergeant, has filed this Writ application seeking Mandates in the nature of Writ of Certiorari to quash documents marked P15 & P19 by which the Petitioner had been discharged from the Sri Lanka Air Force for the reasons contained therein and for an order permitting the Petitioner to retire under the clause determination of engagement according to document P12A.

The material disclosed in the affidavit of the Petitioner, it is stated that he had 22 long years of commendable service and to establish same has annexed documents P1 to P11 A to P11D. His service of 22 years would be completed on 9.5.2010. Petitioner has produced document P12A which refer to as "on termination of engagement, "which letter of discharge is dated 9.3.2009.

Petitioner describes this as a way of retirement under the normal circumstances after same became due by operation of regulation.

In the pleadings filed by the Petitioner it is disclosed that the Petitioner was charged for a minor offence of conduct prejudicial to Air Force discipline. (visiting the woman quarters without informing relevant official). Charge sheet is produced P13 and after inquiry, Petitioner was imposed a punishment of 12 days detention (P14A). According to the Petitioner it is a minor punishment under Section 133 of the Air Force Act. Punishment imposed on 18.12.2008. Petitioner also demonstrate that after the punishment the Petitioner who was in service was in fact promoted as substantive Flight Sergeant on 1.2.2009 (P14B). Thereafter whilst in service the Petitioner was served with letter of 7.5.2009 (P15) titled "provisional clearance on discharge" of Petitioner. Deputy Director (Administration) inform the Petitioner that the Commander of the Air Force had approved the discharge of the Petitioner under clause "SNLR" - Service No Longer Required. The Petitioner being dissatisfied of P15 submitted letters P16; P17 seeking redress of grievance from the 1st Respondent. By P18 the 1st Respondent informed the Petitioner that permission cannot be granted to meet the 1st Respondent.

The Petitioner seeks to challenge letter P15 and state it is unreasonable, arbitrary and capricious and ultra-vires the provisions of the Sri Lanka Air Force Act for the following reasons.

(a) No provision to impose a punishment twice and further punishment could not be imposed

(b) A discharge as in P15 is highly excessive considering the charge in P13.

(c) Violating legitimate expectation of Petitioner who has already been chosen for retirement as in P12A. (termination of engagement)

Paragraph 19 of the Petitioner's affidavit seems to connect letter P19 which is sought to be quashed. The said paragraph reads thus:

> "Therefore the letter issued by the Third Respondent dated 24th June 2009, informing the Petitioner that he is discharged from service, under clause SNLR is ultra-vires, illegal and unreasonable. A copy of the said letter is annexed hereto marked as P19 and pleads same as part and parcel of this petition".

The above letter P19 refer to 3 offences committed by the Petitioner and the Petitioner states that those matters do not amount to military offences. This court observes that only by a perusal of P19 that one can gather the offence committed by the Petitioner. Unlike in paragraph 9 where Petitioner makes a full disclosure of the offence, there is no other paragraph in the pleadings disclosing the matters stated in P19.

Merely to file a document along with the Petition of the Petitioner seeking a prerogative writ, without stating in the petition that such document exists, does not amount to a disclosure of such document by the Petitioner. Athula Ratnayake Vs. Jayasinghe (1975) 78 NLR 35, 39 – 40. Further, if a material fact contained in a document is not expressly referred to in the petition and affidavit, the Petitioner is guilty of suppression of that material fact, even if that document itself is filed along with the petition and affidavit and the fact that the

document is being filed is mentioned in the petition and affidavit Alphonso Appuhamy Vs. Hettiarachchi (1975) 77 NLR 131, 135 at 135

It was one of the main points urged by the learned counsel for the Petitioner that the Petitioner cannot be tried twice or re-imposition a punishment is blatantly ultra-vires since the three items mentioned in P19 had been separately dealt in disciplinary procedures held against him. The question is whether issuance of P15 & P19 amount to a punishment?

In the written submissions and submissions before this court the Petitioner attempted to demonstrate the difference between "On termination of Engagement" and "Service No Longer Required" (SNLR). Learned counsel for Petitioner sought to stress that the eligibility of the Petitioner is confirmed bv the Respondents when document P12A was issued. This would under normal circumstances entitle the Petitioner for a pension and other statutory benefits. It was the case of the Petitioner that the above 'SNLR' applies to those who cannot be discharged under any other category of the relevant regulations. The Petitioner also stress that under SNLR it is the Petitioner who has to make an application and refer to column 5 of Rule XII of schedule B (R1). This court having perused pg. 15 of R1 and column 5 in paragraph (Xii), it is apparent that the Petitioner has erred on this point and need to be stated so since column 5 of Xii and Xiii are under different circumstances .

The other point stressed by the learned counsel for the Petitioner is that P19 refer to only minor offences where he has been warned and punished. As such Respondents cannot impose another punishment to discharge the Petitioner without a pension. Petitioner also state that in terms of the Air Force Act there is no provision to impose punishment twice.

The learned Senior State Counsel on the other hand submitted to this court that letter P19 refer to a decision (letter of 22.6.2009) of the 1st Respondent and the Petitioner has not annexed same, and therefore application should be dismissed for non compliance of Rule 3(1) of the Court of Appeal Rules. No doubt that compliance with Appellate Court Rules is imperative. Vide Shanmugavadivu Vs. Kulathillake 2003 (1) SLR 215 at pg. 220. However the decision of the 1st Respondent referred to in P19 would be the decision makers view to discharge the Petitioner from service by resorting to 'SNLR'. In a strict sense it is necessary . The Petitioner if he had any difficulty in obtaining same could have moved this court in the prayer to the Petition and invited court to call for same. On this ground alone this application could be dismissed. Court cannot quash a document which contains a decision which is not before court. Gunasekera Vs. Secretary Minister of Defence C.A. Application 443/2008, C.A minutes 9.7.22008. On behalf of the Respondents it is also contended that discharging the Petitioner as aforesaid is not a punishment. Learned Senior State Counsel also submit that Petitioner could challenge a decision based On Service No Longer required in instances where the procedure is not followed or adopted. Petitioner's complaint was not on the procedure not being followed but on the vires of document P19 & P15.

In any event the necessary material to arrive at a decision regarding this Writ Application are produced along with the affidavit of the 1st Respondent. Inter alia it is apparent that the Commander of the Air Force (1st Respondent) having considered the past record of the Petitioner has authorized the discharge of the Petitioner under the category service No Longer Required. In support document R4(with annexutres) are produced, which gives full details of

Petitioner's conduct within his service period which would have influenced the 1st Respondent to take steps as above, and establish the grounds of justification to discharge the Petitioner as aforesaid. I would list below gist of some of the material points held against the Petitioner as in document R4 which is described as a copy of the minute paper with the conduct sheet.

(a) Staying in married quarters without authority with another Air woman called Hewagamage. Incident took place whilst her husband was away. Act committed is immoral, indecent and highly indiscipline – punished by 12 days detention.

(b) Failure to settle mess bills – punishment admonished

(c) Marrying another woman without proper authority – punishment – severe reprimand

(d) Discharge from service recommended under service no longer required –

(e) Annexed sheets to R4 (M17) explain further about (a) above that Petitioner failed to justify his visit. M10 sheet confirm (b) above. F 252A sheet confirm that Petitioner married a woman without getting a proper divorce from previous marriage.

Having considered (a) to (e) above this court take the view that there is Justification for the 1st Respondent to discharge the Petitioner under "Service No Longer Required. It appears to this court that the authorities concerned in the Air Force had complied with proper procedures in arriving at the above decision and such discharge from the Air Force is in order. Discharge of the Petitioner was not meted out as a punishment. Therefore the argument of Petitioner that he was punished twice has no merit. Considering (a) to (e) above it is evident that Petitioner was punished as and when an offence was committed. It is apparent that the above material is sufficient for the 1st Respondent to arrive at a conclusion that the Petitioner is not a fit and proper person to be discharged under the other category dependant on document 12A produced by the Petitioner. The position as regards the discharge referred to in 12A has been

explained as a mistake in 1st Respondent's affidavit and this court does not wish to interfere with 1st Respondent's decision. I reject the argument that the Petitioner has been punished twice. It is in order for the 1st Respondent to discharge the Petitioner. A discharge is no punishment. Court has no reason to conclude that the decision in P15 and P19 is either ultra vires or unreasonable in the context of material placed by document R4. There is enough and more material to support document P15 & P19.

I would before concluding this judgment refer to the case law cited by the Petitioner on the alleged submission of imposing punishment twice and decision not filed with the petition. The case of Jinadasa Vs. Associated Newspapers of Ceylon Ltd. This case being a fundamental rights application has no relevance or application to the case in hand. In the above case there were no reasons or grounds to terminate the services. In the case in hand there were more than sufficient reasons and grounds to discharge the Petitioner.

Further termination in the said case was only on the will and pleasure of the Board and no reference to a punishment as in the case in hand. Nor any comparison with the case in hand is possible, as the facts and circumstances are totally different.

The other case of Gunawardena & Wijesooriya Vs. Minister of Local Government, Housing relate to a divesting of a house under the Ceiling and Property Law. In that case Commissioner's decision to divest was not communicated where under the statute there is a right of Appeal to the Board of Review. Such a decision not being communicated is under different circumstances and legal provisions mainly concerned in vesting and divesting of houses. Such a

decision can never be extended to other cases or applied across the board in all other cases. Reference to case law as above is more misleading than assisting court to arrive at a reasonable decision. Both cases cited above on behalf of the Petitioner are no comparison to the case in hand.

This court having examined all the facts and circumstances cannot use its discretion in favour of the Petitioner. We cannot see any legal basis to come to the conclusion that contents in documents P15 & P19 are either ultra vires or unreasonable. We are unable to accept the argument that the Petitioner was punished twice. Any kind of discharge from active service from the Air Force is done according to the statute and prevailing regulations (R1 – R3 & R6). The method to discharge an airman or a person in any other category is spelt out in the above regulations, and a punishment and discharge are different , aspects. On the other hand this court does not wish to cause any administrative inconvenience to the Air Force Authorities in the light of all the material contained in document R4 and its annextures. Further this court is mindful of the consequences of granting a writ.

Sinnatamby J. in P.S. Bus Co. Members and Secretary of the Ceylon Transport Board (1958) 61 NLR 491

Pg. 987.

> "In the present case the consequences of granting the writ can only be described as disastrous. It would result in all the legislation passed by Parliament since it came into existence and all its action liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it would disturb the peace and quiet of the country; and, above all, it will bring the government of the country to a standstill. I take the view that in these circumstances even if the grounds on which the application is made are valid no Court would exercise its discretion in favour of the petitioner.

In all the above facts and circumstances of this case this court is not inclined to exercise its discretion in favour of the Petitioner. This judgment refer to certain instances which disentitle the party concerned for a prerogative writ. We see no legal basis to issue the writ prayed for in this application. In any event the Petitioner is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. As such we dismiss this application without costs.

JUDGE OF ~~T~~HE COURT OF APPEAL

H. N. J. Perera J.

I agree.

JUDGE ~~OF THE~~ COURT OF APPEAL