

**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for the issue of 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.

**\*\*\*\*\***

Cpt. K.G. Titus

No. 29/2, Galawadukumbura

Kawdukelella,

Matale.

**C.A. (Writ) Application No.641/2009**

**PETITIONER**

**Vs**

1. Secretary,  
Ministry of Defence,  
Colombo 03.
2. Commander of the Army,  
Army Headquarters,  
Colombo 03.
3. The Commandant,  
Sri Lanka Army (Volunteer) Force  
Battaramulla.

4. Colonel H.G.W. Pathmasiri,  
Colonel (Coordinating),  
Area Headquarters,  
Hambantota.
5. Major K.H.S. Perera,  
Commanding Officer,  
26, SLNG, Mullaitive.
6. Major J.A.T.P.K. Jayakody,  
2 I.C., 2, S.L.N.G. Kallar,  
Kantale.
7. Major M.K.T.R. De S. Jayasekara,  
SLCMP,  
Army Headquarters,  
Colombo 03.
8. Hon. Attorney General,  
Attorney Generals' Department,  
Colombo 12.

## **RESPONDENTS**

BEFORE

: Deepali Wijesundera J.

COUNSEL

: Mervin Samarakoon for the  
Petitioner.

Vikum De Abrew DSG for the  
Respondents.

ARGUED ON

: 13<sup>th</sup> February, 2014.

DECIDED ON

: 11<sup>th</sup> June, 2014

**Deepali Wijesundera J.**

The petitioner has filed this application for writs of certiorari to quash the decision of the 2<sup>nd</sup> respondent to discharge the petitioner from the Army and to quash the decision of the 2<sup>nd</sup> respondent to recover a sum of Rs. 59,000/= from the petitioner. A writ of Mandamus to compel the 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents to refund the sum of Rs. 59,000/= obtained from the petitioner.

The petitioner served as the Platoon Commanding Officer of the Kotmale Army Training School between 28/07/2003 and 24/12/2003. In early December 2003 the petitioner has collected Rs. 1,000/= each from recruits for a reception to be held at the passing out parade which the petitioner claims he collected on the instructions of the Commandant of the Kotmale Training School. An investigation was held against the petitioner and the Military Police submitted its report (marked as R1 by the respondents). Based on this report action was taken to appoint a court of inquiry comprising 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents as members. Evidence was called and petitioner himself has given evidence and has been present at the inquiry. At the conclusion of the inquiry it was found that the petitioner has abused his powers as the Commanding Officer and was involved in an act of fraud by collecting money from the recruits

in an unauthorized manner, withdrawing money fraudulently from the accounts of the Recruits using their ATM Cards and misusing the said money for his personal use. Based on the findings of the said court of inquiry the Commanding Officer of the Army decided to recover a sum of Rs. 59,000/= from the petitioner and to recommend His Excellency the President to discharge him from the Sri Lanka Army Volunteer Force.

The learned counsel for the petitioner stated that the money for the passing out parade was collected on the specific instructions from the Commandant of the Training School and that the Army does not allow an officer to hold functions without a clear mandate from a superior officer. He further stated to substantiate their allegation they forced the petitioner to confess that he fraudulently obtained a sum of Rs. 59,000/= from the soldiers and got him to sign two documents marked as **R2** and **R3**. This fact he has mentioned at the court of inquiry. Petitioner stated the Commandant himself attended the said function and if he misused the money collected they would not have had the reception.

Counsel for the petitioner further submitted that under the provisions of *Sec. 47 and Sec. 133 of the Army Act* the Commander of

the Army does not possess the legal authority to order the dismissal of an officer from the Army on the findings of a Military Police investigation and that a man shall not be punished without a proper trial. He cited the judgment in **CA/Writ/App/No.895/2007 by Justice Sri Skandarajah**. The facts of this case are different to the instant case.

Petitioner's contention regarding the extraction of Rs. 59,000/= from the petitioner by the 7<sup>th</sup> respondent is that under *Sec.27(d) of the Army Act* the Commander is empowered to do so only after a proper investigation and that the 7<sup>th</sup> respondent had no authority under *Sec.27* to do so. But this is not so, the money was recovered after the investigation and petitioner has volunteered to give the money.

The respondents stated that the petitioner has admitted fraudulently collecting a sum of Rs. 59,000/= and further requested time to refund the said amount by documents marked **R2** and **R3**. They further submitted that the inquiry was conducted according to law and that the petitioner was given an opportunity to make statements and give evidence and call evidence. Based on the finding of this court of inquiry the Commanding Officer of the Army decided to recover the said money and to recommend to His Excellency the President to discharge the petitioner from the Sri Lanka Army Volunteer Force.

The respondents stated that the petitioner's application is misconceived and untenable in law, that the petitioner should have sought redress from the Commander of the Army failing which from His Excellency the President in terms of *Sec.32 of the Army Act*. Respondent's contention is that the impugned decision is merely a recommendation and it has not been finally decided by His Excellency the President, and that the petitioner is challenging the recommendation and that the petitioner's application is premature as he has sought a writ against a recommendation and not a decision. Citing the judgment in ***Air Vice Marshall Elmo Perera Vs Liyanage and Others SLR 2003 Volume 1 Page 331*** he stated that to issue a writ rights of subjects should be affected.

Citing the judgment in the case of ***Association of Geologists and Engineers of Water Resources Board CA 643/2008 CA mts 16/12/2010*** the respondents stated that the petitioner can not seek a writ of Mandamus as the relief sought is not a duty of public nature.

**Sec. 32 of the Army Act states;**

***"Where an officer is aggrieved by any action of, and is unsuccessful in obtaining redress from, his commanding officer,***

*he may make a written appeal for redress to the Commander of the Army, and where he is aggrieved by any action of the Commander of the Army, either in respect of his appeal or in respect of any other matter, he may make a written appeal to the President. An order made by the President on any such appeal shall be final."*

This clearly indicates that the petitioner after the inquiry without seeking the relief granted to him by the Army Act has come to this court to move for a writ to quash the findings of the inquiry which is not the proper procedure under the Army Act.

**Sec. 33 states;**

*(1) Where a soldier is aggrieved by any action of an officer other than the commanding officer of the corps to which he is attached or by any action of any other soldier, he may make a written appeal for redress to such commanding officer, and where he is aggrieved by any action of such commanding officer, either in respect of his appeal or in respect of any other matter, he may make a written appeal to the Commander of the Army.*

***(2) Each officer to whom an appeal is made under subsection (1) of this section shall inquire into the appeal, and, if satisfied that the appeal should be allowed, shall grant redress to the appellant. An order made by the Commander of the Army on any appeal made to him under that subsection shall be final.”***

This further indicates the proper procedure to follow.

The petitioner does not have the essential requirements for granting of a writ of certiorari since his rights have not been affected by the findings of the inquiry only a recommendation was made and it has not been carried out and he had an alternative remedy under Sec.32. The petitioner has challenged the recommendation of the Commander before the said recommendation was sent and a decision was made. By doing so the petitioner has attempted to achieve what this court has no jurisdiction to grant.

By **R2** and **R3** petitioner himself has admitted collecting the money and has asked for time to refund the same. Petitioner has admitted he had no authority to collect money and that he has done so with permission from higher officers in his evidence. Petitioner's



application for a writ of Mandamus can not be granted to compel the 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondent to refund the sum obtained from him as the relief sought is not a duty of public nature. The respondents have acted within the powers vested in them and the commander is empowered to make recommendations.

For the afore stated reason the petitioner's application is dismissed with costs fixed at Rs. 10,000/=

**JUDGE OF THE COURT OF APPEAL.**